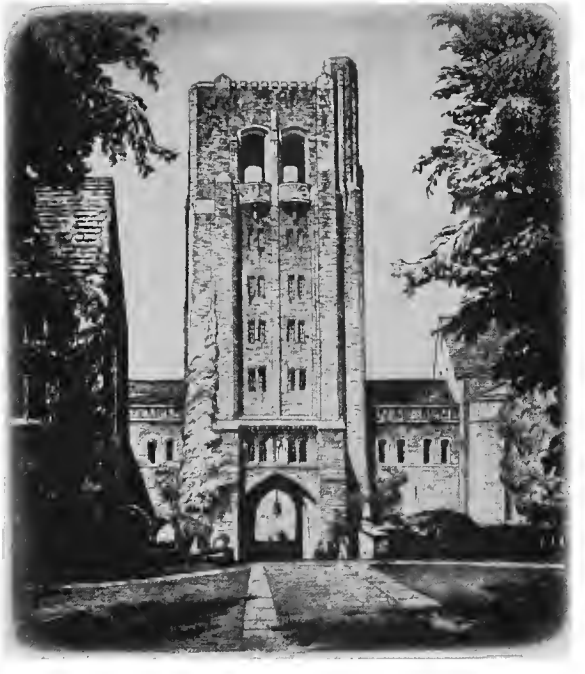

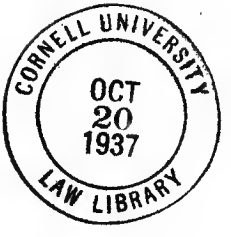

THE

LAW OF ESTATES

CREATED BY WILL.

BY

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PREFACE.

The vast increase of distributed wealth, during the last twenty-five years, has multiplied occasions for examining the nature of interests in property, and the manner and validity of their creation. This duty often occurs in connection with the examination of titles, the preparation of wills, or the administration of estates. Indeed, it may be safely said that no other department of law makes so frequent and continued demand upon the time and capacity of the profession, or affords more legitimate and profitable employment. The Revised Statutes introduced in New York in 1830, modified, changed, or embodied the general doctrines of the common law on the subjects here treated. Although the first interpretation of such statutes are found in the common law and equity reports, yet the more substantial exposition has been the work of the Court of Appeals. The labor of the court in this respect is a splendid monument to the learning, wisdom and industry of its judges. There has arisen from its decisions in connection with the Revised Statutes a system of jurisprudence that sufficiently preserves the spirit of the common law, and yet skillfully adapts the statutes to the quickened thought and the social and commercial necessities of the century. To one reviewing the decisions contained in over one hundred and fifty volumes of the reports of the Court of Appeals, and the elaboration of of these difficult principles and their application to ever varying states of facts, there comes a profound regard for the magnitude of the labor of that court, the general symmetry of the body of the law produced, and the mental grasp of the men who have shaped it. To suitably discard the harmful and confusing technicalities that abound in "the gloomy and intricate forest of ancient laws," retaining what was essentially sound, useful and generally adaptable, was the work of the revisers; to give an independent vigor to the statutes, and, at the same time, to enrich them with the judicial wisdom, which through centuries the common law had accumulated, to apply them to the detailed activities of a

great state, was the task of the court, a task performed if not with uniform absence of error, yet with a success that merits and receives general acknowledgment. The retirement, now too soon approaching, of the present chief judge, whose learning and exalted character has added "dignity to the supreme magistracy" will close the labors of those illustrious lawyers, to whom long since was committed the duty of applying these most subtle principles, and establishing them finally and enduringly in the general fabric of our laws. The work will be continued henceforth by successors, whose devotion to the important interests submitted to them for final decision, renders the profession expectant of a perpetuation of the results already obtained.

The primary purpose of this work is to aid those, *whose sole aim is to ascertain the state of the law in New York*, in relation to the creation of estates, with special reference to estates created by will. But certain phases of the subject, as for instance, the law relating to Trusts, Powers, Conditions, require that the statutes and decisions involving estates created by grant or contract should be included. Whenever necessary, this has been done. The decisions of the Court of Appeals have received their merited prominence, but the cases decided by other courts of this state have been gathered, it is hoped, with sufficient painstaking, and every reasonable effort has been used to place in connection with each topic the pertinent statutes, with references to the enactments from which they were derived, or which they superseded. The law of New York on the subjects here treated is in a large degree based upon, or modified, by statutes. Hence the decisions of the courts of other states are often of no specific aid. However, in instances where they furnish direct assistance, they have been liberally used. The opinions of the courts are frequently given to amplify and enforce the digested case. Opinions often gather, analyze, approve, reject or distinguish cases, and are worthy of careful study. In connection with the statutes are given explanatory discussions. They are taken, when possible, from the notes of the original revisers, or other authoritative sources. When such material is not available, concise, plain and practical notes have been written. The decisions are arranged in chronological and topical order, and at least once digested, but when oftener employed, a briefer abstract is given, with a cross

reference to the place of fuller digest. A useful part of the work is the case index placed at the head of a digest of cases, when the subject treated presents numerous features. This permits ready ascertainment of the cases bearing upon any special phase of the subject, and enables the examiner at once to consult them in their digested form. The case index in some instances consists of rules and elsewhere there is but a suggestion of the topic. It sometimes happens that authorities not digested have been annotated upon the case index. The general plan of the work is similar to that employed in treating the "Law of Negligence." From the large and continued use of that work, it may be inferred that such a plan has been found convenient.

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I. CITIZENS.

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I. CAPACITY TO HOLD AND TRANSFER REAL PROPERTY.

U. S. Rev. Stat., sec. 1978, ch. 31, v. 14, p. 27. (April 9, 1866.) "All citizens of the United States shall have the same right in every state and territory as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property."

Real Property Law, L. N. Y. 1896, ch. 547, sec. 2 (took effect October 1, 1896) "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."

1 R. S. (N. Y.) 719, sec. 8, Banks's 9th ed. 1784 (took effect Jan. 1, 1830, repealed L. 1896, ch. 547, sec. 300). "Every citizen of the United States is capable of holding lands within this state, and of taking the same by descent, devise or purchase."

Real Property Law, sec. 3. L. 1896, ch. 547, sec. 3. "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."

1 R. S. (N. Y.) 719, sec. 10, Banks's 9th ed., p. 1784 (took effect Jan. 1, 1830, repealed L. 1896, ch. 547, sec. 300). "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, restrictions and regulations, provided by law."

1. HEIRS OF PATRIOTIC INDIANS.*

L. 1896, ch. 547, sec. 9. "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."†

Substantially same as R. S. 1830, sec. 13, except—

L. 1896—By approval of state engineer and surveyor.

L. 1830, sec. 20—By approval of surveyor-general.

L. 1892, ch. 679, sec. 2, Banks's 9th ed. N. Y. R. S., p. 202. "* * * a native Indian may take, hold and convey real property the same as a citizen * * *."

Substantially the same as L. 1843, ch. 87, sec. 4, Banks's 9th ed. N. Y. R. S., p. 2068, repealed by L. 1896, ch. 547, sec. 300

NOTE.—L. 1892, ch. 679, sec. 2, not in terms repealed.

1 R. S. 719, sec. 11, Banks's 9th ed. N. Y. R. S., p. 1784 (took effect Jan. 1, 1830). "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, with the Indians in this state, is valid, unless made under the authority and with the consent of the legislature of this state." Repealed by L. 1896, ch. 547, sec. 300.

1 R. S. 719, sec. 12, Banks's 9th ed. N. Y. R. S., p. 1784 (took effect Jan. 1, 1830), repealed by L. 1896, ch. 547, sec. 300. "No Indian residing within this state can make any contract for or concerning the sale of any lands within this state, or in any manner give, sell, devise or otherwise dispose of any such lands, or any interest therein, without the authority and consent of the legislature of this state, except as hereinafter provided."

Note to preceding section.—2 R. L. 175, sec. 55, ch. 92 (passed Apr. 10, 1813), grants the same privileges to heirs of patriotic Indians, but validated only subsequent conveyances and provided that no prior conveyance should be thereby confirmed.

II. WHO IS A CITIZEN.

Fourteenth amendment to Constitution of U. S., sec. 1. "All persons born or naturalized in the United States, and subject to the juris-

*See, as to citizenship of Indians, p. 3.

†1 R. S. 719, sec. 13, Banks's 9th ed. N. Y. R. S., p. 1784, practically same as sec. 9, ch. 547, L. 1896, *supra*.

diction thereof, are citizens of the United States, and of the state wherein they reside."

Meaning of "subject to the jurisdiction thereof" in fourteenth amendment construed:

An Indian who has completely severed his tribal relation and surrendered himself to the jurisdiction of the United States, and is a *bona fide* resident of the state of Nebraska and city of Omaha, does not thereby become a citizen.

Elk v. *Wilkins*, 112 U. S. 94.

From opinion.—(Speaking of the first section of fourteenth amendment.) "This section contemplates two sources of citizenship, and two only; birth and naturalization. The persons declared to be citizens are 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The evident meaning of these last words is, not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth can not become so afterwards, except by being naturalized either individually, as by proceedings under the naturalization acts, or collectively as by the force of a treaty by which foreign territory is acquired." * * *

"It is also worthy of remark, that the language used, about the same time, by the very congress which framed the fourteenth amendment, in the first section of the Civil Rights Act of April 9, 1866, declaring who shall be citizens of the United States, is 'all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed.' 14 Stat. 27; R. S., sec. 1992."

Miller, J., says in the course of his decision in the "Slaughter-house" cases (16 Wall, 36, at p. 73 [1872]): "the phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States."

Corporations are not citizens within the meaning of this section of the fourteenth amendment.

Duquesne Club v. *Penn Bank of Pittsburgh*, 35 Hun, 390.

From opinion.—"The several decisions of the courts of the United States which have hitherto held that corporations are not citizens within the meaning of the Constitution, are, therefore, applicable to and controlling of the construction to be given to the new amendments." Paul v. Virginia, 8 Wall. 181; Conuor v. Elliot, 18 How. (U. S.) 591; Lafayette Ins. Co. v. French, 18 How. (U. S.) 407; Ducat v. Chicago, 10 Wall. 410.

United States Revised Statutes, sec. 1992, ch. 31, sec. 1, v. 14, p. 27 (Apr. 9, 1866). "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States."

Sec. 1993, ch. 71, sec. 1, v. 10, p. 604 (Feb. 10, 1855), ch. 28, sec. 4, v. 2, p. 155 (Apr. 14, 1802). "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

United States Revised Statutes, sec. 1994, ch. 71, sec. 2, v. 10, p. 604 (Feb. 10, 1855). "Any woman who is now or may be hereafter married to a citizen of the United States, and who might herself be lawfully naturalized shall be deemed a citizen."

Kelley v. *Owen*, 7 Wall. 496 (1868).

From opinion.—"The case turns upon the construction given to the second section of act of Cong. of Feb. 10, 1855, which declares 'that any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen.' As we construe this act, it confers the privileges of citizenship upon women married to citizens of the United States, if they are of a class of persons for whose naturalization the previous acts of congress provide The terms 'married' or 'who shall be married' do not refer in our judgment to the time when the ceremony of marriage is celebrated, but to a state of marriage. * * * His citizenship whenever it exists, confers, under the act, citizenship upon her. The terms 'who might lawfully be naturalized under existing laws' only limit the application of the law to free white women."

An alien woman married to a naturalized citizen may take lands by descent under Act of Congress, Feb. 10th, 1855.

Halsey v. *Beer*, 52 Hun, 366.

From opinion.—"The language employed in this law to denote the intention of its makers refers to tho inherent capacity of the woman and not to her present qualifications. Its language is of potentiality, capacity or power as distinguished from actuality. Any woman possessing the natural capacity or power to enter upon the path leading to judicial naturalization such as race and blood, becomes by marriage with a citizen invested with his citizenship."

See, also, People v. Newell, 38 Hun, 78.

United States Revised Statutes, sec. 1995, ch. 172, sec. 3, vol. 17, p. 134 (May 18, 1872), relates to the citizenship of persons born in the territory of Oregon.

Sec. 1996, ch. 79, sec. 21, vol. 13, p. 490 (March 3, 1865), relates to forfeiture of citizenship for desertion.

Sec. 1997, ch. 28, vol. 15, p. 14 (July 19, 1867), relates to certain soldiers and sailors excepted from operation of sec. 1996.

Sec. 1998, ch. 79, sec. 21, vol. 13, p. 490 (March 3, 1865), provides that those avoiding draft are subject to penalties of sec. 1996.

Sec. 1999, ch. 249, sec. 1, vol. 15, p. 223 (July 27, 1868), right of expatriation declared.

Sec. 2172, ch. 28, sec. 4, vol. 2, p. 155 (April 14, 1802.) "The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been citizens of the United States, shall, though born outside the limits and jurisdiction of the United States, be considered as citizens thereof."

This section grants citizenship to minor child though non-resident at the time of its father's naturalization, provided it was a resident at the time of the passage of the act. *Campbell* v. *Gordon and wife*, 6 Cranch, 176. See, also, People v. Newell, 38 Hun, 78; Young v. Peck, 21 Wend. 380; s. c. 26 id. 613; West v. West, 8 Paige, 432.

In the absence of any law of the United States governing the particular case, the question, whether one born out of the United States is a citizen, is to be determined

by the common law, as it existed, irrespective of English statutes, at the adoption of the Federal Constitution.

At common law, the duty of allegiance and the rights of citizenship passed by descent, the child following the condition of the father; so that, if a father, out of the realm, was within the allegiance of the king, his child by an alien wife was born a subject of the British crown.

The statute (25 Edw. 111, ch. 2), upon this point, is a declaratory, and not an enabling act.

Whether a citizen is capable of renouncing his allegiance without the consent of his government, or may when his government had not prohibited it, *quære.*

But, if he may, he can not divest himself of his citizenship until he becomes the citizen of another government; and this he can not do until he arrives at full age.

Where a citizen of the United States went to Peru at the age of eighteen years, with the intention of indefinite continuance there for the purpose of trading, but took no steps to be naturalized in Peru, or to indicate an intention of a permanent change of domicil, otherwise than as above stated, his child, born to him in Peru, of a wife the native of that country, is a citizen of the United States.

A finding, as of a fact, that the father voluntarily "expatriated" himself, with the intention of becoming a permanent resident of Peru, was regarded as immaterial.

Such a child may, it seems, be subject to a double allegiance, and, upon arriving at his majority, may elect to retain the one and repudiate the other; but, until such election, he retains all the rights of citizenship in both countries, though discharging its duties in but one.

Ludlam v. *Ludlam*, 26 N. Y. 356, aff'g 3 Barb. 486.

From opinion.—"The question, who are citizens of the United States, must depend upon the laws of the United States. In 1790, Congress passed an act declaring that 'children of citizens of the United States that may be born beyond the sea, or out of the limits of the United States, shall be considered as natural born citizens.' (1 U. S. Statutes at Large, 103.) In 1795 the following provision was substituted for that previously existing, viz.: 'The children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States.' (1 U. S. Statutes at Large, 445, secs. 3, 4.) In 1802, congress repealed the law of 1795 and enacted that 'the children of persons who *now are or have been* citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States.' This provision continued unchanged, until 1855, when an act was passed, declaring both wife and children, in a case like the present, to be citizens. (10 Statutes at large, 604.)

"As the act of 1802 did not embrace the children of those who might thereafter become citizens, and as the the father of the defendant was born after 1802, and died before 1855, this case does not come within the provisions of any of the statutes of the United States on the subject. The same question is presented, therefore, in this respect, which arose in Lynch v. Clark, (1 Sand. Ch. R. 583), where it is, I think, very clearly shown that, in the absence of any statute, or any decisions of our own courts, state or national, on the subject the question of citizenship can only be determined by reference to the English Common Law, which, at the time of the adoption of the Constitution of the United States, was to a greater or less extent, recognized as the law of all the states by which that Constitution was adopted.

"This conclusion does not involve the question very earnestly debated soon after the organization of the government, whether the common law of England became the law of the Federal Government, on the adoption of the Constitution. It only assumes what has always been conceded, that the common law may properly be resorted to in determining the meaning of terms used in the Constitution, where that instrument itself does not define them. * * *

"The Constitution uses repeatedly the terms, 'citizen of the United States,' but does not define them. Our statute, above referred to, uses the same terms and also leaves them undefined. It becomes necessary for the court to decide whether the defendant, under the circumstances of his birth and life, is a citizen of the United States within those terms." (The opinion then states as follows:)

By statute (7 Edw. III.) children of British subjects, in the service of the king, though born beyond the sea, were capable of inheriting.

By statute (25 Edw. III., Ch. 2) children "which *henceforth* shall be born out of liegeance of the king, whose *fathers and mothers*, at the time of their birth, he and shall he at the faith and liegeance of the king of England, shall have and enjoy the same benefit and advantage, to have and bear inheritance within the same liegeance as the other inheritors aforesaid, *in time to come*, so also that the mothers of such children passed the sea by the license and will of their husbands."

The above statutes are here considered in connection with their history and decided to he declaratory of the common law and not enabling acts. 7 Coke, 1; 6 James, 1 (Calvin's Case); Brooke's Abridgment, Title Denizen, 6; Brooke's Abridgment, Title Denizen, 21; Rex v. Eaton, (Litt. 23); Collingwood v. Pace, 1 Vent. 413, 422; 1 Jenk. Cent. case 2. The opinion proceeds:

"These opinions are confirmed by that of the court of King's bench in the case of Bacon v. Bacon (Cro. Cas. 601). There children born in Poland were held not to be aliens. It is true, the father and mother in that case were both English; but the court said it would make no difference, though the mother were an alien. This was not put as I understand the case solely upon the statute by any of the judges. As the case before them came directly within the terms of the statute, it was natural that they should refer to it. But they seem to place their decision as much upon the common law as the statute. Their language is, 'he being an English merchant, and residing there for merchandising, his children shall, by the *common law;* or rather, as Berkeley said, hy the statute of 25 Edw. III., be accounted the king's lieges, as their father is.' From this alone we might not be able to determine what the judges thought as to the common law. But they also say, that it would not be material, though the wife were an alien; for which they gave this reason, viz.: that she is '*sub potestate viri* and *quasi* under the allegiance of the king.' This can have no reference to the statute. It is the common law argument upon the subject, and shows clearly the opinion of the judges to be, that the common law went further than the statute, and denizened the children in all cases where the father was a natural born subject." * * *

"The domicil of the minor child is always that of the father during his life (Westlake on Priv. Int. Law, 35; 5 Ves. 750, 787), and I think the same rule applies in regard to citizenship; that the citizenship of the father is that of the child so far as the laws of the country of which the father is a citizen is concerned; but the child from the circumstances of his birth, in a country where the father is not a citizen, may acquire rights, and be subject to duties in regard to such country which do not attach to the father.

It does not militate against this position that by the law of England the children of alien parents, born within the kingdom are held to be citizens. * * * So, as I suppose, a child may be in a position which will enable him to elect, when he becomes of age, of which of two countries he will become a permanent citizen. * * I do not apprehend that if a child, born in England of alien parents, should, before arriving at manhood, return to and become a permanent resident of the country to which his parents belonged, without any intention of ever returning to England, or of claiming any rights as a natural born citizen of that country, he would still be claimed as a subject of the British crown, and indictable for the crime of treason if he should take up arms against that country." Westlake Pr. Int. Law, Ch. 2, sec. 12; Opinion of Northey, Att. Genl. in case of Gillingham, Chalmer's Colonial Opinions, 645.

The law and policy of expatriation are considered, but the case is put upon the more narrow and technical ground, that at the time of the alleged expatriation the defendant was a minor and therefore incapable of making any election with regard to his citizenship."

A chi'd born here, of non-resident parents, and now residing here, is *prima facie* a citizen of this state, notwithstanding his mother was only here for the purpose of being confined.*

An alien may take by purchase, and hold against all parties except the state claiming under an inquest of office.

A person coming to this country from Scotland and departing prior to our Revolution to reside permanently in Canada, is an alien from the time of the establishment of an independent government here.

* A child born in the United States of alien parents, is a citizen, regardless of his future residence. Lynch v. Clark, 1 Sand. Ch. 583.

So also a minor son, though remaining here till after the treaty of peace in charge of relatives, is, by reason of his nonage, incapable of making an actual election, and departing to Canada in obedience to his father's summons, fails to become a citizen of the United States.* *Munro* v. *Merchant*, 28 N. Y. 9.

A child born of alien parents during a temporary sojourn in New York city is an alien. *Lynch* v. *Clark*, 1 Sand. Ch. 583.

A person born in this country but who left it in July, 1783, is an alien. *Orser* v. *Hoag*, 3 Hill, 79.

Persons born here who left the country before the declaration of independence, and never returned, became thereby aliens. *Inglis* v. *Trustees of the Sailors' Snug Harbor*, 3 Peters, 99.

See, also, Shanks v. Dupont, 3 Peters, 242: Fairfax Devisees v. Hunters' Lessee, 7 Cranch, 603; Orr v. Hodgson, 4 Wheat. 453; Blights' Lessee v. Rochester, id. 535.

Per THOMPSON, J., in Inglis v. Trustees, etc.:—"*Prima facie*, and as a general rule, the character in which the American *ante noti* are to be considered, will depend upon, and be determined by, the situation of the party and the election made at the date of the declaration of independence, according to our rule; or the treaty of peace according to the British rule. But this general rule must necessarily be controlled by special circumstances attending particular cases, and if the right of election is at all admitted, it must be determined, in most cases, by what took place during the struggle, and between the declaration of independence and the treaty of peace."

The several states composing the Union became entitled, after the declaration of independence, to all the rights and powers of sovereign states, so far at least as regards their municipal relations and hence each was competent as such to claim the allegiance of all persons born and residing within its limits, and a person voluntarily residing within the state after such a claim became a citizen. *McIlvaine* v. *Coxe's Lessee*, 4 Cranch, 209.

A person born in England before our Revolution and who was never in the United States is an alien. *Dawson's Lessees* v. *Godfrey*, 4 Cranch, 321.

See further cases on expatriation, Fish v. Stoughton, 2 Johns. Cases, 407; Caignet v. Pettit, 2 Dallas, 234 (Sup. Ct. Pa.); Talbot v. Janson, 3 Dall. 133; Shanks v. Dupont, 3 Pet. 242; The Santissima Trinidad & The St. Ander, 7 Wheat. 283.

III. NATURALIZATION.

Const. of U. S., art. 1, sec. 8, subdiv. 4, confers on congress the power to establish a uniform rule of naturalization.

Power of naturalization is exclusively in congress. *Chirac* v. *Chirac*, 2 Wheat. 269; 2 Dallas, 372; *Lynch* v. *Clark*, 1 Sand. 583.

U. S. Rev. Stat., sec. 2165, ch. 28, secs. 1, 3, vol. 2, pp. 153–155 (April 14, 1802); ch. 186, sec., 4, vol. 4, p. 69 (May 26, 1824); subdiv. 6, ch. 21, sec. 2, vol. 3, p. 259 (Mar. 22, 1816); ch. 116, sec. 2, vol. 4, p. 310 (May 24, 1828), prescribe the formalities of naturalization; also particular provisions with regard to persons residing in the United States before January 29, 1795, and with regard to persons residing in the United States between June 18, 1798, and June 18, 1812.

Campbell v. Gordon and wife, 6 Cr. 176; Stark v. Chesapeake Ins. Co., 7 id. 420; Chirac v. Chirac, 2 Wheat. 269; Osborn v. U. S. Bank, 9 id. 827; Spratt v. Spratt, 4 Pet. 393.

* See, also, Elmendorf v. Jackson, 7 Johns. 214.

Sec. 2166, ch. 200, sec. 21, vol. 12, p. 597 (July 17, 1862), admits aliens honorably discharged from military service, without previous declaration, upon proof of one year's residence prior to application.

Sec. 2167, ch. 186, sec. 1, vol. 4, p. 69 (May 26, 1824). The omission of the previous declaration excused in the case of certain resident minors under certain circumstances.

Sec. 2168, ch. 47, sec. 2, vol. 2, p. 293 (Mar. 26, 1804). "When any alien who has complied with the first condition specified in section 2165" (*i. e.* previous declaration), "dies before he is actually naturalized, the widow and children of such alien shall be considered as citizens of the United States, and shall be entitled to all the rights and privileges as such, upon taking the oaths prescribed by law."

Sec. 2169, ch. 254, sec. 7, vol. 16, p. 256 (July 14, 1870). "The provisions of this title shall apply to aliens of African nativity and persons of African descent."

Sec. 2170, ch. 42, sec. 12, vol. 2, p. 811 (Mar. 3, 1813). Continued residence of five years shall be required.

Sec. 2171, ch. 28, sec. 1, vol. 2, p. 153 (April 14, 1802); ch. 36, vol. 3, p. 53 (July 30, 1813), provide that alien enemies shall not be admitted.

Sec. 2172, ch. 28, sec. 4, vol. 2, p. 115 (Apr. 14, 1802), provides that children of naturalized citizens shall be deemed citizens. (Quoted above.)

Sec. 2173, ch. 133, sec. 5, vol. 16, p. 154 (June 17, 1870). The police court of District Columbia shall have no power to naturalize.

Sec. 2174, ch. 322, sec. 29, vol. 17, p. 268 (June 7, 1872). Seamen shall be admitted after three years' service subsequent to declaration upon production of certificate of discharge and good conduct and certificate of declaration, and shall be entitled to protection as a citizen after filing declaration.

Sec. 2312, ch. 127, sec. 4, vol. 13, p. 562 (Mar. 3, 1865), allows Stockbridge Munsee Indians to become citizens.

Sec. 4749, ch. 28, vol. 15, p. 14 (July 19, 1867), removes disabilities from certain deserters.

Laws of 1882, ch. 126, sec. 14, United States Statutes at Large. "Hereafter no state court or court of United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."

Laws of 1894, ch. 165, United States Statutes at Large. Aliens of twenty-one or over, having served five consecutive years in the United States Navy or one enlistment in the United States Marine Corps, and

been honorably discharged, to be admitted to citizenship without previous declaration.

A person born within the United States of Chinese parents residing therein, and not engaged in any diplomatic or official capacity under the emperor of China, is a citizen of the United States, and hence can not be excluded except in punishment of crime. In re Look Tin Sing, 21 Fed. Rep. 905.

By the admission of Nebraska into the Union "upon an equal footing with the original states in all respects whatsoever," citizens of the territory and also those who had declared their intention of becoming citizens, became citizens of the United States. Boyd v. Nebraska, Thayer, 143 U. S. 135.

II. ALIENS.

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IX. PROPERTY RIGHTS OF ALIENS UNDER TREATIES, p. 32.

I. COMMON LAW RIGHTS OF ALIENS.

An alien at common law could take real property by conveyance or by devise, could hold the same except against the state, could convey or devise the same subject to the rights of the state;[1] but he could neither inherit real property himself[2] nor transmit the same by inheritance to his heirs, although they were capable of taking property from a citizen either by conveyance, devise, or inheritance.[3]

[1] 2 Kent's Com. 53; Co. Litt. 2; Comyn's Dig. Alien; Bacon's Ab. Aliens; Jackson v. Beach, 1 Johns. Cas. 401; Fairfax v. Hunter, 7 Cr. 619, 620; Governeur v. Robertson, 11 Wheat. 332.

[2] 2 Kent's Com. 467; Coke Litt. 26 and notes 3, 4, 5; Calvin's Case, 7 Co. 25a; 1 Ventr. 417; Mooers v. White, 6 Johns. Ch. 365; Jackson v. Lunn, 3 Johns. Cases, 109.

[3] Mooers v. White, 6 Johns. Ch. 365; Collingwood v. Pace, 1 Sid. 193; 1 Vent. 413; Co. Litt. 2b; Plowd. 229b. 230a.

To the common law right of an alien to take by *devise*, the statutes have made the following exception:

2 R. S. 57, sec. 4, Banks's 9th ed. N. Y. R. S., p. 1876. "Every devise of 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. The interest so devised shall descend to the heirs of the testator; if there be no such heirs competent to take, it shall pass under his will to the residuary devisees therein named, if any there be competent to take such interest."

Currin v. Finn, 3 Denio, 229; Mick v. Mick, 10 Wend. 379. The statutes respecting alieus modify section 4. Hall v. Hall, 81 N. Y. 130, p. 22.

See Goodell v. Jackson, 20 Johns. 694, 707; People v. Etz, 5 Cowen, 314; People v. Lervey, id. 397.

By the common law an alien can take real estate by devise, although he can not hold it as against the state.

The statute (2 R. S. 57, sec. 4), which declares that every devise of 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, does not apply to an alien devisee, born after the death of the testator.

The testator devised lands in trust for the use of his daughter, who was an American citizen, during her life, with remainder in fee to her issue, and she subsequently died leaving an alien son, born after the death of the testator.

Construction. — The son took under the will as against the heirs of the testator. *Wadsworth* v. *Wadsworth*, 12 N.Y. 376. See, also, Van Cortlandt v. Laidley, 59 Hun, 161; Wadsworth v. Murray, 16 Barb. 601.

A bequest of money to be laid out in lands for the benefit of aliens who are to have the possession and enjoyment, contravenes the statute of wills and is void. 2 R. S. 57, § 4 (Banks's 9th ed. N. Y. R. S. p. 1876). *Beekman* v. *Bonsor*, 23 N. Y. 298, digested, p. 857.

This section does not apply to personalty.

Devise to trustees to pay income to alien is valid. *Marx* v. *McGlynn*, 88 N. Y. 357, digested, p. 819. Beck v. McGillis, 9 Barb. 50.

A direction to sell and pay over the proceeds is a gift of money and not of lands, and is valid though the beneficiaries are aliens. *Meakings* v. *Cromwell*, 5 N. Y. 136. See Parker v. Linden, 113 id. 28.

At common law an alien may take real estate by purchase and hold same against everybody, except the state. Statutes have made one exception to this (2 R. S. 57, sec. 4), making a devise to an alien, not authorized by statute to take and hold, void.

The act of April 21, 1825 (1 R. S. 720, secs. 15, 16, 17), did not abrogate the above common law rule, but simply produced a disqualification of which the state alone can take advantage. *In Matter of Leefe*, 4 Edward's Ch. 407.

II. DEPOSITION OF RESIDENT ALIEN.

SECTION 4 OF THE REAL PROPERTY LAW. (L. 1896, ch. 547, taking effect October 1, 1896.) "An alien who, pursuant to the laws of the United States, has declared his intention of becoming a citizen, and who is, or 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."

Substantially the same as sec. 15, R. S. pt. 11, ch. 1, tit. 1.

1 R. S. 720, Sec. 15 (passed Dec. 10, 1828, took effect Jan. 1, 1830, Banks's 9th ed. N. Y. R. S., p. 1783, repealed by ch. 547, sec. 300, L. 1896). "Any alien who has come, or 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 has 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." (Thus amended by L. 1834, ch. 272.)*

Sec. 15 substantially reincorporated L. 1825.

L. 1834, ch. 272, amended R. S. sec. 15, as follows:

Sec. 15.—"Aliens who have or may come into this state," etc.

1834.—"Aliens who have or may come into the United States and this state," etc.

Alien's deposition. The United States Statutes, sec. 2165, title 30, provide (1) He shall declare on an oath before a circuit or district court of the United States, or a district, etc., etc., * * * two years before admission that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance, etc. (to foreign power) of which the alien may be at the time a citizen or subject of.

(2) It must appear to the satisfaction of the court that he has resided for five years at least in the United States and the state or territory in which the court is, one year at least, and he be of good moral character.—See *Citizen*, p. 7.

III. WHEN AND HOW ALIEN MAY ACQUIRE AND TRANSFER REAL PROPERTY.

Before giving section 5 of the "Real Property Law," and the statute which it supplanted, a brief history of the legislation of this immediate subject will be found useful.

Previous to 1798, private statutes had been from time to time enacted.†

*Previous to the enactment of section 15 above, ch. 307, L. 1825 (passed April 21st), was in force, but the latter statute was repealed by L. 1828, ch. 21, sec. 1, paragraph 453, the repeal taking effect Dec. 31, 1829.

The portions of the act of 1825 pertinent to the making of the deposition were in substance as follows:

Sec. 1. Deposition was required to be made in writing before chancellor, judge of court of record, or other officer authorized to take acknowledgment or proof of deeds, to the effect that the deponent is a resident in and intends always to reside in the United States, and become a citizen thereof, as soon as he can be naturalized and that he has taken incipient steps to become so. * * *

Sec. 2. After same made as aforesaid and certified by one before whom made, it shall be filed in secretary of state's office and be recorded by same in a book kept by him for that purpose, and shall be evidence on all occasions of such person having made same.

†The following illustrate such private statutes:

L. 1790, ch. 41, permitting P. J. V. B. to purchase lands, tenements and hereditaments within the state and hold the same to his heirs and assigns forever, as if he had been a natural born citizen.

Id. of A. R. and C D. L. F.

Id. of J. M. and J. F. not exceeding £4.000.

That J. C. R. might lawfully convey lands since purchased of J. M. as if he had been a citizen at the time of his deed from H. to R.

The first general law was ch. 72, L. 1798, Banks's 9th ed. N. Y. R. S., p. 1982 (passed April 2, slightly amended by sec. 3, ch. 95, L. 1798). It provided that conveyances "hereafter to be made" to an alien, not the subject of a hostile power, should vest in such alien the estate granted, to have and hold to him and his heirs and assigns.

There were these limitations in this act:

(1) He could reserve no rent or rent service;

(2) His deed must be recorded within twelve months of its date;

(3) The act should remain in force for three years.

(Sec. 4, ch. 49, L. 1802, extended the time for recording deeds to twelve months beyond its passage.)

Sec. 1, ch. 25, L. 1819, Banks's 9th ed. N. Y. R. S., p. 1983 (passed March 5) declared that *conveyances* made pursuant to ch. 72, L. 1798, should vest the estate conveyed in the alien grantees, their heirs and assigns, in such manner as to authorize the grantees, their heirs and assigns, *being aliens*, to make valid disposition of the lands by devise, grant, gift in fee or otherwise to any other friendly aliens.

Sec. 2, ch. 25, L. 1819, declared valid, so far as alienism might affect them, mortgages taken or to be taken by the grantees under such act to secure the purchase money on a sale thereof and allowed the grantees and their heirs and assigns to repurchase on foreclosure.

By its terms, the act of 1798 should have expired April 2, 1801, and notwithstanding the declaratory act of 1819, the act of 1798 probably did so expire.

For decisions under these acts see note.*

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*Land conveyed to an alien pursuant to the provisions of the act of 1798 (passed April 2) may continue to be held by alien heirs and alien devisees of the grantee until by inheritance, devise or grant the title comes to a citizen.

The term *heirs* in that statute applies as well to the heirs of the first heir as to the first heir himself, and the term *assigns* includes *devisees* and heirs of assignees and assignees of heirs.

A devise of land held under the act by an alien to alien trustees, taking effect in 1811, vested a legal estate in the trustees.

The act of March 3, 1819, declaratory of the construction of the former act cured any defect in titles then existing arising from the alienism of any of the parties to or through whom they had passed.

Duke of Cumberland v. *Graves*, 7 N. Y. 305; see 9 Barb. 595.

This case followed and approved and the provisions of the treaty of 1794 with reference to the capacity of British aliens to hold and convey lands in this country under it, and the law of this state, April 2, 1798, on same subject is stated and discussed in People v. Snyder, 41 N. Y. 397.

An alien who has received a conveyance of and from an alien may transmit the title by conveyance to an alien, under the provisions of the act of the legislature relative to agents holding and conveying real estate (1798 and 1819).

Aldrich v. *Manton*, 13 Wend. 458.

Devise to alien trustees of lands held by an alien under the act of 1798 "to enable aliens to purchase and hold real estate within this state" (ch. 72, L. 1798) is valid.

Howard v. *Moot*, 64 N. Y. 262; 2 Hun, 475.

See Duke of Cumberland v. Graves, 7 N. Y. 305.

The next act was ch. 49, L. 1802, Banks's 9th ed. N. Y. R. S., p. 1984. Sec. 1 gave aliens, who have come to *and become inhabitants* of this state, the right to hold and dispose of or transmit land purchased before or after its passage, up to a limit of 1,000 acres.

Sec. 2 enabled the alien, his heirs and assigns, to take a mortgage for the purchase money on the sale of the land.

By sec. 26, ch. 109, L. 1804; sec. 1, ch. 25, L. 1805; sec. 1, ch. 175, L. 1808, Banks's 9th ed. N. Y. R. S., p. 1985, this act was extended to the close of the legislature of the last year, and the last act, sec. 2, provided "that all persons authorized to acquire real estate by *purchase* by this act, or the act hereby extended, may also take and acquire by *devise or descent.*"

The act of 1802 does not seem to have been extended save as above, so that it only enabled persons who *came and became inhabitants previous* to the closing of the legislature of 1808.

NOTE.—Laws of 1798, 1802, 1804, 1805, 1808 were not revised in R. L. (1813) and were all repealed by L. 1896, ch. 547, sec. 300.

With the exception of ch. 25, L. 1819, which was merely declaratory of the act of 1798, no act seems to have been passed on this subject from 1808 to 1825 (Mick v. Mick, 10 Wend. 379), when, by ch. 307 of the Laws of 1825, a new act and a new policy was adopted, viz.: to enable only *such aliens to acquire interests in land as should take the preliminary steps to become citizens.* Ch. 307, L. 1825, enabled alien inhabitants, who had or should come to this state, upon making and filing the required deposition of residence, and intention to become a citizen, and that he had taken these incipient measures required by Laws of U. S., to take and hold land to them, their heirs or assigns forever, and to sell, assign, mortgage, devise and dispose of the same in any manner; but there were two limitations:

(1) They could not before naturalization lease;

(2) They could not take or hold lands descending, devised or conveyed *previous* to their becoming residents and making the required deposition.

The Law of 1826, ch. 297 (passed April 18), modified the Law of 1825 by allowing an alien who had purchased real estate before making and filing his deposition to continue to hold, provided he filed his deposition within one year from the passing of the act, and, where the alien, being an inhabitant of the United States, died within six years after filing the required deposition, by allowing such alien, after having filed his deposition, to grant, devise, contract, mortgage and transmit by descent to alien heirs resident in this state the same as a citizen of this state.

The Laws of 1825 and 1826 were repealed (repeal to take effect Dec. 31, 1829) by L. 1828, second meeting, ch. 21, sec. 1, par. 453, and were substantially reincorporated in the Revised Statutes, 1 R. S. 720, secs. 15–20, Banks's 9th ed. N. Y. R. S., p. 1786.

The Revised Statutes and several statutes passed after its adoption (given below), were repealed by the Real Property Law now existing.

The present law and the statutes that it superseded are as follows:

Real Property Law, sec. 5 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "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."*

Naturalization has no retroactive effect so as to vest a title, which at the time of the death of the ancestor, could not be inherited on account of alienage. See Jackson v. Beach, 1 Johns. Cas. 399.

*L. 1893, ch. 207, sec. 1, Banks's 9th ed. N.Y. R. S., p. 2908 (passed and took effect March 24, 1893, repealed by L. 1896, ch. 547, sec. 300). "Any person who would otherwise answer to the description of heir or devisee of a person, who, at the time of his death, was a citizen of the United States, shall be entitled to inherit or take from said citizen, and hold, enjoy, convey, transmit and devise any interest in real property situated in this state, in the same manner and to the same extent and with the same effect as if he was himself a citizen of the United States, notwithstanding the fact that he be a non-resident alien, and the fact that any person otherwise qualified to take, hold, enjoy, convey, transmit and devise any interest in real property situated in this state, is a non-resident alien, shall not prevent his taking, holding, enjoying, conveying, transmitting and devising such interest, providing his title, or that of some person under whom he claims, shall be derived, by descent or devise, from some person who was, at the time of his death, a citizen of the United States."

Thus, where plaintiffs, who proved right to inherit if not disqualified by alienage, were in this country at the time of the decease of their ancestor but were not naturalized until afterwards, they were not allowed to recover in ejectment.

Moreover, the statute of April 10th, 1843, sec. 1, authorizing a naturalized citizen to whom lands would have descended if he had been a citizen at the time of the death of the person last seized, to continue to hold in the same manner as if he had been a citizen at the time of such descent cast, applied only to those who were then naturalized citizens.

Heney v. *Brooklyn Benevolent Society*, 39 N. Y. 333.

From opinion.—(Priest v. Cummings, 20 Wend. 347, 352 ; Kennedy v. Wood. id. 240.) These cases show that the opinion of the Court in The People v. Conklin (2 Hill, 67), is not in reference to the point under consideration, to be regarded as a dictum unsustained by authority. It is there held, that the capacity to take by descent must exist at the time the descent happens. It is there conceded that an alien may take by purchase, subject to the right of the state to recover the land after office found ; and that, if naturalization be had before office found, his title will be thereby confirmed. That a conveyance or devise should be deemed to operate technically as a transfer of the title to the alien, is in harmony with the fact that the state, seeking to avail itself of the *escheat*, must itself rely upon the conveyance or devise as a transfer of the title, and if therefore, the grantee or devisee be naturalized before office found, it may be true, that, because he is then capable of holding the title so conveyed, and he can not thereafter be found an alien, the estate can not enforce the *escheat*. But this reasoning can have no application to a descent, which is by operation of law. The law casts no title on an alien, and there is no need of finding by inquisition of office found to entitle the state to recover. Hence, it is also said in the last case cited, that the rule is 'otherwise where the party claims by descent,' though naturalized after descent cast." See, also, Jackson v. Green, 7 Wend. 333.

The capacity to take by descent must exist at the time the descent happens.

Though aliens may take lands by purchase, neither they nor a purchaser under them, can hold as against the state.

Where lands are devised to aliens, with a power to executors to sell, etc., an entry by the people extinguishes the whole estate and the power along with it. *People* v. *Conklin*, 2 Hill, 67.

Where a direction for a conversion is simply for the purpose of the will, the doctrine of conversion will, if necessary, apply in favor of non-resident aliens. *Parker* v. *Linden*, 113 N. Y. 28.

Except as to the state alien brother and sister may take real estate. *Parker* v. *Linden*, 113 N. Y. 28, digested, p. 936.

Although an alien may not acquire title to real estate, as against the true owner, by an adverse possession of twenty years, claiming title thereto in himself, yet the statute of limitations will furnish a perfect defense to an action of ejectment against him by the true owner. *Overing* v. *Russell*, 32 Barb. 263.

An alien friend is entitled not only to take and hold until office found, but to maintain an action for its recovery in case of intrusion by an individual. *Bradstreet* v. *Supervisors of County of Oneida*, 13 Wend. 546 (1835).

If an alien holding lands under the provisions of the acts of 1802 and 1808, authorizing aliens to purchase and hold real estate, dies intestate, his lands descend to his heirs, although they be aliens ; if he dies without heirs, the lands *escheat ;* but until office found, the state has no right to enter and take possession, and the grant of the

lands before office found, whether the legislature act or otherwise, conveys no title. *Jackson* v. *Adams*, 7 Wend. 367.

Where an alien, for the purpose of evading the law prohibiting him from taking and holding land, purchases land and takes a conveyance in the name of a third person, without written declaration of trust, a resulting trust will not arise in favor of the purchaser. *Leggett* v. *Dubois*, 5 Paige Ch. 114.

Conveyance of land in trust to sell and pay over proceeds to a creditor who is an alien, is a valid trust, and the interest of the alien in such proceeds is not subject to forfeiture; as the principle of public policy which prohibits an alien from holding lands, either in his own name or in the name of his trustee, without the consent of the state, does not apply to such a case. *Anstice* v. *Brown*, 6 Paige, 448.

No title in case of alienism vests in the people of the state until after office found.

Naturalization has a retroactive effect to affirm a former title. *Jackson* v. *Beach*, 1 Johns. Cases, 399.

Though an alien may take by purchase and hold until office found, yet on his death, the land *escheats*, without any inquest of office. *Mooers* v. *White*, 6 Johnson's Ch. 360; Collingwood v. Pace, 1 Sid. 193; 1 Vent. 413; Co. Litt. 2b; Plowd, 229b, 230a.

"The permission, by law, to an alien to take and hold lands to him and his heirs, or a grant from government by authority of law, to an alien and his heirs, does necessarily imply, that he may transmit by descent to his children, or their alien heirs, and that his heirs may take the land in question equally as if they were natural born citizens." *Goodell* v. *Jackson*, 20 Johns. 694, at 707; People v. Etz, 5 Cowen, 314; People v. Lervey, id. 397.

Previous to these statutes of 1896 and 1893, the law had since 1830 been contained in the Revised Statutes and subsequent independent statutes. The Revised Statutes and such independent statutes are as follows:

1 R. S. 720, sec. 16, Banks's 9th ed. N. Y. R. S., p. 1786 (passed Dec. 10, 1828, took effect Jan. 1, 1830, repealed by L. 1896, ch. 547, sec. 300). "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."

Sec. 16 is substantially the same as sec. 1 of the Laws of 1825.* (See history of the law, pp. 14, 15).

Changes:

L. 1825, sec. 1.—"And may sell, assign," etc.

R. S. sec. 16.—"And may during *six years* sell, assign," etc.

Acts affecting section 16.

N. Y. L. 1830, ch. 171, sec. 2, Banks's 9th ed. N. Y. R. S., p. 1786 (passed April

*Act of April 21, 1825 (1 R. S. 720), applies to prior as well as subsequent resident aliens. *Kennedy* v. *Wood*, 20 Wend. 230.

Act of Nov. 26, 1827 (a private act), conferred upon an alien heir of an alien the right to inherit in spite of their alienage. But that does not apply to a naturalized citizen, who after his naturalization holds under same law as any other citizen, and alien heirs of a citizen can inherit only on compliance with 1 R. S. 720, secs. 15-16. *McCarty* v. *Terry*, 7 Lans. 236.

15, repealed by L. 1896, ch. 547, sec. 300). "Every grant, contract or mortgage, heretofore made and executed by any *such* alien, to and with any citizen of the United States, shall be deemed and considered as valid and effectual, as if such grant, contract or mortgage, had been made by a citizen of this state."

N. Y. L. 1836, ch. 339, sec. 2 (passed May 15, and by its third section to remain in force five years from its date). "Every grant, contract or mortgage, made and executed agreeable to the provisions of the preceding section, by any such alien, to and with any citizen of the United States, shall be deemed and considered as valid and effectual as if such grant, contract or mortgage had been made by a citizen of this state."

Re-enactment of sec. 2, L. 1830.

N. Y. L. 1845, ch. 115, sec. 9, Banks's 9th ed. N. Y. R. S., p. 2075 (passed April 30, repealed by L. 1896, ch. 547, sec. 300). "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 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."

N. Y. L. 1845, ch. 115, Banks's 9th ed. N. Y. R. S., pp. 2073–2076 (passed April 30, repealed, L. 1896, ch. 547, sec. 300).

Sec. 1, extends 1 R. S. 720, sec. 17. See p. 21.

Sec. 2, relates to alien dower. See p. 29.

Sec. 3, relates to alien dower. See p. 29.

Sec. 4, extends 1 R. S. 710, sec. 18. See p. 22.

Sec. 5.—"Any resident alien of this state who has purchased and taken a conveyance, or who shall purchase and take a conveyance of real estate within this state, and has died or shall die after having devised or conveyed the same, the devisee or grantee of such real estate may take and hold, and is hereby declared capable of holding the real estate so granted or devised, whether such grantee or devisee be a citizen or alien, according to the nature and effect of such grant or devise; but no devisee or grantee of full age who is an alien, shall hold such real estate as against the state, unless he make and file in the office of the secretary of state the deposition or affirmation mentioned in the first section of this act."*

Sec. 6.—"Any resident alien who has purchased and taken by deed or devise any real estate within this state, or who may hereafter purchase and take by deed or devise any real estate within this state, and who has made and filed, or shall make and file, in the office of the secretary of state, the deposition in the first section of this act mentioned, may grant and devise such real estate to any citizen of the United States, or to any alien resident of this state, in the same way and to the like effect, and to and for the same purposes as if such alien were a citizen of the United States; but no resident male alien of full age shall hold any lands so granted or devised to him

*Under provisions of section 5 of chapter 115 of 1845, any resident alien of this state who has purchased and taken a conveyance of real estate within this state, may grant or devise the same, and his grantee or devisee may take and hold the same upon complying with the conditions of said sections. Section 5 is not limited by the provisions of section 6 of said act and such grant or devise is valid even though such grantor or devisor may never have filed the deposition or affirmation required by the said section 6. *Dusenberry* v. *Dawson*, 9 Hun, 511, following Goodrich v. Russell, 42 N. Y. 177.

as against the state, unless he make and file in the office of the secretary of state the deposition or affirmation in the first section of this act mentioned."

Sec. 7.—"Every woman being an alien and resident of this state, is hereby declared to be and is hereby made capable of taking and holding real estate under the will of her husband, or of any person capable of devising any real estate, and she is hereby declared to be and is hereby made capable of executing any and every power in respect to the real estate devised to her, and which may lawfully be created, the same as if she were a citizen of the United States."

Sec. 8. "Every woman being an alien and resident of this state, is hereby declared to be and is made capable of taking any and every beneficial interest or estate in any lands or real estate within this state, which has been or may be created in her favor, or for her benefit in any marriage settlement, or in any will or devise made by her husband, or of any person capable of devising real estate, subject to all the provisions of law, regulating the creation of uses and trusts."

Sec. 9—relates to title through an alien. See L. 1896 ch. 547, sec. 7, p. 26.

Sec. 10—"All proceedings to recover lands held by a resident alien, by reason of his alienage, shall be suspended, on his filing in the office of secretary of state the deposition or affirmation mentioned in the first section of this act, and on payment of the costs and charges of such proceedings, up to the time of serving a certified copy of such deposition or affirmation on the attorney-general of this state."

Sec. 11—"This act shall not affect the rights of this state in any case in which the proceedings for escheat have been or shall, before the making or filing the deposition or affirmation in the first section of this act mentioned, be commenced or the rights of any person or persons whose interests may have become vested in any such lands or real estate; but all proceedings commenced or hereafter commenced to recover lands, as for an escheat, held by resident alien, shall be subject to the provisions of the last preceding section."*

NOTE—See last clauses L. 1868, ch. 513; 1872, chs. 141 and 358; 1875, ch. 336; 1877, ch. 111, 1843, ch. 87, sec. 3.

Sec. 12—relates to the liabilities of alien owners of real property, See L. 1896, ch. 547, sec. 8, p. 28.

Sec. 13—applies the provisions of sec. 19 of 1 R. S. 721, to this act, see p. 28.

Sec. 14—repeals L. 1832, 1833.

Sec. 15—"Nothing herein contained shall prejudice the rights bona fide acquired by purchase or descent, without notice before this act shall take effect."

The several provisions of this act were reenacted by L. 1857, ch. 576 (quoted *post* p. 22).

1 R. S. 720, sec. 17, Banks's 9th ed. N. Y. R. S., p. 1786 (passed Dec. 10, 1828, took effect Jan. 1, 1830, repealed L. 1896, ch. 547, sec. 30). "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."†

L. 1825, ch. 307, sec. 1, last subdiv. and sec. 17, the same. (See history of the law at pp. 14, 15).

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* Sec. 10 refers to proceedings for escheat against the alien himself, while sec. 11, to those against persons who derive their title through aliens and so would themselves be subject to escheat were it not for this section. This evidenced by position of substantially the same clause in L. 1896, ch. 547. *i. e.*, sec. 10, replaced it in sec. 5; last sentence sec. 11, re-enacted in sec. 7 next to last sentence.

†The alienage of a husband does not prevent the vesting in him, upon the death of his wife,

Acts affecting section 17.

N. Y. L. 1830, ch. 171, Banks's 9th ed. N. Y. R. S., p. 1786 (passed April 15, repealed by L. 1896, ch. 547, sec. 300). Sec. 1. "Any resident alien who has purchased and taken a conveyance for any lands or real estate, within this state, before making and filing the deposition or affirmation in writing required by the provisions of title one of chapter one of the second part of the Revised Statutes of this state (section regarding form of deposition) may continue to hold such lands and real estate, in the same manner and with the like effect as he would have done if such purchase had been made and conveyance taken after the making and filing of the deposition or affirmation in the said title and chapter specified. But to entitle any such alien to the benefits of the provision of this section, such alien, at the expiration of one year from the passing of this act, shall have made and filed such deposition or affirmation as is required by the provisions of the aforesaid title; otherwise this section shall be of no force or effect whatever, as it regards such alien."*

L. 1836, ch. 339, sec. 1 was passed May 15 and is principally the same as L. 1830, ch. 171, sec. 1, but changed the Law of 1830, ch. 171, as follows:

1836—Aliens who have or may *hereafter* purchase.

1830—Aliens who *have* purchased and taken.

1830—Shall file deposition before one year after act passed.

1836—Shall file deposition within one year after act passed, or within one year from date of taking such lands.

1830—Heretofore made.

1836—Made agreeable to the provisions of preceding section.

Sec. 2. (See acts affecting sec. 16.)

Sec. 3. "This act shall continue in force for five years from the date hereof, and no longer."

L. 1838, ch. 32, sec. 1 (passed Feb. 7, is amendatory of L. 1836, ch. 339). Resident aliens under L. 1836 may, prior to April 13, 1839, make and file depositions mentioned in R. S. pt. 2, ch. 1, tit. 1, and filing same, entitled them to same rights and privileges they would have been entitled to had it been filed within the time required by act amended.

N. Y. L. 1843, ch. 87, Banks's 9th ed. N. Y. R. S., p. 2068 (repealed by L. 1896, ch. 547, sec. 300). Sec. 1. "Any naturalized citizen of the United States, who may have purchased and taken a conveyance for any lands or real estate within this state, or to whom any such lands or real estate may have been devised, or to whom they would have descended if he had been a citizen at the time of the death of the person last seized, before he was qualified to hold them by existing laws, may continue to hold the same in like manner as if he had been a citizen at the time of such purchase,

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of the entire estate in land conveyed in fee to himself and wife, subject only to the paramount right of the people upon office found or escheat.

The provision (1 R. S. 720, sec. 17), that an alien shall not be capable of taking or holding land conveyed or devised to him, previous to his making the deposition therein mentioned, is a limitation of the preceding sections and prevents his title thus acquired being good as against the people, but does not impair the common law rule.

The statute (1 R. S. 720, secs. 15-19) enables a resident alien, who has filed the required deposition, to take and hold lands by descent—of which he was incapable at common law—and by devise—which, in the absence of an enabling act, is against the statute of wills—and also renders the land descendible to his heirs inhabiting the United States, in case of his death within six years.

The 17th section restricts the operation of the others to lands acquired after the filing of the deposition, and leaves the common law in force as to lands previously acquired, and as to aliens who have not complied with the statute.

Wright v. *Saddler*, 20 N. Y. 320.

*The time for making and filing depositions was extended by L. 1831, ch. 172 (passed April 18); by L. 1832, ch. 171 (passed April 17); L. 1833, ch. 167 (passed April 18) in each case to April 15 next."

These three acts each provided that all other provisions of the act of 1830, ch. 171, be also extended.

devise or descent cast; and all conveyances, by deed or mortgage, heretofore made by such naturalized citizen, are hereby confirmed."

Sec. 2. "Any alien, who, being at the time an actual resident of the United States, may have heretofore purchased and taken a conveyance of any such lands or real estate, or to whom they may have been devised, or to whom they would have descended if he had been a citizen at the time of the death of the person last seized; and any such alien who may hereafter purchase and take a conveyance of any lands or real estate, or to whom the same may be devised, or to whom the same would have descended if he were a citizen, and who have already filed, or shall within one year from the passage of this act, or within one year from the time of such purchase, devise or descent cast, file the deposition or affirmation specified in the fifteenth section, article second, chapter first, part second of the Revised Statutes, may hold or convey such land or real estate during the term of five years from the passage of this act, in the same manner as if he were a citizen of this state. And any conveyances by deed or mortgage heretofore made by any such alien, is hereby declared in like manner valid."

Sec. 3. "This act shall not affect the rights of the state in any case in which proceedings for escheat have been instituted; nor the rights of any person or persons, whose interests may have become vested in any such lands or real estate."

Sec. 4 relates to Indians. See L. 1896, ch. 547, sec. 9, p. 2.

Sec. 5. "The words 'real estate,' as used in this act, comprehend equitable as well as legal estate."

N. Y. L. 1845, ch. 115. Banks's 9th ed. N. Y. R. S. p. 2073 (passed Apr. 30, repealed by L. 1896, ch. 547, § 300).

Sec. 1—"Any alien resident of this state, who has heretofore purchased and taken, or may hereafter purchase and take a conveyance of any lands or real estate within this state, or to whom any lands or real estate has been or may hereafter be devised, before making and filing in the office of secretary of state, the deposition or affirmation in writing, specified in the fifteenth section of the first title in the first chapter of the second part of the Revised Statutes, may, on making and filing such deposition or affirmation, hold the real estate granted, conveyed or devised to such alien, in the same manner and with the like effect as if such alien at the time of such grant, conveyance, or devise, were a citizen of the United States."*

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*The children of a resident alien, deceased succeed to his real estate, as heirs, although they are themselves non resident aliens; the title of such of them as are males of full age being defeasible by the state, however, unless, before the consummation of proceedings instituted for that purpose, they shall file their deposition of intended citizenship, as required by the act of 1845 (Laws of 1845, ch. 115, secs. 1 and 10).

M., a resident alien, having purchased and possessed lands in this state, and given a mortgage thereon, died, in 1864, intestate, without having filed any deposition or affirmation of intention to become a citizen. He left two sons and one daughter, all of full age, residing in England, and subjects of Great Britain and collateral kindred who were residents and citizens of the United States. His three children conveyed to W., and subsequently, by act of the legislature, all the rights of this state "acquired by escheat" were released to W., and the conveyance to him confirmed and legalized. Afterward the mortgage was foreclosed, W. and the three children of M., but none of the collateral kindred, being made defendants, and the plaintiff purchased the premises on foreclosure sale. The plaintiff then made a contract for the sale thereof with the defendant, agreeing to give good title. The defendant refused to perform this contract, on the ground that the plaintiff could not convey good title.

Construction. The plaintiff's title was good, and he could enforce specific performance of the contract.

The estate descended to the three children of M., the title which descended to the sons, being defeasible, by the state, they being of full age, unless they should

L. 1857, ch. 576, Banks's 9th ed. N. Y. R. S., p. 2076 (repealed by L. 1896, ch. 547, sec. 300).

Sec. 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."

NOTE.—See L. 1896, ch. 547, sec. 7; also, 1845, sec. 9.

1 Revised Statutes, 720, sec. 18, Banks's 9th ed. N. Y. R. S., p. 1786 (passed Dec. 10, 1828, took effect Jan. 1, 1830, repealed by L. 1896, ch. 547, sec. 300). "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 alien died seized, 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."

1826, sec. 2, last subdiv., and sec. 18, are the same.

Acts affecting section 18.

N. Y. L. 1845, ch. 115, sec. 4, Banks's 9th ed. N. Y. R. S., p. 2073 (passed April 30, repealed by L. 1896, ch. 547, sec. 300). "If any alien resident of this state, or any naturalized or native citizen of the United States, who has purchased and taken, or hereafter shall purchase and take, a conveyance of real estate within this state, has died, or shall hereafter die, leaving persons who, according to the statutes of this state, would answer the description of heirs of such deceased person, or of devisees, under his last will, and being of his blood, such persons so answer-

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file a deposition of intention to become citizens before the consummation of proceedings for that purpose; but the special act of the legislature made this title valid, even as against the state. *Goodrich* v. *Russell*, 42 N. Y. 177.

Under the provision of the act of 1845, to enable resident aliens to hold and convey real estate (sec. 1, ch. 115, Laws of 1845), which provides that a resident alien to whom any real estate had been or should thereafter be devised, might on filing the deposition of intention to become a citizen, etc., prescribed by the Revised Statutes (1 R. S. 720, sec. 15), hold the real estate the same as if he was a citizen at the time of the devise, a resident alien devisee of a citizen takes, upon acceptance of the devise, a conditional title, absolute as against the heirs of the testator, but defeasible by the state until he complies with conditions as to aliens.

The provision, therefore, of the statute of wills (2 R. S. 57, sec. 4) declaring a devise to one who, at the time of the death of the testator, is an alien to be void, was modified by the said act in this respect.

The said act of 1845 is not retrospective solely, it applies to aliens who have become residents of this state subsequent to its passage.

Hall v. *Hall*, 81 N. Y. 130, aff'g 13 Hun, 306.

ing the description of heirs or of such devisees of such deceased person, whether they are citizens or aliens, are hereby declared and made capable of taking and holding, and may take and hold, as heirs, or such devisees of such deceased person, as if they were citizens of the United States, the lands and real estate owned and held by such deceased alien or citizen at the time of his decease. But if any of the persons so answering the description of heirs, or of such devisees, as aforesaid, of such deceased person, are males of full age, they shall not hold the real estate hereby made descendible or devisable to them as against the state unless they are citizens of the United States, or in case they are aliens, unless they make and file in the office of the secretary of state the deposition or affirmation mentioned in the first section of this act."

As amended by L. 1874, ch. 261, sec. 1, as amended by L. 1875, ch. 38, sec. 1.

Where an alien female intermarried with a citizen, by virtue of the marriage she becomes a citizen and capable of taking and holding lands in this state by purchase or descent. (United States Statutes at Large, vol. 10, p. 604; 1 R. S. 719, sec. 8).

The words "resident alien," in the provision of the act of 1845, "to enable resident aliens to take and hold real estate" (sec. 4, ch. 115, Laws of 1845), which enables those answering the description of heirs of a deceased alien resident to take, whether they are citizens or aliens, do not include or designate a naturalized citizen.

The incapacity therefore of alien heirs of a naturalized citizen, who died intestate, to take lands of which he died seized, was not removed by that statute.

So, also, the alien children of a deceased brother or sister of the intestate, who was an alien are not within the provisions of the statute (1 R. S. 754, sec. 22), which saves a person "capable of inheriting," from being barred by the inheritance by reason of the alienage of any ancestor. Alienism is an impediment to taking lands by descent only when it comes between the stock of descent and the person claiming to take; if some of the persons who answer the description of heirs are incapable of taking by reason of alienage they are disregarded, and the whole title vests in those heirs competent to take, provided they are not compelled to trace the inheritance through an alien.

The common law principle, that the descent between brothers, or a brother and sister, is immediate and is not impeded by the alienage of the father, was not changed by the statute of 1786 (sec. 4, ch. 12, Laws of 1786), which changed the order of descent by enabling the father of a decedent to inherit in default of lineal heirs.

J., a naturalized citizen, died in 1866, intestate, and seized of certain real estate. He left him surviving his widow, his father, the defendant B., who was his sister, and the wife of a citizen, and two alien children of a deceased sister, who was an alien. The widow died in 1870. B., in 1873, by judgment in an action of ejectment, wherein she founded her claim upon her title by descent, recovered possession of the premises.

She contracted to sell the same to plaintiff in 1877. Submission of the controversy as to her title under section 1279 of the Code of Civil Procedure.

Construction.—The title to the premises vested in B. upon the death of her brother, the act of 1874 (chap. 261 of Laws of 1874), amending the said provision of the act of 1845, by inserting after the words "resident alien" the words "or any naturalized or native citizen," could not operate to divest her estate thus acquired, and, therefore, she could give a good title to a performance of the contract.

Luhrs v. *Eimer*, 80 N. Y. 171, aff'g 15 Hun, 399.

One who has taken lands by devise, holds the same as purchaser within the meaning of the provision of the act "to enable resident aliens to hold and convey real estate" (sec. 4, ch. 115, Laws of 1845, as amended by ch. 261, Laws of 1874 and ch. 38, Laws of 1875), which provides that if any alien, resident or citizen, who has purchased and taken a conveyance of real estate within this state shall die "leaving persons who, according to the statutes of this state, would answer the description of

heirs," such persons whether aliens or citizens, may take and hold as heirs the real estate owned and held by the decedent at the time of his death.

Real estate therefore, taken and held by the decedent as devisee, passes to his heirs, alien or resident, under said provision.

As against every claimant, except the state, the title of an alien heir is good, and he may hold the real estate without making the deposition required by said act.

Stamm v. *Bostwick*, 122 N. Y. 48, aff'g 40 Hun, 35.

NOTE—The popular and commercial meaning of the words "to purchase" is doubtless "to buy", but generally in law the word has a more extended meaning and includes every mode of acquiring land except by descent.

"There are two modes only, regarded as classes, of acquiring a title to land, namely, descent and purchase; purchase including every mode of acquisition known to the law, except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by the act of the law." 3 Washb. on Real Prop. 290; James v. Morey, 2 Cow. 246; McCartee v. Orphan Asylum Society, 9 Cow. 437-507; Hoyt v. Van-Alstyne, 15 Barb. 568-572."

S. died in 1871 intestate, leaving plaintiff, an alien, her only heir at law. By an act passed in 1876 the state released its right and interest in the land to A. Held that the act of 1874 (L. 1874, ch. 261) amending act of 1845 (L. 1845, ch. 115) by its terms includes within its effect the heirs of those who had died before as well as after its passage, and, although the land had escheated to the state when the act of 1874 was passed, the legislative purpose is by its provisions quite apparent to surrender the title to lands taken by escheat, and of which the state had not before that time assumed in any manner to make disposition. And therefore at the time of the passage of the act of 1876 no title was in the state and the act was ineffectual to vest any title in A.

Wainwright v. *Low*, 132 N. Y. 313.

Land acquired by descent is not within the operation of sec. 4 of ch. 115 of Laws of 1845 as amended by L. 1875, ch. 38, and hence, while land acquired by purchase will descend to heirs, citizen or alien, by force of the statute, land acquired by descent will not.

Callahan v. *O'Brien*, 72 Hun, 216.

Where an alien and wife had filed the certificate required by Revised Statutes to enable them to hold real estate in N. Y. and had purchased lands, and died leaving as heirs at law brothers and sisters, nephews and nieces, some of full age and some minors, and all aliens and non-resident, held; that under L. 1845, ch. 115, sec. 4, as amended by L. 1874, ch. 261 and L. 1875, ch. 38, such of the alien heirs at law of the husband as were minors and females took an absolute indefeasible estate. That such of the male heirs as were over twenty-one years, took a title which was defeasible by the state in proper proceedings instituted by it, so long as they omitted to file the deposition or affirmation mentioned in the first section of the act.

That until the forfeiture was so declared, the state had no rights in the land which it could grant or convey to a stranger.

Maynard v. *Maynard*, 36 Hun, 227.

Under sec. 4, ch. 115 of L. 1845, as amended by ch. 38 of L. 1875, those lands of a citizen acquired by purchase descend to non-resident aliens, but those acquired by descent do not—citizen heir may inherit though compelled to trace his right through two non-resident alien ancestors.

Callahan v. *O'Brien*, 72 Hun, 216.

1 R. S. 721, sec. 19, Banks's 9th ed. N. Y. R. S., p. 1786 (passed Dec. 10, 1828, took effect Jan. 1, 1830, repealed by L. 1896, ch. 547, sec. 300). "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 mortgagees, his heirs, assigns or legal representatives, or any of them, may re-purchase 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."

Act affecting section 19.

N. Y. L. 1845, ch. 115, Banks's 9th ed. N.Y. R. S., p. 2076 (passed Apr. 30, repealed by L. 1896, ch. 547, sec. 300). Sec. 13. "The provisions of section nineteen of title one, chapter first, part second of the Revised Statutes, are hereby made applicable to this act, and all the provisions of title twelve, chapter nine, part first of the Revised Statutes, inconsistent with the provisions of this act, are hereby repealed."

Provisions of sec. 19, R. S. pt. 2, ch. 1, etc., apply to this act, and provisions of tit. 12, ch. 9, pt. 1 R. S. inconsistent herewith repealed.

IV. EFFECT OF MARRIAGE WITH AN ALIEN.

Real Prop. L., sec. 6 (N. Y. L. 1896, ch. 547), amended by ch. 756, L. 1897, taking effect May 22, 1897. "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."

N. Y. L. 1889, ch. 42, Banks's 9th ed. N. Y. R. S., p. 2746 (passed and took effect March 2, 1889, repealed by L. 1896, ch. 547, sec. 300). "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."

L. 1872, ch. 120, sec. 1, Banks's 9th ed. N. Y. R. S., p. 2330 (repealed by L. 1896, ch. 547, § 300). "Real estate in this state now belonging to, or hereafter coming to,

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

V. TITLE THROUGH ALIEN.

Real Prop. L., sec. 7 (L. 1896, ch. 547, sec. 7, taking effect Oct. 1, 1896). "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 rights of any heir, devisee, mortgagee, or creditor by judgment or otherwise."

Substantially same as L. 1877, ch. 111; 1875, ch. 336; 1872, ch. 141; also, see, L. 1868, ch. 513; 1807, ch. 123, § 2.

L. 1877, ch. 111, sec. 1, Banks's 9th ed. N. Y. R. S., p. 1784 (repealed L. 1896, ch. 547, § 300). Sec. 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 of 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."

Same as L. 1872, ch. 141, or 1875, ch. 336, except
L. 1875, Right, title or interest in or to
L. 1877, Title to
L. 1877, Now held or hereafter acquired
L. 1875, Now held or hereafter acquired omitted; also omitted in L. 1872, ch. 141; see 1868, ch. 513, sec. 1, 1807, ch. 123, sec. 2.
L. 1877, ch. 111, sec. 2, same as L. 1872, ch. 141, or L. 1875, ch. 336.

L. 1875, ch. 336, secs. 1, 2, Banks's 9th ed. N. Y. R. S., p. 1784 (repealed L. 1896, ch. 547, § 300). Sec. 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.

Sec. 2. "Nothing in this act shall affect or impair the right of any heir, devisee, mortgagee, or creditor, by judgment or otherwise."

Same L. 1872, ch. 141, secs. 1, 2.

L. 1874, ch. 261, Banks's 9th ed. N. Y. R. S., p. 2074 (repealed L. 1896, ch. 547, § 300). Sec. 2. "All acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed, provided, however, that nothing herein contained shall be taken or construed to affect any grant of land *heretofore* made by this state; and provided further that nothing in this act contained shall be taken or construed to affect the title to any land or lands which may have been *heretofore* derived through any devise, grant, gift or purchase prior to the passage of this act, or to give any person not heretofore entitled thereto under the laws of this state any right,

title or interest as against any such devisee, grantee or purchaser, or any right to impeach or in any manner call in question the validity of any will of the person so dying seized as aforesaid, and it is hereby declared that the record of any such will in the office of the surrogate of any county in this state shall be conclusive evidence of its validity against any and all persons claiming or to claim under this act."

NOTE.—Sec. 1 amends L. 1845, ch. 115, sec. 4; sec. 2 construes the same and relates to L. 1845.

NOTE.—*Cf.* statutes affecting devises, L. 1808, ch. 175, sec. 2; L. 1843, sec. 2; L. 1845, secs. 4, 5, 6, 7.

L. 1872, ch. 358, sec. 1, Banks's 9th ed. N.Y. R. S., p. 1784 (repealed L. 1896, ch. 547, § 300). "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 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."

L. 1872, ch. 141, sec. 1, Banks's 9th ed. N.Y. R. S., p. 1784 (repealed L. 1896, ch. 547, § 300). "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."

L. 1868, ch. 513, sec. 1, Banks's 9th ed. N. Y. R. S., p. 1784 (repealed L. 1896, ch. 547, § 300. "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."

Same as L. 1807, ch. 123, sec. 2 (except etc. see for comparison Law of 1845) provided this shall not affect the rights of the state in cases which proceedings for escheat have been instituted.

L. 1845, ch. 115, sec. 9, Banks's 9th ed. N. Y. R. S., p. 2075 (passed Apr. 30, repealed L. 1896, ch. 547, § 300). "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 convenants and conditions in 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 R. S. 719, Banks's 9th ed. L. N. Y., N. Y. R. S. p. 1784, sec. 9 (passed Dec. 10, 1828, took effect Jan. 1, 1830, repealed L. 1896, ch. 547, § 300).

"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."

N. Y. L. 1826, ch. 297, sec. 3 (passed April 18). "The title of any citizen of this state to any lands or real estate within this state, *heretofore* conveyed, or hereafter to be conveyed, in pursuance of any written contract for the sale thereof *now existing*, shall not be questioned, impeached or defeated, by reason of such title having been derived by, from or through an alien."

It can not be discovered that this section of this statute has been repealed.

L. 1807, ch. 123, sec. 2, Banks's 9th ed. N. Y. R. S., p. 1784 (passed April 4, repealed L. 1896, ch. 547, sec. 300). "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."

N. Y. L. 1802, ch. 49, sec. 3, Banks's 9th ed. N. Y. R. S., p. 1784 (passed March 26, repealed L. 1896, ch. 547, sec. 300). "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."

VI. LIABILITIES OF ALIEN HOLDERS OF REAL PROPERTY.

Real Prop. L., sec. 8 (L. 1896, ch. 547, sec. 8, taking effect Oct. 1, 1896). "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."

1 R. S. 721, sec. 20, Banks's 9th ed. N. Y. R. S., p. 1786 (passed Dec. 10, 1828, took effect Jan. 1, 1830, repealed by L. 1896, ch. 547, sec. 300). "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 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."

L. 1825, ch. 307, sec. 4 (passed April 21, repealed by L. 1828, 2d meeting, ch. 21, sec. 1, par. 453), practically reincorporated. The law of 1825, however, expressly permitted aliens to serve on a jury *demediatate linguae*.

Acts affecting section 20.

L. 1845, ch. 115, sec. 12, Banks's 9th ed. N. Y. R. S., p. 2076 (passed April 30, 1845, repealed by L. 1896, ch. 547, sec. 300). "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."

Amendment of 1845, ch. 115, sec. 12—same as R. S., sec. 20, except,

1845—as if a citizen of the U. S.

R. S., sec. 20—as if a citizen of N. Y.

VII. ALIEN DOWER.

Real Prop. L., sec. 5.—The provision with regard to dower in land held by an alien contained in sec. 5 of the "Real Property Law" (L. 1896, ch. 547, sec. 5) is as follows: "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."

1 R. S. 740, sec. 2, Banks's 9th ed. N. Y. R. S., p. 1814 (passed Dec. 10, 1828, took effect Jan. 1, 1830, repealed by L. 1896, ch. 547, sec. 300). The widow of any alien who, at the time of his death, shall be entitled by law to hold any real estate, if she be an inhabitant of this state at the time of such death, shall be entitled to dower of such estate, in the same manner as if such alien had been a native citizen."

N. Y. L. 1845, ch. 115, sec. 2, Banks's 9th ed. N. Y. R. S., p. 2073 (passed April 30, repealed by L. 1896, ch. 547, sec. 300). "The wife of any alien resident of this state, who has heretofore taken by conveyance, grant or devise any real estate and become seized thereof, and who has died before the passing of this act, and the wife of any alien resident of this state, who may hereafter take by conveyance, grant or devise, any real estate within this state, shall be entitled to dower therein, whether she be an alien or citizen of the United States; but no such dower shall be claimed in lands granted or conveyed by the husband before this act shall take effect."

Sec. 3. "Any woman being an alien, who has heretofore married or who may hereafter marry a citizen of the United States, shall be entitled to dower in the real estate of her husband, within this state, as if she were a citizen of the United States."

Alien widow of naturalized citizen, though non-resident during his life, is entitled to dower.

Burton v. *Burton*, 1 Abb. Ct. App. Dec. 271 (1864).

NOTE.—Court equally divided as to construction of Act of Congress of 1855, ch. 71 and N. Y. L. 1845, ch. 222, sec. 3, but the opinion holding residence unnecessary confirmed in 42 N. Y. 177.

The several statutes enabling aliens to take and hold real estate, which were passed prior to the 21st of April, 1825, were so far modified by the act passed on that day (Stat. 1825, p. 427) that no alien could subsequently take lands by purchase, without complying with the provisions of that act. Accordingly held that an alien widow, whose husband, being a citizen, purchased lands during their coverture in 1833, and died in 1838, was not entitled to dower within Sutliff v. Forgey, 1 Cow. 89.

Currin v. *Finn*, 3 Denio, 229.

Alien widow of naturalized citizen, not having taken any steps to become naturalized so as to enable her to take and hold lands, can not claim dower, 1 R. S. 720, sec. 17; nor does 1 R. S. 740, sec. 2, give it to her, as that section applies only to "widow of an alien."

Connolly v. *Smith*, 21 Wend. 60.

The widow of a natural born citizen, who was an alien when the act passed in 1802, enabling aliens to purchase and hold lands, is not entitled to dower under the provisions of that act, where the lands in which the dower is claimed were acquired by the husband, and the marriage took place previous to the passage of the act.

Priest v. *Cummings*, 20 Wend. 338, rev'g 16 id. 619.

From opinion.—"The estate of the wife as tenant in dower is but a continuance of the estate of the husband, so that if he acquires land by purchase, or other conveyance to himself, she, by virtue of the same purchase, if then of legal capacity to take an inchoate right of dower, takes it as a purchaser by the same conveyance, in the same manner as if he had taken a conveyance to himself, and a limited remainder in one-third of the premises to his wife for life, in case she survive him."

Alien widow of natural born citizen can not be endowed by reason of her alienism, nor can she take by devise without having taken the requisite steps towards naturalization, by reason of the provision of our Statute of Wills, 2 R. S. 57, sec. 4.

Mick v. *Mick*, 10 Wend. 379.

Her alienage is a bar by 1 R. S. 720, sec. 17; had she acquired rights under Statutes of 1802–1808, she would be regarded as a capable purchaser, and therefore dowable. See Forgey v. Sutliff, 1 Cow. 89.

Alien widow, qualified under provisions of Act of 1802, 2 R. L. 542, to take land as a purchaser, is entitled to dower. See Forgey v. Sutliff, 5 Cow. 713.

Sutliff v. *Forgey*, 1 Cow. 89.

VIII. ALIENISM OF ANCESTOR.

Real Prop. L., sec. 294. (L. 1896, ch. 547, taking effect Oct. 1, 1896). "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."

1 R. S. 754, Banks's 9th ed. N. Y. R. S., p. 1827 (passed Dec. 10, 1828, took effec Jan. 1, 1830, repealed by L. 1896, ch. 547, sec. 300). Sec. 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."

Note in each case the section refers and applies to its own chapter or article, *i. e.*, that of "descent of real property" and does not properly concern or effect in any way *e. g.* section 6, Rev. 1896, and statutes thereunder traced, nor sec. 5 Rev. 1896, and statutes thereunder traced, much less sec. 7, Rev. 1896.

By the common law rule of descents the alienage of common grandfather does not impede descent between cousins, the children of brothers who were citizens and capable of transmitting by descent.

The rule that the descent between brothers is immediate, and not impeded by the alienage of their father, holds also between one of the brothers and the representative of the other, and also between the representatives of both of them. *McGregor* v. *Comstock*, 3 N. Y. 408.

The twenty-second section of the statute regulating descents, which provides, that no person capable of inheriting real estate "shall be precluded from such inheritance by reason of the alienism of any ancestor of such person," protects the inheritance whether the claimant derives title through lineal or collateral ancestors, or through both."

The word "ancestors" by its established import, when used in relation to succession to real estate by descent, embraces both lineals and collaterals.

Denis McCarthy, a naturalized citizen, died in 1835, in the city of New York, intestate and without issue, seized of real estate in that city. Denis McCarthy, of Saratoga, who was naturalized in 1834, and was a great-grandson of Daniel McCarthy, a brother of Timothy McCarthy, who was the grandfather of the deceased Denis, claimed the estate of which the latter died seized, as his heir at law; all the ancestors of the latter, and of the claimant, having died *aliens*.

Construction.—The claimant was entitled to the estate.

A record of the judgment of a competent court admitting an alien to become a citizen, and reciting the facts which entitled the alien to such judgment, can not be impeached by proof contradicting those recitals. In all collateral proceedings such record is conclusive. *McCarthy* v. *Marsh*, 5 N. Y. 263.

NOTE.—"By the common law the plaintiff could not have inherited the estate in controversy from Denis McCarthy of New York, because he traces the descent of the land through aliens, who, having no inheritable blood, were incapable not only of

taking by inheritance, but through whom it could not be transmitted. Jackson v. Green, 7 Wend. 333; The People v. Irvin, 21 Wend. 128; 10 Wend. 9, Jackson v. Fitzsimmons; 3 Comstock, 408, McGregor v. Comstock." (p. 274.)

The statute (1 R. S. 754, sec. 22), which provides that no person capable of inheriting real estate shall be precluded from such inheritance by reason of the alienism of any ancestor of such person, enables those only to inherit who would be entitled to the estate by the ordinary laws of descent on the death of the person last seized, but for the alienism of some person through whom title is deduced.

It does not enable a person to take an estate by inheritance who deduces title by descent through a living alien relative of the deceased, who would himself inherit the estate were he a citizen.

Accordingly, where decedent left him surviving a sister, and a niece, her daughter, the former an alien and the latter a citizen; held, that the niece did not take his real estate by inheritance.

McLean and wife v. *Swanton*, 13 N. Y. 535.

From opinion. — "The argument of plaintiff's counsel, to avoid this view of the subject, was, in effect, that the existence of the plaintiff's mother might be disregarded, upon a doctrine thus expressed by Chancellor Kent: 'If a citizen dies, and his next heir be an alien, who can not take, the alien can not interrupt the descent to others and the inheritance descends to the next of kin who is competent to take, in like manner as if no such alien had ever existed.' 2 Kent's Com. 56. The difficulty of this position is, that if the name of the mother be stricken from the plaintiff's genealogical chart, it will not appear that she has any connection with Robert Swanton, whose heir she claims to be. The cases to which the doctrine referred to in the Commentaries applies, are those in which the claimant does not make title through the alien, but where she can deduce her pedigree from the person dying seized, by leaving out or passing by the alien. All the cases decided in this country, where an alien would have taken the estate but for his alienage, and in which a more remote heir was preferred, were cases of the same character, the successful claimant making out his descent independent of and not through the alien. Orr v. Hodgson, 4 Wheat. 453; Lessee of Levy v. McCartee, 6 Pet. 102; Jackson v. Lun, 3 John. Cas. 109; Jackson v. Jackson, 7 John. 214; Orser v. Hoag, 3 Hill, 79; Jackson v. Green, 7 Wend. 333."

The nephew of a person dying intestate and seized of a state of inheritance, although a naturalized citizen, is not capable of inheriting the estate, if his father be an alien and living at the time of the decease of the person last seized, notwithstanding the provision of the statute of descents, "That no person capable of inheriting, etc., shall be precluded from such inheritance by reason of the alienism of any ancestor of such person."

Our statute is substantially like the act of 11 and 12 Wm. III, ch. 6, and must receive the same construction, viz. . that it does not enable a person to deduce title through an alien ancestor still living. *People* v. *Irvin*, 21 Wend. 128 (1838).

No one who is obliged to trace his descent through an alien can inherit real estate, if the death of the owner happened previous to the 1st of January, 1830, until when the statute 11 and 12 William III, ch. 6, was not incorporated into our law of descent; so held where the children of a naturalized citizen claimed that their father was the heir of a naturalized citizen, they being obliged to trace their descent through their grandmother, who was an alien. It seems, however, that this rule would not apply where the claimant was a brother of the person last seized; the descent from brother to brother is considered immediate, but not so from cousin to cousin. *Jackson* v. *Jackson*, 7 Wend. 333.

See Collingwood v. Pace, 1 Ventr. 413.

The fifth canon of the statute of 1786, regulating descents, does not confer the capacity upon alien nephews and nieces to inherit lands; its only effect is to alter the rule of descent as it existed at common law. *Jackson* v. *Fitz Simmons*, 10 Wend. 9.

Where there is a failure of inheritable blood by reason of alienism, the lands do

not *escheat*, but go to the next heir. Thus, where the granddaughter is an alien, the brother and his representatives, not being aliens, inherit. *Jackson* v. *Jackson*, 7 Johns. 214.

In New York a citizen can not inherit collaterally from another citizen, where the former must make his pedigree through mediate alien ancestors. There is a review of common law as to mediate and immediate lineal and collateral descent. *Levy's Lessees* v. *M'Cartee*, 6 Pet. 102.

IX. PROPERTY RIGHTS OF ALIENS UNDER TREATIES.

A treaty is, by virtue of the Constitution of the United States, a part of the supreme law of the land, and supersedes all local statutes that contravene its provisions.

By force of the treaty of 1783 and the treaty of 1794, an alien son may inherit from an alien father who was never attainted by treason.

An alien may take by purchase, and hold against all parties except the state claiming under inquest of office. *Munro* v. *Merchant*, 28 N. Y. 9.

Where a treaty between the United States and Wurtemburg provides that when land in the territory of the one would descend upon a citizen of another, except for his alienage, such citizen should be allowed a term of two years to sell and remove the proceeds, it was held that for the period of two years the treaty conferred upon him the same rights he would enjoy if he were a resident heir, simply imposing upon him the obligation to sell within the prescribed time or declare his intention of becoming a citizen of this country.

"All the rights of the state are suspended by the treaty for the full period of two years, and all the rights of other heirs over the property are also suspended by the operation of the treaty." *Kull* v. *Kull*, 37 Hun, 476.

To same effect is Bollerman v. Blake, 94 N. Y. 625; s. c., 24 Hun, 187. As to the effect of treaties in overriding local statutes, see People v. Snyder, 41 N. Y. 397; Hanenstein v. Lynham, 10 Otto, 483; Chirac v. Chirac, 2 Wheat. 259; Fairfax devisees v. Hunter's lessee, 7 Cranch, 627; Ware v. Hylton, 3 Dallas, 99; Orr v. Hodgeson, 4 Wheat. 453; Hughes v. Edwards, 9 id. 489.

The treaty of 1794 by the term "assigns" embraced, in its spirit, all who should succeed to the title of the original owner by any other means than by descent. And it conferred upon the devisee of such original owner, although an alien, all the rights which he could have had if he had become naturalized; consequently such devisee could grant or devise the land to anyone competent to take. *Watson* v. *Donnelly*, 28 Barb. 653.

The 6th article of the treaty of 1783, not only barred the escheat of lands held by British subjects in this state, but gave them capacity to transmit them by descent; but the descent must be to a citizen.

Where a British subject holding lands here died previous to the treaty of 1794, leaving no citizen heirs, his land escheated and the provisions of the treaty did not pass the lands to alien heirs.

The act of 1845 (Laws 1845, p. 94) does not operate to confirm a title previously conveyed by an alien heir of one holding real estate. The exception, established in Jackson v. Lunn, 3 Johns. Cas. 109, and Kelley v. Harrison, 2 id. 29, where British subject owns lands at commencement of revolutionary war, recognized, but declared inapplicable to present case. *Brown* v. *Sprague*, 5 Denio, 545.

Where a person dies leaving issue, some of whom are aliens, and others citizens, the former are not deemed his heirs at law; but the estate descends to the latter in the same manner as if there were no other issue in existence.

The treaties of 1783 and 1794 between the United States and Great Britain only provide for then existing titles; and consequently no claim to lands can be established in virtue of either, where the claimant is unable to show a title in himself or his ancestors at the time of the treaty made.

A further and more full discussion in the United States courts and elsewhere has resulted in showing conclusively that the alien heir can not inherit as the common law disability applies in all its force, and accordingly the distinction upon which the exception to the general rule was sought to be sustained in Jackson v. Lunn has been repeatedly repudiated, as unfounded in law or reason. *Orser* v. *Hoag*, 3 Hill, 79; Jackson v. Lunn overruled in part.

Citing, Danson's lessees v. Godfrey, 4 Cr. 321; Inglis v. Trustees, 3 Pet. 121; Fairfax devisees v. Hunter's lessees, 7 Cr. 603; Orr v. Hodgson, 4 Wheat. 453; Blyth's lessees v. Rochester, 7 id. 535; Jackson's lessees v. Burns, 3 Binn. 75.

K., a native of Ireland, removed to New York in 1760, where he continued to reside until his death in 1798. He left a wife in Ireland, at the time he removed from that country. His wife never left that country but continued a subject to the king of Great Britain. It was held that the wife of K., being an alien, could recover dower of those lands only of which K. was seized before the American Revolution, or the fourth of July, 1776, and not of those he acquired after that period.

The division of an empire works no forfeiture of a right previously acquired. *Kelley* v. *Harrison*, 2 Johns. Cas. 29.

Though in case of a purchase, the law will recognize the title of an alien in lands until office found; yet in case of a descent, the law takes no notice of an alien heir, on whom, therefore, the descent is not cast. But where the title to land in this state was acquired by a British subject prior to the American Revolution, it seems, that the right of such British subject to transmit the same, by descent, to an heir, in esse, at the time of the revolution, continued unaltered and unimpaired; the case of a revolution or division of an empire being an exception to the general rule of law on this subject. *Gansevoort* v. *Lunn*, 3 Johns. Cas. 109.

Calvin's Case, 7 Cow. 27b. See Orser v. Hoag, 3 Hill, 79, in part overruling this case.

III. CORPORATIONS.

I. GENERAL POWER TO TAKE, p. 34.
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2. BY LAW OF 1848, CH. 319, SEC. 6, AND BY LAW OF 1860, CH. 360, p. 37.
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I. GENERAL POWERS.

General Corporation Law (L. 1892, ch. 687, Banks's 9th ed. N. Y. R. S., p. 978), sec. 11. "Every corporation, as such, has power, though not specified in the law under which it is incorporated;"

Subdiv. 3. "To acquire by grant, gift, purchase, devise or bequest, to hold and dispose of such property as the purposes of the corporation shall require; subject to such limitations as may be prescribed by law."

L. 1890, ch. 563, sec. 8, subd. 3, reads: "To acquire by grant, gift, devise, or bequest, and to dispose of such property as the purposes of the corporation shall require, not exceeding the amount limited by law." (Not in terms repealed.)

1 R. S. 600, secs. 1, 2 (repealed L. 1892, ch. 687).

Sec. 1. "Every corporation, as such, has power (4) to hold, purchase, and convey such real and personal estate, as the purposes of the corporation shall require, not exceeding the amount limited in its charter."

Sec. 2. "The powers enumerated in the preceding section, shall vest in every corporation that shall hereafter be created, although they may not be specified in its charter or in the act under which it shall be incorporated."

II. RESTRICTION ON POWER TO TAKE BY DEVISE.

1. BY REVISED STATUTES.

At common law a corporation had power to take by devise, *post*, p. 36, (see, also, Dillon's Munic. Corp., sec. 566); but 2 R. S. 57, sec. 3, Banks's 9th ed. N. Y. R. S., p. 1875, provides: "No devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter or by statute to take by devise."

This statute is not in terms repealed, and the question has arisen whether it is superseded by sec. 11, subd. 3, *supra*. On this subject see Banks's 9th ed. N. Y. R. S., p. 1875; also Chaplin's Express Trusts

and Powers, § 112. As the section last quoted is not expressly repealed it must be read in connection with sec. 11 of ch. 687, L. 1892. The result of such reading would be to prohibit, in the absence of other statutory authority, corporations from acquiring by devise property other than that *required* for corporate purposes.*

A devise to an unincorporated association is void.

Under 2 R. S. 57, sec. 3, prohibiting devises to a corporation not expressly authorized to take, a power which would operate to give the rents and profits of land to corporations not expressly authorized to take by devise, would be void.

But a power to sell the land would be valid, for such a corporation may take money or personalty by testamentary gift, even though raised by the conversion of land.

A provision in the charter of a corporation enabling it to take land "by direct purchase, or *otherwise*," is an express authority within the meaning of the statute of wills.

A devise to a charitable purpose can not be sustained, if made to a corporation in violation of the statute of wills.

Downing v. *Marshall*, 23 N. Y. 366 (1861).

From opinion.—(The case of McCartee v. The Orphan Asylum Society, 9 Cow. 437, the effect of 2 R. S. 57, sec. 3, upon it, and the mortmain policy of our statutes is discussed.)

"In this form the statute (2 R. S. 57, sec. 3) was designed to be prohibitory, and to leave no room for the subtleties and refinements which had obscured the subjects. The language is so broad as to include every interest which is capable of being devised. Uses and trusts not less than legal estates, fall under the prohibition. (See next case.)

A devise of real estate direct to a corporation is void within the statute of wills as enacted in 1 R. L. 364. Otherwise, it seems, had there been a trust (insisted on at large, in the dissenting opinion of Stebbins, senator, and supported by Jones, chancellor, *arguendo* for his decree). *McCartee* v. *Orphan Asylum Society*, 9 Cow. 437 (1827).

The English statute of charitable devises, of devises in *mortmain*, or of wills or devises to corporations, and the common law, and the rules of the English chancery on these subjects, independently of statutes, and a comparison between the English and New York statute law on these subjects, and a very full review and history of the cases on the same subjects, both English and American, *per* Jones, chancellor, in support of his opinion that, though a devise directly to a corporation may be void by the statute of wills (1 R. L. 364), yet a devise to a natural person, in trust for a corporation, is good. And this was not questioned by the court of errors.

See, also, Theological Seminary of Auburn v. Childs, 4 Paige, 419.

By common law, and in the absence of statutory prohibitions, corporations, in whatever manner created, could take by all the usual

* General Corporation Law (L. 1892, ch. 687, am'd L. 1895, ch. 672), sec. 10. "No corporation shall possess or exercise any corporate powers not given by law, or not necessary to the exercise of the power so given."

A similar provision is to be found in L. 1890, ch. 563, sec. 9, and 1 R. S. 600, sec. 3. (This section, together with whole of ch. 18 of Part. 1 of R. S., repealed by L. 1892, ch. 687.)

See Dillon's Munic. Corp., sec. 561, *et. seq.*

methods of acquiring property. By the statute of wills (2 R. S. 57, sec. 3), they are now prohibited from taking lands by devise unless expressly authorized by their charters or by statute, but they may still acquire personal property in any manner.

A foreign corporation is competent to take personalty in this state, by bequest. Although it has no legal existence out of the state of its creation, its existence in that state may be recognized in this state; and its foreign residence creates no insuperable objection to its receiving a gift of money by will from a resident of New York, if it be authorized generally by its charter to take such gifts. *Sherwood* v. *American Bible Society*, 4 Abb. Ct. App. Dec. 227.

The trustees of a religious society, under Laws of 1813, can not take a trust for the sole benefit of members of the church as distinguished from other members of such congregation.

Gram v. The Prussia Emigrant, etc., German Society, 36 N. Y. 161.

Religious societies incorporated under the Act of 1813 are not expressly, or even impliedly, authorized to take lands by devise, for any purpose whatever, when such devise is made after their incorporation, and a devise to them is consequently void. *Goddard* v. *Pomeroy*, 36 Barb. 546.

Citing Theological Seminary of Auburn v. Childs, 4 Paige, 419; Ayres v. The Methodist Episcopal Church, 3 Sandf. S. C. R. 351; King v. Rundle, 15 Barb. 139.

In Levy v. Levy, 33 N. Y. 97, it is said at p. 124: "But it seems clear to me that neither the statute of 1813, nor the general statute, which defines and regulates the powers of all corporations, and enumerates those that they possess (1 R. S. 600), recognizes the action of religious corporations, as trustees, for purposes outside of those contemplated by their incorporation."

See, also, Wilson v. Lynt, 30 Barb. 124.

A devise to a church society was held to be void, as the corporation could not take by devise. *King* v. *Rundle*, 15 Barb. 139.

A bequest to a religious society, as such, is valid where there is no doubt or uncertainty as to who was the legatee intended, although the society is not incorporated. *Banks* v. *Phelan*, 4 Barb. 80.

Municipal Corporations.

"Bodies politic and corporate" were expressly excepted from those capable of taking by devise in 1 R. L. 364, ch. 23, sec. 1; also by L. 1787, ch. 47, "An act to reduce the law concerning wills into one statute." But by section 11, subd. 3 of the General Corporation Law, every corporation is to have the power to acquire by devise such property as the purposes of the corporation shall require, subject to such limitations as may be prescribed by law. The last clause of the section provides that subdivisions 4 and 5 shall *not* apply to municipal corporations; hence, subdivision 3 does.

In the absence of a special grant of power by statute, a town can not act as trustee of property given for charitable purposes.

A testamentary gift to a town, in order to take effect as an absolute one, must be for one or all of the purposes for which the corporation was created.

Fosdick v. Town of Hempstead, 125 N. Y. 581, digested p. 864.

The laws of this state do not prohibit a testamentary bequest to a foreign municipality, and the ability to take depends upon the law of the legatee's domicil. Matter of Huss, 126 N. Y. 537, citing Chamberlain v. Chamberlain, 43 id. 424.

Legacy to a town, to be used in the erection of a town hall—construction of the terms of the will as to the uses to which the building may be put. Button v. Ely, 46 Hun, 100,

In the absence of statutory prohibition, a municipality may take by voluntary gift or devise. See Le Couteulx v. City of Buffalo, 33 N. Y. 333; Vail v. Long Island R. Co., 106 id. 283; Coggeshall v. Pelton, 7 Johns. Ch. 292; see Dillon's Munic. Corp., secs. 566, *et seq.*

For power of corporation to hold property in trust, see Dillon's Munic. Corp., secs. 567, 573, *et seq.*; also *post*, p. 715.

2. BY LAW OF 1848, CH. 319, SEC. 6, AND LAW of 1860, CH. 360.

But the right to take by devise is still limited by L. 1860, ch. 360, L. 1848, ch. 319, sec. 6, which section was expressly excepted in the repeal of that law by the membership Corporation Law.

L. 1848, ch. 319, Banks's 9th ed. N. Y. R. S., p. 1875, An act for the incorporation of benevolent, charitable, scientific and missionary societies. Sec. 6. "Any corporation formed under this act shall be capable of taking, holding or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will or testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of ten thousand dollars; provided, no person leaving a wife or child or parent shall devise or bequeath to such institution or corporation more than one-fourth of his or her assets, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one-fourth, and no such devise or bequest shall be valid, in any will which shall have been made or executed at least two months before the death of the testator.*

People's Trust Co. v. Smith, 82 Hun, 494; Beekman v. People, 27 Barb. 304;

*L. 1865, ch. 368, An act for the incorporation of societies or clubs for certain social or recreative purposes.

Sec. 6. Same provision as above, L. 1848, ch. 319, sec. 6.

L. 1875, ch. 343, An act for the incorporation of library societies.

Sec. 5. Same provision as above, L. 1848, ch. 319, sec. 6.

A provision, preventing a testator, leaving a wife, child or parent, from devising more than one-fourth of his estate, after payment of debts, is inserted in

L. 1887, ch. 315, sec. 5, for incorporation of Fire Departments;

L. 1887, ch. 317, for incorporation of Bar Associations;

L. 1886, ch. 236, for incorporation of Political Clubs.

The statute of 1855 (L. 1855, ch. 230) forbidding grant, conveyance, devise or lease of personal or real estate to any person and his successor in ecclesiastical office, was repealed by L. 1862, ch. 147.

Betts v. Betts, 4 Abb. N. C. 317; Carpenter v. Historical Soc., 2 Dem. 574; Lawrence v. Elliott, 3 Redf. 235.

L. 1860, ch. 360, Banks's 9th. ed. N. Y. R. S., p. 1875. An act relating to wills.

Sec. 1. "No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half of his or her estate, after the payment of his or her debts (and such devise or bequest shall be valid to the extent of one-half, and no more)."

Sec. 2. "All laws and parts of laws inconsistent with this act are hereby repealed."

Harris v. American Bible Society, 2 Abb. Ct. App. Dec. 316; 4 Abb. N. S. 421; Beekman v. People, 27 Barb. 304; Dowd's will, 8 Abb. N. C. 118; Final Accounting in Leary's Estate, 1 Tuck. 235; Wardwell v. Home for Incurables, 4 Dem. 473.

The existence of a corporation organized under the laws of a sister state is recognized by the courts of this state, and they may take personal property under wills executed by citizens of this state, if, by the laws of their creation, they have authority to acquire property by bequest.[1]

For the purpose of ascertaining the estate, only half of which can be devised to charitable or educational corporations, under the act of 1860, the widow's dower and the debts are to be first deducted.

A testator can not give to two or more corporations in the aggregate more than he can give to a single object, viz., one-half of his estate. *Chamberlain* v. *Chamberlain*, 43 N. Y. 424. (See Conflict of Laws.)

[1] See, also, Riley v. Diggs, 2 Dem. 184.

A subsequent amendment of its charter, imparts no vitality to a devise to a corporation, not authorized to take at the time of the death of the testator.[1]

A devise to a corporation organized under the laws of another state, is void, unless it is authorized so to take by a statute of this state, although by its charter it had that authority.[2] *White* v. *Howard, et al.*, 46 N. Y. 144; 52 Barb. 294.

[1] See, also, Leslie v. Marshall, 31 Barb. 562.

[2] See, also, Boyce v. City of St. Louis, 29 Barb. 650.

Devise to corporation is not defeated by non-user. *Matter of Trustees of Cong. Church*, 131 N. Y. 1.

By its charter (sec. 4, ch. 244, L. 1849), the power given to a charitable society was "to receive by gift or devise, in the same manner and subject to the same restrictions as provided in the general laws for the incorporation of religious and benevolent associations," (ch. 319, L. 1848) which act (sec. 6) declared that no devise or bequest to

corporations formed under the act should be valid, unless the will was made and executed two months before the testator's death; and it appearing that the will was made within such time, the bequest was void.

The act of 1848 was not repealed by ch. 360, L. 1860, relating to wills (People v. Clute, 50 N. Y. 451); but the dissenting opinion cites Pierce v. Delamater, 1 Comst. 17; Potter's Dwarris on Stat. 154.

Even if it repealed, the repeal did not affect a special charter of which it was a part. *Lefevre* v. *Lefevre*, 59 N. Y. 434.

The provision in section 6 of chapter 319 of 1848 requiring a will to be executed two months before the death of the testator was not altered or repealed by chapter 641 of 1881. *Matter of Connor*, 44 Hun, 424.

Corporation, when subject to the limitation imposed by section 6 of chapter 319 of 1848—power to take property by "devise or otherwise" includes "bequests"—a bequest to a corporation, incorporated under chapter 413 of 1869, invalid when the testator died within two months. *People's Trust Company* v. *Smith*, 82 Hun, 494.

Bequests to charitable and religious corporations in or out of this state—are not valid unless made two months prior to the death of the testator—how the amount of a legacy, limited upon a life estate, is to be determined—1848, ch. 319, sec. 6; 1879, ch. 51; 1860, ch. 360. *Hollis* v. *Hollis*, 29 Hun, 225.

A corporation chartered by special act may be made subject to general act (ch. 319, L. 1848, amended by ch. 51, L. 1870) providing for the incorporation of benevolent and other societies, which restricts their capacity to take under a will.

The provision of the act of 1870 (ch. 129, L. 1870), amending ch. 99, L. 1839, incorporating the Union Theological Seminary of the City of New York, which limits the power of that corporation to take and hold by gift, grant, or devise, by subjecting it "to all the provisions of law relating to devises and bequests by last will and testament" makes applicable thereto the act of 1848, sec. 6, which declares that no devise or bequest to any corporation formed under it, by one leaving wife, child, or parent, shall be valid in any will which shall not have been made and executed at least two months before the death of the testator; and also makes applicable the act of 1860, ch. 360, prohibiting devises or bequests to certain societies to more than one-half of the testator's estate.

The act of 1860 does not repeal two months' clause in act of 1848. Lefevre v. Lefevre, 59 N. Y. 434.

The right of a corporation to take by devise or bequest is subject to the general laws of the state in regard thereto, passed subsequent to its incorporation.

The act of 1853 (Pennsylvania) prohibiting devises or bequests to any body politic, or person in trust for religious or charitable uses, unless by will executed at least one month before testator's death, affects

the power to take as well as the power to devise, and precludes a religious corporation of that state from taking a bequest to it in trust for such purposes by a will executed in this state by a citizen thereof within one month of his death, and such bequest is void. Chamberlain v. Chamberlain, 43 N. Y. 424, distinguished.

The will gave to wife the net income derived from his estate, after payment of the legacies, during her life, and the principal left of the estate after her death to various societies. The sums attempted to be bequeathed by the void legacies as above were to be distributed as in case of intestacy. *Kerr* v. *Dougherty*, 79 N. Y. 327, aff'g 17 Hun, 341.

Residuary estate was devised to the "Roman Catholic Little Sisters of the Poor of the City of New York;" the will was executed within two months of the death of the testatrix, and the devise was void.

If the society was unincorporated it could not take; if incorporated it could not take under sec. 6, ch. 319, L. 1848. *Marx* v. *McGlynn*, 88 N. Y. 357.

A devise or bequest to a corporation organized under the act of 1848 (ch. 319, L. 1848) providing for the incorporation of "benevolent, charitable, scientific and missionary societies," contained in a will made within two months of the testator's death, is, by the terms of the exception in the provision of said act (sec. 6), authorizing such corporations to take by devise or bequest, invalid, although the testator leave no wife, child, or parent.

When a missionary society (sec. 2, ch. 41, L. 1862) was authorized to take by bequest or devise "subject to the provisions of law relating to bequests and devises to religious societies," the exception in the provision of the act of 1860 applied, and a bequest to the society, in the will of one who died within two months after the execution of the will, was invalid. *Stephenson* v. *Short*, 92 N. Y. 433, aff'g 27 Hun, 380.

Where the charter of a corporation contains a provision to the effect that it shall be subject to all provisions of law in relation to devises by will, such provision makes the corporation subject to the limitations of chapter 319 of the Laws of 1848. *Fairchild* v. *Edson*, 77 Hun, 298.

Gifts to charitable, benevolent, scientific, or educational institutions are not against public policy, and there is no public policy outside of the statutes which condemns testamentary gifts to such institutions, although contained in a will executed within two months of the testator's death.

The provision of the act of 1848 (sec. 6, ch. 319, L. 1848), providing for the incorporation of such institutions, which declares invalid a devise or bequest to "any incorporation formed under this act," in a will not made and executed "at least two months before the death of

the testator," applies only to corporations organized under that act and the acts amendatory thereof. (Ch. 239, L. of 1861; ch. 526, L. of 1881.)

Foreign corporations stand, in this particular, in the same position as domestic corporations.

A gift in a will, executed within two months of the testator's death, to a foreign scientific and educational corporation which was empowered to take such gift by the law of the state where it was chartered, was valid. Kerr v. Dougherty, 79 N. Y. 327; Lefevre v. Lefevre, 59 id. 434, distinguished.

In determining whether the will of a person who died "leaving a wife, child, or parent," gives to corporations of the classes above specified more than the law permits, *i. e.*, more than one-half of his estate after payment of debts (ch. 360, L. 1860), the whole estate must be treated as if converted into money at his death, and the money value of the portion or interest so given ascertained; if this is not more than one-half of the whole, the statute has not been violated.

The will of H. directed his executors to convert the bulk of his estate into money, to invest the same, and to pay the income of different portions thereof to certain persons named during their lives, respectively, and upon their deaths give the principal sums to certain scientific and educational corporations.

Construction:

In determining whether the statutory limit had been exceeded, the value, at the time of the testator's death, of the portion of the estate so disposed of, should be ascertained, from which could be deducted the values of the life estates, computed according to the proper annuity tables, and the balance would represent the value of the remainders given to said corporations; and, it appearing that this was less than one-half of the value of the testator's estate at the time of his death, said bequests were valid. *Hollis* v. *Drew Theological Seminary*, 95 N. Y. 166.

See, also, Currin v. Fanning, 13 Hun, 462.[1]

Bequests and devises to religious societies incorporated under the act of 1813, and the acts amendatory thereof and supplementary thereto are not subject to the provisions contained in section 6 of chapter 319 of L. 1848. *Harris* v. *American Baptist Home Missionary Society*, 33 Hun, 411.

The will of B., after various devises and bequests, which disposed of but a small portion of his property, directed that his residuary estate, most of which was personalty, be divided into two parts, one of said parts "to be paid" to a religious corporation, the other to a college named.

[1] Rich v. Tiffany, 2 App. Div. 25, and cases there cited.

The gifts were in conflict with the provisions of the statute forbidding testamentary gifts to religious and other charitable corporations in certain cases in excess of one-half of the testator's property (ch. 360, L. 1860). *Chamberlain* v. *Taylor*, 105 N. Y. 185; same will, 43 id. 424.

K. died in 1887, leaving a will executed in the month previous to his death, by which he devised and bequeathed one-third of his residuary estate to a charitable corporation organized in 1866 under and by special act (ch. 201, L. of 1866), which provides (sec. 7), that "said corporation shall possess the general powers and be subject to the general restrictions prescribed in the 3d title of the 18th chapter of the Revised Statutes, and also subject to the provisions of title 7, part 1 of chapter 18 of the Revised Statutes in relation to devises or bequests by will." Chapter 18 of the Revised Statutes proper contains but four titles and contains no provision in relation to devises or bequests by will, but chapter 18 of the unofficial edition, known as the fifth edition, which was published in 1859, and was in general use, cited in the courts by lawyers and judges as the Revised Statutes, contains a title (7) which embodies the general act for the incorporation of charitable societies (ch. 319, L. of 1848), with amendments thereto, including the provision (sec. 1) that no bequest or devise to any corporation formed thereunder will be valid, unless "made or executed at least two months before the death of the testator."

Construction:

By the reference in the charter the edition of the Revised Statutes then in use was to be considered as intended; and so, the bequest or devise in question was invalid; also, the court might take judicial notice that the fifth edition was in common use when said act of incorporation was passed. *Matter of Will of Kavanagh*, 125 N. Y. 418, aff'g 53 Hun, 1.

The provision of the Revised Statutes (1 R. S. 773, sec. 1) prohibiting the suspension by will of the power of alienation for a longer period than two lives in being at the death of the testator, does not, nor do the statutory provisions invalidating testamentary gifts to certain corporations, unless made a certain time before the testator's death, where he has a wife, children or parents, interdict bequests within the prohibition made in another country to take effect here, and such bequests, if valid at the domicil of the testator, are valid here. Those statutory provisions apply to domestic wills which, by their provisions, are to be executed here. Hollis v. Drew Theo. Seminary, 95 N. Y. 171; Cross v. U. S. Trust Co., 131 id. 330; Hope v. Brewer, 136 id. 126. *Dammert* v. *Osborn*, 140 id. 30, digested p. 470.

III. LIMITATION OF AMOUNT.

Gen'l Corp. Law (L. 1892, ch. 687, and L. 1894, ch. 400), Banks's 9th ed. N. Y. R. S., p. 978.

Sec. 12. "If any general or special law heretofore passed, or any certificate of incorporation, shall limit the amount of property a corporation other than a stock corporation may take or hold, such corporation may take and hold property of the value of three million dollars or less, or the yearly income derived from which shall be five hundred thousand dollars or less, notwithstanding any such limitations. In computing the value of such property, no increase in value arising otherwise than from improvements made thereon shall be taken into account." L. 1892, ch. 687, sec. 12, same clauses rearranged.

By L. 1889, ch. 191, religious, educational, literary, scientific, benevolent or charitable corporations, or corporations organized for hospital, infirmary or other than business purposes, are forbidden to take and hold property in excess of two million dollars, or the yearly income of one hundred thousand dollars. Same provision in regard to computing value. It was provided that the act should not affect the right of such a corporation to take in excess of the specified amount, provided such right was granted by special statute.

By L. 1890, ch. 497, the amount was increased to three million, or annual income of two hundred and fifty thousand dollars.

By L. 1890, ch. 553, am'd L. 1889, ch. 191, bible, missionary and tract corporations, or corporations organized for the enforcement of laws relating to children or animals, were included, the amount increased to three million dollars, or yearly income of two hundred and fifty thousand, and it was provided that the corporations enumerated might take and hold in their own right, or in trust for any purpose comprised in the objects of its incorporation.

The provision of the Revised Statutes limiting the amount of property which incorporated colleges may take and hold by gift, grant, or devise (1 R. S. 460, sec. 36), is not confined to colleges incorporated by the regents of the university under the general laws of the state, but applies also to such an incorporation created by special charter, unless inconsistent provisions are to be found in the charter.

The provisions of the act of 1840 (ch. 318, L. 1840), as amended in 1841 (ch. 261, L. 1841), authorizing the creation of trusts to incorporated colleges, by grants, devises or bequests, do not repeal or affect the general law limiting the amount of property which may be taken and held by such a corporation. Chamberlain v. Chamberlain, 43 N. Y. 424.

The distinction between the taking and holding of property by

corporations recognized in relation to English corporations, subject to the *mortmain* laws of that country, is not applicable in this state.

Where, in a special charter granted to an institution of learning, a limitation is put upon its power to hold property, in the absence of some plain and controlling circumstance showing a contrary intent, it must be construed as limiting the taking, as well as holding beyond the amount specified; and a devise or bequest to it, exceeding the amount or value it is permitted to take, is void for the excess.

The provision of the charter of Cornell University (sec. 5, ch. 585, L. 1865), declaring that the corporation thereby created might hold property "not exceeding $3,000,000 in the aggregate," prohibited its taking, as well as holding, beyond that amount; and, it appearing that the university already held property up to the limit, a bequest to it was void; also, the heirs or next of kin of the testatrix could raise the question.

Leazure v. Hillegas, 7 S. & R. 313; Baird v. Bank of Washington, 11 id. 411; Goundie v. N. W. Co., 7 Pa. St. 233; Runyan v. Carter, 14 Pet. 122; Smith v. Shelley, 12 Wall. 358; Bogardus v. Trinity Church, 4 Sandf. Ch. 633; Humbert v. Trinity Church, 24 Wend. 587; De Camp v. Dobbins, 29 N. J. Eq. 36; s. c. 31 id. 671; Davis v. O. C. R. Co., 131 Mass. 258; Vidal v. Girard's Ex'rs, 2 How. U. S. 127; In re N. Y. E. R. R. Co., 70 N. Y. 327; Moore v. B. C. R. R. Co., 108 id. 98, and other cases holding the doctrine that one who has contracted with or conveyed to a corporation for a consideration will not be heard to raise the question as to its power to take, distinguished.

Also, the question was not affected by the fact that subsequent to the death of the testatrix the limitation on the power of said university to take was removed by the legislature. *Matter of McGraw*, 111 N. Y. 66, aff'g 45 Hun, 354.

Notes from the opinion.

(1) *Power to take by devise at common law.*—"A corporation, by the common law, had power to take property by devise. Sherwood v. American Bible Society, 4 Abb. Ct. of App. Dec. 227, 231; 1 Kyd. on Corp. 74-78; Grant on Corp. 98."

(2) *Relation of English mortmain statutes to the laws of New York.*—"The nature of the tenure of real property at the time of the passage of the early *mortmain* acts in England bears no resemblance to the tenure by which a citizen of this state holds lands. Here there is no vassal and superior, but the title is absolute in the owner, and subject only to the liability to *escheat*. (Const. of N. Y., art. 1, sec. 13.) The *escheat* takes place when the title to lands fails through defect of heirs. (Const. of N. Y., art. 1, sec. 11.) We have not in this state re-enacted the statutes of *mortmain* or generally assumed them to be in force, and the only legal check to the acquisition of lands by corporations consists in those special restrictions contained in the acts by which they are incorporated, and which usually confine the capacity to purchase real estate to

specified and necessary objects. (2 Kent's Com. 282.) Of course, the restrictions contained in any general law, if applicable, must also he referred to."

(3) *Interpretation of mortmain statutes.*—"Judges have given the widest possible scope to statutes in restraint of the disposal of property in *mortmain*, and have been astute in their arguments for the application of such statutes to cases as they arose." (Per Gibson, Ch. J., Hillyard v. Miller, 10 Penn. 326.) "The courts ought not to impute an intent to the legislature not clearly expressed, in direct hostility to the traditions and policy of the past. * * * Claiming property and seeking the aid of the courts to reach it, the corporation can rely only on the warrant and authority conferred by law, and can not claim in transgression or excess of that authority. * * * Doubtless, the restriction upon corporations is a governmental regulation, and one of policy, and to be enforced by the government; but an individual whose interests will be affected by a transgression of the rule, may assert and insist upon the limitation as a restriction upon the power of the corporation to take. (Per Allen, J., in Chamberlain v. Chamberlain, 43 N Y. 424–439.)" (107–108.)

(4) *Nature of the title of an alien.*—"It is said that an alien has the right to take property by purchase, but he can not hold it as against the state. That is so. He takes, however, a defeasible title, good as to all but the sovereign power, which must take it upon office found or by *escheat*. Wright v. Saddler, 20 N. Y. 320.

In such case it is not exactly an accurate description of the alien's title to simply say that he can take but can not hold. That is a contradiction in terms. If he take, he must hold, if for but a fractional part of a second of time. The expression is but a short one for the statement that he can not hold, as against the claim of the state, where properly made and enforced."

(5) *Executed grants to corporations taking grants in violation of statute.*—"The other cases cited in the printed argument of the counsel for the appellant, are mostly cases where a corporation has contracted with parties on a valid consideration, and where a conveyance has been made and then it is sought to raise the question as to the power of the corporation to take or convey a title, and it has been held that in such a case of an executed contract, if the corporation has violated the statute, the parties seeking to set up such violation would not be heard, and in such case none but the state would be. That one who contracts with a corporation shall not, under such circumstances, be heard to raise the question, is, in substance, the principle decided.

Such are the cases in substance and principle of Cowell v. Springs Co., 100 U. S. 55; Hough v. Cook Co. Land Co., 73 Ill. 23; Alexander v. Tolleston Club of Chicago, 110 id. 65; Barnes v. Suddard, 117 id. 237; Cal. Tel. Co. v. Alta Tel. Co. 22 Cal. 398; Natoma Water Co. v. Clarkin, 14 id. 544; Haywood v. Davidson, 41 Ind. 212; Baker v. Neff, 73 id. 68; C. B. & Q. Co. v. Lewis, 53 Iowa, 101; Land v. Coffman, 50 Mo. 243; Chambers v. City of St. Louis, 29 id. 576; Barrow v. Nashville, etc., Tel. Co., 9 Humph. 304; Baker v. Northwestern Guarranty Co., 36 Minn. 185; Missouri, etc., Co. v. Buchwell, 2 Neb. 192. I have examined all of these cases, and while the facts are, of course, not precisely similar, yet in not one of them does the fact exist of a devise of property to a corporation which it can not hold, because the limitation has been reached provided for by statute, and, of course, no doctrine that in such case the heirs can not claim the property, is advanced.

In most of them the court looks upon the question as one of a forfeiture of the charter on account of a violation of some limitation therein contained, and in such case it is said, none but the sovereign can raise such question." (102–103.)

(6) *Effect of taking beyond amount limited by law.*—"There can be no doubt that it is the law, in this state at least, that if there be a prohibition against the taking of

property beyond a certain amount or value, a devise or bequest to a corporation of property which will exceed the amount or value which the corporation is permitted to take, will be void for the excess. This is expressly decided in the Chamberlain v. Chamberlain case, and we think it was rightly decided. Nor is there any doubt that in such a case the heirs or next of kin can raise the question. This was also decided in the same case. See, also, White v. Howard, 46 N. Y. 144. * * *" (108.)

(7) *Who may question a gift or grant in violation of law.*—"The language of Chief Justice Beasley, in the case of De Camp v. Dobbins, 31 N. J. Eq. 690, is very appropriate here. He says: 'Nor can I assent to the other proposition that if, as the contention assumes, this bequest is violative of the law if carried into effect, that none but the state can intervene. I find no warrant for such a doctrine, either in the legal principles belonging to the subject or in the adjudications. There can be no doubt that there are cases in which, where a corporation has acquired rights of property to an extent or in a manner unwarranted by its charter, no one but the public can have the right to complain. A grantor making title to a corporation might be estopped from questioning the effect of his own conveyance. So a mere stranger could not question such a corporate title. But I have not observed any decision that asserts, where a title is created by devise which vests in a corporation for its own use a larger quantity of property than the laws authorize, that the heir at law has no right to make objection. The authorities referred to do not lend countenance to such a doctrine.'" (108–109.)

For purposes of estimating property held by any institution its debts must be deducted. *Wetmore* v. *Parker*, 52 N. Y. 450.

IV. ACQUIRING PROPERTY IN PLACE OF THAT CONVEYED.

General Corp. L. (L. 1892, ch. 687), Banks's 9th ed. N. Y. R. S., p. 980, sec. 13, provides that when a corporation has conveyed any part of its real property, the supreme court may authorize it to purchase other property, but not to exceed in amount the property conveyed.

General Corp. L. (L. 1892, ch. 687), Banks's 9th ed. N. Y. R. S., p. 980, sec. 14, allows domestic corporations doing business in other states to acquire land for business purposes.

V. ACQUISITION OF REAL PROPERTY BY FOREIGN CORPORATIONS.

General Corp. L. (L. 1892, ch. 687), Banks's 9th ed. N. Y. R. S., p. 982, secs. 17, 18, regulate the acquisition of real property in this state by foreign corporations. Lancaster v. Amsterdam Co., 140 N. Y. 576, construes these sections to be declaratory and not limiting

IV. INFANTS, IDIOTS AND PERSONS OF UNSOUND MIND.

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I. DEEDS.

1. STATUTES.

The Real Prop. L., sec. 3 (L. 1896, ch. 547, sec. 3). "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.

1 R. S. 719, sec. 10, Banks's 9th ed. N. Y. R. S., p. 1784 (repealed by L. 1896, ch. 547, sec. 300). "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."

See 1 R. L. 70 (L. 1787, ch. 36, sec. 1) and 74 (L. 1787, ch. 37, sec. 5), both repealed by L. 1828, second meeting, ch. 21, sec. 1, par. 15.

Sale of lands of infants, lunatics or habitual drunkards is regulated by Code Civ. Pro., sec. 2345 to sec. 2364, inclusive, formerly provided for by 2 R. S. 194, sec. 170, *et seq.*, which was repealed by L. 1877, ch. 417 and L. 1880, ch. 245.

2. INFANTS.

A mortgage of personal property executed by an infant is voidable at his election at any time before he arrives of age and within a reasonable time thereafter, and is avoided by any act which evinces that purpose. An unconditional sale and delivery of the property to a third person is such an act. *Chapin* v. *Shafer et al.*, 49 N. Y. 407.

If there be a feoffment with livery, it may be avoided by entry or by writ *dum fuit infra ætatem*. If a deed of bargain and sale be executed it may be avoided by another deed of bargain and sale made to a third person without entry, in case the land be vacant and uncultivated; but in all other cases there must be an actual entry, for the express purpose of disaffirming the deed.

I. DEEDS — 3. IDIOTS, ETC.

If, when the second deed be executed, the land be holden adversely to the infant, it seems that the second deed will not amount to a revocation of the first conveyance.

Whether the deed of an infant can be affirmed by his mere silence or omission to disaffirm it for a period of time after he come of age, *quære*.

Bool v. *Mix*, 17 Wend. 119.

That a deed of lands by an infant is voidable, see, also, Gillett v. Stanley, 1 Hill, 121.

The rule sanctioned by Lord Mansfield in Zouch v. Parsons, 3 Burr. 1794, that "all such gifts, grants or deeds made by an infant which do not take effect by delivery of his hand are void ; but all gifts, grants or deeds, made by infants, by matter in deed or in writing which do take effect by delivery of his hand, are voidable, by himself, by his heirs and by those who have his estate," was approved in Conroe v. Birdsall, 1 Johns. Cas. 127; see, also, 2 Paige, 191; 6 id. 635.

As to what amounts to affirmance or disaffirmance, see Green v. Green, 69 N. Y. 553; also, Allen v. Lardner, 78 Hun, 603; Jackson v. Carpenter, 11 Johns. 539; Jackson v. Burchin, 14 id. 124 ; Merchants' Fire Ins. Co. v. Grant, 2 Edw. Ch. 544; Eagle Fire Ins. Co. v. Lent, 1 id. 301; s. c., 6 Paige, 635, as grantor.

Henry v. Root, 33 N. Y. 526 ; Flynn v. Powers, 54 Barb. 550 ; Lynde v. Budd, 2 Paige, 191; Kincaid v. Kincaid, 85 Hun, 141, as grantee.

The deed of an infant *feme covert* who joins with her husband in a conveyance of his lands, is void; and does not bar her action for dower therein, though she have done nothing to affirm it. *Sherman* v. *Garfield*, 1 Denio, 329. See, also, Cunningham v. Knight, 1 Barb. 399.

3. IDIOTS, AND PERSONS OF UNSOUND MIND.

A deed or mortgage executed by one who thereafter, by inquisition in proceedings *de lunatico*, is found to be a lunatic, although made within the period during which he is declared by the finding to have been a lunatic, is not absolutely void; the proceedings are presumptive, not conclusive evidence of want of capacity, and may be overcome by satisfactory evidence of sanity. *Hughes* v. *Jones*, 116 N. Y. 67.

From opinion.—"All contracts of a lunatic, habitual drunkard, or person of unsound mind, made after an inquisition and confirmation thereof, are absolutely void, until by permission of the court he is allowed to assume control of his property. L'Amoureaux v. Crosby, 2 Paige, 422; Wadsworth v. Sharpstein, 8 N. Y. 388; 2 R. S. 1094, sec. 10. In such cases the lunacy record, as long as it remains in force, is conclusive evidence of incapacity. Id.

Contracts, however, made by this class of persons before office found, but within the period overreached by the finding of the jury, are not utterly void, although they are presumed to be so until capacity to contract is shown by satisfactory evidence. Id.; Van Deusen v. Sweet, 51 N. Y. 378 ; Banker v. Banker, 63 id. 409. Under such circumstances the proceedings in lunacy are presumptive but not conclusive evidence of a want of capacity. The presumption, whether conclusive or only *prima facie*, extends to all the world and includes all persons, whether they have notice of the inquisition or not. Hart v. Deamer, 6 Wend. 497 ; Osterhout v. Shoemaker, 3 Hill, 513; 1 Greenl. Ev. sec. 556.

That the deed of a lunatic is, like that of an infant, not void but voidable, at his election, see Ingraham v. Baldwin, 9 N.Y. 45; Jackson v. Gumaer, 2 Cow. 552 (568); Bool v. Mix, 17 Wend. 119 (134), and cases; F. N. B. 202.

II. WILLS — 2. INFANTS.

An habitual drunkard is not incompetent to execute a deed, he is simply incompetent upon proof that at the time his understanding was clouded, or his reason dethroned by actual intoxication, or upon proof of general unsoundness of mind. *Van Wyck* v. *Brasher*, 81 N. Y. 260.

Citing Peck v. Carey, 27 N. Y. 9; Gardner v. Gardner, 22 Wend. 526.

Assuming that a deed executed by an insane person is not voidable merely, but absolutely void Van Deusen v. Sweet, 51 N. Y. 378, to establish its invalidity, it must appear that the grantor was, at the time he executed it, wholly, absolutely and completely unable to understand or comprehend the nature of the transaction. *Aldrich* v. *Bailey*, 132 N. Y. 85.

II. WILLS.

1. STATUTES.

2 R. S. 57, sec. 1, Banks's 9th ed. N. Y. R. S., p. 1875. "All persons, except idiots, persons of unsound mind and infants, may devise their real estate, by a last will and testament, duly executed according to the provisions of this title."

(Thus amended by L. 1867, ch. 782.) The original enactment brought married women within the exception.

1 R. L. 364, ch. 23, sec. 5 (repealed L. 1828, second meeting, ch. 21, sec. 1, par. 95) made the following exception:

"That no last will and testament, aforesaid, made by a married woman or by any infant, idiot, or person of insane memory shall be valid."

2 R. S. 60, sec. 21, Banks's 9th ed. N. Y. R. S., p. 1876. "Every male person of the age of eighteen years or upwards, and every female at the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate, by will in writing." (Thus amended by L. 1867, ch. 782.) As originally enacted married women were excepted.

2. INFANTS.

In an action brought to obtain judicial construction of a will, it was adjudged that the title to a greater portion of the real estate of which the testatrix died seized, vested in her heirs upon her death, subject to the execution of a power of sale by the executors, and said executors were directed to sell and convey said real estate in pursuance of a contract made by them. This was accordingly done, and the proceeds paid over to the county treasurer. Subsequently one of the heirs, an infant over eighteen years of age, died, leaving a will, whereby she devised

and bequeathed all of her property to her husband, who petitioned to have the share of his wife in the fund paid over to him.

Construction:

The proceeds of the sale were to be regarded as personal property, and the portion of the infant heir could be disposed of by and passed under her will.

Where real estate owned by tenants in common, of whom an infant is one, is sold under and in pursuance of a judgment in a partition suit, instituted by others of the tenants in common, the portion of the proceeds belonging to the infant remains impressed with the character of real estate, and as such does not pass under the infant's will. *Horton* v. *McCoy*, 47 N. Y. 21.

3. IDIOTS AND PERSONS OF UNSOUND MIND.

1. LUNACY.

Assuming it to be possible that a testator may manifest sufficient capacity to revoke an existing will, and yet be incapable of demonstrating (although he might possess) sufficient capacity to support the complex provisions of a new will, this notion can not be so applied to a codicil as to render it effective as the revocation of a will, while void as an affirmative testamentary disposition.

The person propounding an alleged testamentary paper must prove, not only the execution and publication of the instrument, but also the mental capacity of the testator;[1] so that if, upon consideration of the evidence on both sides, the court is not satisfied that the supposed testator was of sound and disposing mind and memory, probate must be denied; *but*,

At common law, and under our statutes, the legal presumption is, that every man is *compos mentis;* and the burden of proof that he is *non compos mentis* rests on the party who alleges that an unnatural condition of mind existed in the testator. He who sets up the fact that the testator was *non compos mentis* must prove it.[2]

In law, the only standard as to mental capacity in all who are not idiots or lunatics is found in the fact whether the testator was *compos mentis* or *non compos mentis*, as those terms are used in their fixed legal meaning.

Such being the rule, the question in every case is, had the testator, as *compos mentis*, capacity to make a will; not had he capacity to make the will produced. If *compos mentis*, he can make any will, however complicated; if *non compos mentis*, he can make no will—not the simplest.[3]

II. WILLS — 3. IDIOTS, ETC.

The opinions on that subject of medical men, as well actual observers as experts, are mere evidence, and are to be produced in court, and under oath, as other evidence is.

The case of Stewart v. Lispenard, 26 Wend. 255, disapproved, and, it seems, overruled; but whether any different rule of law is affirmed, *quære.*[4] *Delafield* v. *Parish*, 25 N. Y. 9; s. c., 42 Barb. 274; 1 Redf. 1.

[1] See also Ramsdell v. Viele, 6 Dem. 244; s. c., 20 St. Rep. 446, aff'd, 117 N. Y. 636 (the practice in such cases also stated in this case).

Also Van Pelt v. Van Pelt, 30 Barb. 134; McSorley v. McSorley, 2 Bradf. 188; Morrison v. Smith, 3 id. 209; Loder v. Whelpley, 1 Dem. 368; 111 N. Y. 239; Esterbrook v. Gardner, 2 Dem. 543.

[2] See, also, Matter of Flansburgh, 82 Hun, 49; Matter of Rapplee, 66 id. 558, aff'd 141 N. Y. 553; Matter of Groot, 72 id. 548. But mental derangement once proved, devisee must show a lucid interval. Christy v. Clarke, 45 Barb. 529; Brown v. Torrey, 24 id. 583; Van Dusen v. Van Dusen, 5 Johns. 144; Taylor's Will, Edm. S. C. 375; Clark v. Fisher, 1 Paige, 171; Gombault v. Public Administrator, 4 Bradf. 226.

[3] Eau v. Snyder, 46 Barb. 230; Forman's Will, 54 id. 274; s. c., 1 Tuck. 205; Brush v. Holland, 3 Bradf. 461.

[4] The doctrine of Stewart v. Lispenard was followed in Blanchard v. Nestle, 3 Denio, 37, and Newhouse v. Goodwin, but was disapproved and not applied in Thompson v. Thompson, 21 Barb. 116, and Stanton v. Weatherwax, 16 id. 259.

NOTE.—*What insufficient to establish testamentary incapacity:*

Mere fact that all property was given to those not related to testatrix. Deas v. Wandell, 1 Hun, 120; s. c., 3 S. C. 128, aff'd in 59 N. Y. 636.

A finding, on writ *de lunatico inquirendo*, that testator was of unsound mind for the previous twenty-four months, is not conclusive that there was no interval of capacity during that time. Searles v. Harvey, 6 Hun, 658.

An hereditary tendency to insanity. Bristed v. Weeks, 5 Redf. 529.

Extreme old age. Clarke v. Davis, 1 Redf. 249; Maverick v. Reynolds, 2 Bradf. 360; Moore v. Moore, id. 261; Butler v. Benson, 1 Barb. 526; Creely v. Ostrander, 3 Bradf. 207; Cornwall v. Ricker, 2 Dem. 354; Van Alst v. Hunter, 5 Johns. Ch. 158.

The facts held not to warrant a finding of incapacity. Potter v. McAlpine, 9 Dem. 108; Matter of Mahoney, 34 St. Rep. 183; s. c., 38 id. 344; Matter of Stewart, 39 id. 801.

Inequality of distribution among children. La Bau v. Vanderbilt, 3 Redf. 384.

That the testamentary provision is less than what would have been received on intestacy. Matter of Tracy, 11 St. Rep. 103.

Defect of memory, unless it be total or appertain to things essential. Bleecker v. Lynch, 1 Bradf. 458; Reynolds v. Root, 62 Barb. 250.

Defect of senses. Weir v. Fitzgerald, 2 Bradf. 42.

A person deaf and dumb from nativity is not therefore an idiot nor *non compos mentis*, though such perhaps may be the legal presumption until his mental capacity is proved or an inquiry and examination for that purpose. Brower v. Fisher, 4 Johns. Ch. 441.

What sufficient to establish testamentary incapacity:

As to amount of mental unsoundness arising from old age. Newhouse v. Goodwin, 17 Barb. 236.

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From a mortal illness. Alston v. Jones, 17 Barb. 276; Sheldon v. Dow, 1 Dem. 503.

When the will indicates that a son of the testator is an infant when in fact he is not, it is important as tending to establish incapacity. Cooper v. Benedict, 3 Dem. 136.

Where, at the time of execution, the decedent was in a state of stupor, though perhaps capable of being roused so as to perform a sensible action, the proof to establish a rational act, should be of the clearest character; and that failing, probate should be denied. McGuire v. Kerr, 2 Bradf. 244.

The testamentary capacity is mainly a question of fact, to be determined by the testimony of witnesses examined before the surrogate when the will is propounded for record, etc. *Gardiner* v. *Gardiner*, 34 N. Y. 155.

The will is valid where, though the testatrix, by an inquisition in the supreme court, was declared a lunatic from the last of October, 1856, when the will was executed in the July previous, she was of disposing mind and memory within the rule suggested in Delafield v. Parish, 25 N. Y. 9. *Van Guysling* v. *Van Kuren*, 35 N. Y. 70.

(a) Insane delusion.

It seems that, on questions of testamentary capacity, courts should be careful not to confound perverse opinions and unreasonable prejudices with mental alienation.

The true test of insanity affecting testamentary capacity, etc., aside from cases of dementia, or loss of mind and intellect, is mental delusion.

A person, persistently believing supposed facts, which have no real existence, against all evidence and probability, and conducting himself upon the assumption of their existence, is, so far as such facts are concerned, under an insane delusion.

If a testator at the time of making his will is laboring under any delusion in respect to those who would naturally have been the objects of his testamentary bounty, and the court can see that the dispository provisions were or might have been caused or affected by such delusion, such instrument is not to be deemed to be his will. *The American Seaman's Friend Society* v. *Hopper*, 33 N. Y. 619; s. c., 43 Barb. 625.

See, also, Lathrop v. Borden, 5 Hun, 560: Lathrop v. American Board of Foreign Missions, 67 Barb. 590; Merrill v. Rolston, 5 Redf. 220; Stanton v. Weatherwax, 16 Barb. 259.

Insane delusion held established in Miller v. White, 5 Redf. 320; Morse v. Scott, 4 Dem. 507; Matter of Dorman, 5 id. 112.

Insane delusion held not established in Phillips v. Choter, 1 Dem. 533; Hagen v. Yates, id. 584; Matter of Vedder, 14 St. Rep. 470; s. c., 6 Dem. 92; Bull v. Wheeler, id. 123; Matter of Gross, 14 St. Rep. 429, aff'g 7 id. 739.

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It is not enough to avoid a will, that the testator, otherwise competent, had mistaken notions that one of his daughters was illegitimate, provided it did not amount to an insane delusion but was simply the effect of inadequate evidence on a jealous and suspicious mind. *Clapp* v. *Fullerton*, 34 N. Y. 190.

NOTE.—"It was also insisted that, aside from the issue of imbecility, the testator was disqualified by lunacy. This claim rested on the assumption, that during the las year of his life he was laboring under an insane delusion as to the legitimacy of his elder daughter. To sustain the allegation, it is not sufficient to show that his sus picion in this respect was not well founded. It is quite apparent from the evidence that his distrust of the fidelity of his wife was really groundless; but it does not follow that his doubts evince a condition of lunacy. The right of a testator to dispose of his estate, depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to the will, though its provisions are unreasonable and unjust."

A person having capacity sufficient to acquire a large fortune by per sonal industry and intelligence, who successfully conducts a large business, whose business correspondence shows a clear comprehension of the subjects upon which he writes, and who is pronounced by his intimate friends of sound mind, and of more than ordinary intelligence and firmness, will not be considered as incompetent to make a will simply because he exhibits eccentricities of character in regard to himself, is subject to fits of melancholy in regard to his health, even amounting to hypochondria. *Brick* v. *Brick*, 66 N. Y. 144.

Probate of the will of E. was contested on the ground of incompetency, by reason of delusions as to the conduct and affection of her husband, as to the want of affection toward her of some of her children, among others, that they desired to confine her in an asylum; whereby she was induced to make discriminations against them. It appeare d that the testatrix was a woman of strong will; she had a severe sickness prior to the making of her will; she continued, however, thereafter to manage and control her business as she had done before, collecting rents and making improvements; she conversed intelligently with her friends and her attorney giving instructions to the latter as to the will and following in some respects his advice. No act of insanity or of improvidence in the conduct of her affairs was proved. She was passionately jealous of her husband, and they had frequent quarrels; at one time a divorce suit was pending between them. Her son had committed an assault upon her for which he and her husband were indicted and the former convicted. The children who were discriminated against took sides with the husband; those favored, espoused the cause of the mother. Proceedings were at one time instituted for the appointment of a com-

mittee to take charge of her estate, and she was advised by her attorney that if the proceedings were successful the right existed to place her in an asylum. These proceedings were arrested by the husband. *Held*, that the evidence failed to show the existence of any insane delusions, such as rendered the testatrix incompetent to make a will. *Coit* v. *Patchen*, 77 N. Y. 533.

To set aside a gift of property because of unsoundness of mind of the donor, it is not essential to show that he was an idiot or an imbecile at the time; it is sufficient to show that he was laboring under a delusion out of which he could not be reasoned, which led him to make the gift, and which so took possession of his mind that he could not act upon the subject sensibly.

If such delusion exist upon one subject the person, as to that, is of unsound mind, although, in regard to other subjects, he may reason and act intelligibly.

It appeared that a person, under the influence of a belief that his wife and children had conspired together to injure him, which had no foundation in fact and was merely an insane delusion, for the purpose of preventing them from inheriting, gave a large portion of his estate to defendant under an arrangement that it was to pay him interest thereon during his life, this arrangement having been advised be an agent of the defendant, who well knew his mental condition.

Construction:

The gift was invalid and the defendant was properly required to restore the property; also, it was immaterial to inquire whether restoration could be made without impairment of defendant's estate.

As to whether it was essential to show that defendant was chargeable with knowledge of the donor's condition of mind, *quære*. *Riggs* v. *The American Tract Society*, 95 N. Y. 503.

It seems that where one persistently believes supposed facts, which have no real existence, except in his perverted imagination, against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, the delusion is insanity.

Where, however, there are facts, insufficient although they may be in reality, from which a prejudiced, narrow or bigoted mind might derive a particular idea or belief, it can not be said that the mind is diseased in that respect. The fact that the belief is illogical or preposterous is not evidence of insanity.

W. died, leaving a widow, a daughter by her, and a son by a former marriage, him surviving, and leaving a will, probate of which was con-

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tested by his son on the ground of mental incapacity. W. was at the time of his death eighty-eight years old, having retained, to an extraordinary degree, vigor of mind and body, and having continued to manage his own affairs, and in full possession of his reasoning and reflective faculties. He was a man of strong will and determined character, positive and independent in his opinions, and unyielding in them when opposed. From his youth W. had entertained a bitter dislike of the order of Free Masons. In August, 1884, he had a dispute with neighbors in regard to the location of boundary lines; a survey made, which was unsatisfactory to him, was repeated, at the suggestion of his son. The line ran nearly identically with that of the previous surveys. W. was not satisfied. His son combatted his views. The neighbors and surveyors were Masons, and during the dispute he discovered his son was, also. He became angered and charged that his son had conspired with the others to defraud him of his rights. This became a settled conviction upon his mind, and the breach between them growing out of this conviction was never closed. The will, made in July, 1885, left a small legacy to the son, and the balance of the testator's estate was given to the widow and daughter. It appeared that W. had made several prior wills, one before the breach, making a similar disposition of his property.

Construction:

The evidence failed to show the testator was laboring under, and the will was the offspring of, an insane delusion, and a decree admitting it to probate was proper. *Matter of Will of White*, 121 N. Y. 406.

2. INFIRMITY.

The circumstance that the testator died within a few hours after the making of his will, does not alone warrant an inference of incapacity. *Jackson* v. *Jackson*, 39 N. Y. 153, digested p. 1193.

The fact that an aged person is forgetful and, at times labors under slight delusions, does not *per se* establish want of testamentary capacity. *Children's Aid Society* v. *Loveridge*, 70 N. Y. 387, digested p. 1197.

There is no presumption against a will because made by a person of advanced age; nor can incapacity to make a will be inferred from an enfeebled condition of mind or body. If the testator has sufficient intelligence to comprehend the condition of his property, his relation to those who are or may be the objects of his bounty, and the scope and meaning of the provisions of his will, and if it is his free act, it will be sustained. *Horn* v. *Pullman*, 72 N. Y. 269.

See also Clark v. Fisher, 1 Paige, 171.

The fact that the testatrix has the feebleness of old age, both mentally and physi-

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cally, does not necessarily render her incapable of making a will, if she is rational and has sufficient capacity to comprehend the condition of her property, her relations to the objects of her bounty and the scope and bearing of the provisions of her will. *Matter of Pike*, 83 Hun, 327.

See also Matter of Lewis, 81 Hun, 213; Matter of Townsend, 75 id. 593; Matter of Skaats, 74 id. 462; Matter of Folts, 71 id. 492.

3. DRUNKENNESS.

A will is valid though the testator was a confirmed drunkard, and the execution took place after a long debauch and the testator had drunk several times during the day. *Peck* v. *Cary*, 27 N. Y. 9.

See, also, Matter of Tracy, 11 St. Rep. 103, aff'g s. c., 3 id. 239.

From opinion: "In order to avoid a will made by an intemperate person, it must be proved that he was so excited by liquor, or so conducted himself, during the particular act, as to be, at the moment, legally disqualified from giving effect to it. Shelford on Lunacy, 276. The same learned writer says that incapacity arising from intoxication differs from ordinary lunacy in this, that the effects of drunkenness only subsist while the cause, the excitement, visibly lasts.

There is, he adds, scarcely such a thing as latent inebriety; so that a case of incapacity from mere drunkenness, and yet the man be capable to all outward appearances, can hardly arise; "consequently, in cases of this description, all which is required to be shown is the absence of such excitement at the time of the act done as would vitiate it; for, under slight degree of excitement from liquor, the memory and understanding may be as correct as in the total absence of any exciting cause." Id. 304. A similar rule was laid down by Sir John Nicholl sitting in Prerogative Court in Ayrey v. Hill, 2 Addams, 206.

In such a case it is competent, as it is the universal practice in the probate courts, to examine the dispositive parts of a will, to see whether the dispositions are extravagant and unreasonable, on the one hand, or whether on the other, they are such as might probably be expected from one in the situation of the alleged testator. The question is not, however, whether the gifts are such as, upon the whole, we would have advised under the same circumstances, but whether there is such a violent departure from what we would consider natural, that they can not fairly be referred to any cause other than a disordered intellect."

See, also, Lewis v. Jones, 50 Barb. 645; Vanwyck v. Brasher, 81 N. Y. 260; Gardner v. Gardner, 22 Wend. 526; Matter of Ely, 16 Misc. 228; Matter of Woolsey, 17 id. 547.

V. MARRIED WOMEN.

I. CAPACITY TO TAKE ESTATES.

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I. CAPACITY TO TAKE ESTATES

1. BY GRANT.

1. GENERALLY.

Before L. 1848, a married woman held what rights she had under common law rules.

L. 1848, ch. 200 (passed April 7th). Sec. 1. "The real and personal property of any female who may *hereafter marry*, and which she shall own at the time of marriage, and the rents, issues and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property, as if she were a single female."

Sec. 2. "The real and personal property, and the rents, issues and profits thereof, of any female now married shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were a single female, except so far as the same may be liable for the debts of her husband heretofore contracted." *

*The husband has a vested interest in a legacy, which was bequeathed to his wife prior to the act of 1848 for the more effectual protection of the property of married women, although the legacy was not reduced to possession when that act took effect.

The legislature had not power to deprive the husband of his rights to such a legacy, and make it the sole and separate property of the wife; and so far as the act purports to do so, it violates the provision of the Constitution of the state, declaring that no person shall be deprived of "property without due process of law."

The act of 1848, for the protection of the property of married women, did not divest a husband's interest in a legacy previously bequeathed to his wife, though not then reduced to possession. *Westervelt* v. *Gregg*, 12 N. Y. 202.

1. BY GRANT.

1. GENERALLY.

Sec. 3. (Was amended by sec. 1, L. 1849, ch. 375, as given below.)

L. 1849, ch. 375. Sec. 1. "The third section of the act of 1848 amended to read, 'Any married female may take by inheritance or by gift, grant, devise or bequest, from any person other than her husband and hold to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof in the same manner and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband nor be liable for his debts.'"

L. 1848, sec. 3, same as far as capacity to take is concerned.

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

Sections 2–11 of this act do not relate to this title.

What is a married woman's separate estate.—L. 1858, ch. 187, sec. 1, enacts substantially that a wife may cause the life or health of her husband to be insured for her sole use, and if she survive the period of the insurance the sum or net amount of the insurance becoming due and payable, by the terms of the insurance, shall be payable to her to and for her own use, free from the claims of the representatives of the husband, or of any of his creditors, or any party or parties claiming by, through, or under him. (Thus far, substantially the same as L. 1840, ch. 80, sec. 1.) But, when the premium paid in any year out of the property or funds

See, also, Norris v. Beyea, 13 N. Y. 278; Ryder v. Hulse, 24 id. 372; Briggs v. Mitchell, 60 Barb. 288. See, also, Matter of the Reciprocity Bank, 22 id. 12.

The act of 1848 was prospective in its operation; it did not affect existing interests. *Smith* v. *Colvin*, 17 Barb. 157.

See, also, Shumway v. Cooper, 16 Barb. 556; Perkins v. Cottrell, 15 id. 446; White v. White, 5 id. 474; 4 How. Pr. 102; Holmes v. Holmes, 4 Barb. 295.

The statutes of 1848 and 1849 for the protection of married women, gave no power to the wife to dispose by will of property acquired by her before the passage of the acts, or of the interest accruing after the acts upon money previously given her, or of the proceeds of her own labor which her husband permitted her to receive, manage, and invest in her own name and as if it were her own property.

The property which a married woman may take and hold as her separate estate, under the act of 1848 and 1849, must be acquired by inheritance, gift, grant, devise, or bequest from some person other than her husband; those acts do not embrace her separate earnings. *Ryder* v. *Hulse*, 24 N. Y. 372; s. c., 33 Barb. 264.

As to latter point see, also, Switzer v. Valentine, 4 Duer, 96; 10 How. Pr. 109: Freeman v. Orser, 5 Duer, 476; Rouillier v. Wernecki, 3 E. D. Smith, 310; Boyle's Estate, 1 Tuck. 4.

1. BY GRANT.

1. GENERALLY.

of the husband shall exceed five hundred dollars, such exemption from such claims shall not apply to so much of said premium so paid as shall be in excess of five hundred dollars, but such excess, with the interest thereon, shall inure to the benefit of his creditors.

Baron v. Brummer, 100 N. Y. 372; Frank v. Mutual Life Ins. Co., 102 id. 266; Anderson v. Goldsmidt, 103 id. 617, aff'g s. c., 38 Hun, 360.

Decisions under L. 1840, ch. 80. Olmsted v. Keyes. 85 N. Y. 593; Eadie v. Slimmon, 26 id. 9; Brummer v. Cohn, 86 id. 11; Living v. Domett, 26 Hun, 150; Leonard v. Clinton, id. 288; Baron v. Brummer, 100 N. Y. 372; Whitehead v. N. Y. Life Ins. Co., 102 id. 143; Smillie v. Quinn, 90 id. 492; Baker v. Mutual Life Ins. Co., 43 id. 283; Tremeyer v. Turnquest, 85 id. 516, decided under L. 1860, ch. 90, sec. 1, and L. 1862, ch. 172.

Under the act of 1848 the increase of a wife's animals owned by her *dum sola* is her separate property. *Van Sickle* v. *Van Sickle*, 8 How. Pr. 265.

Code Civ. Pro. sec. 450. "A married woman may sue and be sued, etc. * * * and all sums that may be recovered in such actions or special proceedings shall be the separate property of the wife * * * ."

L. 1862, ch. 172, sec. 3. * * * "and the money received *upon the settlement of any such action* or recovered upon a judgment, shall be her sole and separate property." * * *

L. 1860, ch. 90, sec. 7, the same.

Code Civ. Pro. sec. 1399. "A lot of land, with one or more buildings thereon, owned by a married woman, * * * and occupied by her as a residence, may be designated as her exempt homestead, as prescribed in last section, and the property so designated is exempt from sale by virtue of an execution, under the same circumstances, and subject to the same exceptions, as the homestead of a householder, having a family."

Where household furniture belonging to a married woman is, with her consent, taken to the house of her husband, mingled with his furniture and used therewith for the household purposes, it does not thereby become the property of her husband, but the title remains in her. *Fitch* v. *Rathbun*, 61 N. Y. 579.

Cases decided under the statutes of 1848–1849.

The statutes (ch. 200 of 1848, and ch. 375 of 1849) "for the more effectual protection of the rights of married women" do not remove their legal incapacity to contract debts.

As incident to the power of disposition given by the statutes of 1848 and 1849, a married woman may create an express charge on her separate estate, held under them, in the same manner as if she were a *feme sole*. *Yale* v. *Dederer*, 18 N. Y. 265.

The provision of the acts of 1848 and 1849 allowing a married woman to take by "grant" from any person other than her husband, empowers her, with her husband's assent, to take a mortgage payable to herself for a debt due to them both and no one but the husband's creditors can impeach the mortgage on that account. *Wolfe* v *Scraggs*, 4 Abb. Ct. App. Dec. 634.

A married woman is empowered by the act of 1848 to execute a valid chattel mortgage of her separate property. *Cheseborough* v. *House*, 6 Duer, 125.

See, also, Tolman v. Hawxhurst 4 Duer, 221.

In equity a *feme covert* is regarded as a *feme sole* with reference to her separate estate, unless specially restrained by the instrument creating the separate estate. *Gibson* v. *Walker*, 20 N. Y. 476.

See, also, Albany Fire Ins. Co. v. Bay, 4 N. Y. 9; M. E. Church v. Jaques, 17 Johns. 548; 3 Johns. Ch. 77; Knowles v. McCauly, 10 Paige, 342.

The statutes of 1848 and 1849, for the protection of married women, gave no power to the wife to dispose by will of property acquired by her before the passage of the acts, or of the interest accruing after the acts upon money previously given to her, or of the proceeds of her own labor which her husband permitted her to receive, manage and invest in her own name and as if it were her own property. *Ryder* v. *Hulse*, 24 N. Y. 372.

Under the statutes of 1848 and 1849, an assignment, made by a *feme covert*, with all "claims and demands" is valid, and passes the title of the owner as well as rights of action pertaining thereto. *Sherman* v. *Elder*, 24 N. Y. 381.

See, also, *Edgerton* v. *Thomas*, 9 N. Y. 40.

1. BY GRANT.

1. GENERALLY.

Since the act of 1849, for the protection of the rights of married women, it seems that no acknowledgment is requisite to the conveyance of the separate estate of one. Wells v. Peck, 26 N. Y. 42.

NOTE.—This construction is regarded unsound by Selden, J., who, were the question new, would hold that the statute of 1849 did not render a conveyance effectual without an acknowledgment "and that the provisions of the Revised Statutes declaring that no estate of a married woman residing in this state should pass by any conveyance not acknowledged, still remained in force, on the ground that there is no express repeal, and a repeal by implication is never held to take place where both the acts may stand together. The contrary, however, has been held, and it is too late now to question the correctness of that conclusion involving, as it doubtless would, the validity of many titles. Blood v. Humphrey, 17 Barb. 666; Andrews v. Shaffer, 12 How. 441; Yale v. Dederer, 18 N. Y. 271."

Under the statutes of 1848 and 1849, a married woman can acquire title to real and personal property purchased upon credit. If the vendor take the risk of payment, the transfer is valid to vest the property in her and the husband takes no interest.

Knapp v. *Smith*, 27 N. Y. 277.

From opinion.—"At common law, a married woman has capacity to take real and personal estate, by grant, gift or other conveyance from any person except her husband. But as to real property, the husband, where no trust was created, had an estate during the coverture, and during his life, if there was issue of the marriage; and the wife's personal estate, in the absence of a trust, vested in him absolutely, when reduced to his possession. The object of the statutes of 1848 and 1849 was to divest title of the husband *jure mariti* during coverture, and to enable the wife to take absolute title, as though she were unmarried. (L. 1849, p. 527, ch. 375, sec. 1.) There is some difficulty in a married woman purchasing property, whether real or personal, on credit, arising out of the principle that she can not make a contract for payment which will be binding upon her personally according to the general rule of law; but if the vendor will run the risk of being able to obtain payment of the consideration of the same, the transfer will be valid, and no estate will pass to the husband, whether the wife has antecedently any separate estate or not."

Section 3 of L. 1848, and § 1 of L. 1849, in respect to married women, vest in the wife the legal title to the rents, issues and profits of her real estate, as against the husband and his creditors, "with the like effect as if she were unmarried;" and the husband can not now, as formerly, acquire title to such property in virtue of his marital rights. *Gage* v. *Dauchy & Beekman*, 34 N. Y. 293.

The object of the statutes of 1848 and 1849 was to divest the title of the husband, *jure mariti*, during coverture, and enable the wife to take the absolute title as though unmarried. Hence a *feme covert* may take and hold independently of her husband a leasehold estate. But prior to the statute of 1860 the common law disability of contract remained and the lessor would assume the risk of being able to obtain payment of the rent. *Draper* v. *Stouvenel*, 35 N. Y. 507.

On same point, see also Vandevoort v. Gould, 36 N. Y. 639; Darby v. Callaghan, 16 id. 71; Prevot v. Lawrence, 51 id. 219.

Since the passage of the acts of 1848–9 in relation to the property of married women there is no presumption that the husband is in occupation of his wife's lands, and in an action of ejectment brought against the husband to recover possession of such lands, whether she was occupying them at the time of the commencement of the action, or had given to her husband the possession, is to be determined as a question of fact. *Martin* v. *Rector*, 101 N. Y. 77.

Cases decided under the law of 1860.

Under existing statutes, a married woman may manage her separate property through the agency of her husband, without subjecting it to the claim of his creditors.

1. BY GRANT.

1. GENERALLY.

She is entitled to the profits of a mercantile business, conducted by the husband in her name, when the capital is furnished by her, and he has no interest but that of a mere agent.

The application of an indefinite portion of the income to the support of the husband does not impair the title of the wife in her property.

No interest in her separate estate is acquired, either by the husband or his creditors, through his voluntary services as her managing agent. *Buckley* v. *Wells*, 33 N.Y. 518.

The common law right of a husband through administration to the title of his deceased wife's personal property is not affected by the statutes of 1848, ch. 200, L. 1849, ch. 375, Robins v. McClure, 100 N. Y. 328, nor by L. 1860 ch. 90; L. 1862, ch. 172, or L. 1867, ch. 782. *Barnes* v. *Underwood*, 47 N. Y. 351.

Ransom v. Nichols, 22 N. Y. 110 to same affect.

A married woman is not liable upon a promissory note obtained under duress not given in course of her separate business or for the benefit of her separate estate. *Loomis* v. *Ruck*, 56 N. Y. 462.

If a bill of exchange be made payable to a married woman, her indorsement will transfer title. *Lee* v. *Satterlee*, 17 Abb. Pr. 6; s. c. 1. Rob. 1.

All legal incidents attach to a promissory note indorsed by a married woman in the course of her separate estate the same as if she were a *feme sole*. *Third Nat'l Bank* v. *Blake*, 73 N. Y. 260.

Also see Woolsey v. Brown, 74 N. Y. 82; Knowles v. Toone, 96 id. 534; Treadwell v. Archer, 76 id. 196, substantially to the same effect; see also First Nat'l Bank of Saugerties v. Hurlbut, 22 Hun, 310· as to question of pleading, see Schwartz v. Oppold, 74 N. Y. 307.

A married woman is liable to an accommodation indorser on her note, when procured for purpose of securiug funds for the benefit of her separate estate. *Scott* v. *Otis*, 25 Hun, 33.

A married woman may, under the statutes as they now exist (L. 1848, ch. 200; L. 1849, ch. 375; L. 1860, ch. 90; L. 1862, ch. 172), and as incident to the right to acquire property and hold it to her sole and separate use, purchase property upon credit and bind herself by an executory contract to pay the consideration money; and any obligation entered into by her, given to secure the purchase price of property acquired and held for her separate use, may be enforced against her the same as if she was a *feme sole;* and this, although she had no antecedent estate to be benefited, and although the purchase was not made for the purposes of a trade or business. *Cashman* v. *Henry*, 75 N. Y. 103.

L. 1848–9, 1860–2, changed wife's equitable right to hold separate property into a legal estate. *Wood* v. *Wood*, 83 N. Y. 575.

Under the statute (L. 1848, ch. 200; L. 1860, ch. 90; L. 1862, ch. 172) general rules of ownership of property now apply to wife, unaffected by the former disabilities of the marital relation.

The possession of articles adapted plainly to the wife's separate and personal use, and not that of the husband or family, and so actually used by her, in the absence of other facts contradicting the inference, must be held to denote her ownership of the property, either as purchased out of her own means, or given to her by her husband or others. *Whiton et. al.* v. *Snyder*, 88 N. Y. 299.

As to the legal title of wife to her paraphernalia, see Rawson v. Penn. R. Co., 48 N. Y. 212; Curtis v. D. L. & W. R. Co., 74 N. Y. 116.

1. BY GRANT.

2. BETWEEN HUSBAND AND WIFE.

Partition and division of lands owned by husband and wife.

L. 1880, ch. 472, sec. 1. "Whenever husband and wife shall hold any lands or tenements as tenants in common, joint tenants, or as tenants by entireties, they may make partition or division of the same between themselves, and such partition or division, duly executed under their hands and seals, shall be valid and effectual; and when so expressed in the instrument of partition or division, such instrument shall bar the right of dower of the wife in and to the lands and tenements partitioned or divided to the husband."

Conveyances between husband and wife.

L. 1887, ch. 537, sec. 1. "Any transfer or conveyance of real estate hereafter made by a married man directly to his wife, and every transfer or conveyance of real estate hereafter made directly by a married woman to her husband, shall not be invalid because such transfer or conveyance was made directly from one to the other without the intervention of a third person."

Dean v. M. E. R. Co., 119 N. Y. 540; White v. Wager, 25 id. 328; Winans v. Peebles, 32 id. 423; 6 id. 422; 71 Hun, 386; 35 id. 267; 14 Barb. 531; 17 id. 103; 26 id. 419; 16 Johns. 110; 2 Johns. Ch. 537; Hunt v. Johnson, 44 N. Y. 27; Tallinger v. Mandeville, 113 id. 432; Shepard v. Shepard, 7 Johns. Ch. 57; 79 Hun, 44 id. 79; 26 Barb. 419; 17 Johns. 548; 11 Paige, 377; 3 Edw. Ch. 59.

The disability of a husband to take land by conveyance from his wife, is not removed by the statute (L. 1849, ch. 375) enabling her to devise and convey as if she were unmarried. *White* v. *Wager*, 25 N. Y. 328.

The disability of the husband to take land by conveyance from the wife remains as before the statute (L. 1849, ch. 375). *Winans* v. *Peebles*, 32 N. Y. 423.

Since statute of 1848 a husband may convey real estate to a trustee for the benefit of his wife, and the trustee may convey the legal title to the wife. *Wilbur* v. *Fradenburgh*, 52 Barb. 474.

A husband may make a gift of personalty directly to his wife. *Armitage* v. *Mace* 96 N. Y. 538.

Husband and wife may transfer personal property directly to each other. Whiton v. Snyder, 88 N. Y. 299; Rawson v. R. R. Co., 48 id. 216; Phillips v. Wooster, 36 id. 412.

Before the statute of 1887 (L. 1887, ch. 537) the common law disability was in force and a conveyance of lands from husband to wife or wife to husband was void. *Dean* v. *M. E. R. Co.*, 119 N. Y. 540.

Citing, White v. Wager, 25 N. Y. 328; Winans v. Peebles, 32 id. 423; on this point see, also, 6 id. 422; 71 Hun, 386; 35 id. 267; 14 Barb. 531; 17 id. 103; 26 id. 419; 16 Johns. 110; 2 Johns. Ch. 537; except when founded on such a valuable or meritorious consideration that they will be sustained in equity.

Citing, Hunt v. Johnson, 44 N. Y. 27; Tallinger v. Mandeville, 113 id. 432; Shepard v. Shepard, 7 Johns. Ch. 57; on this point see, also, 79 Hun, 44; id. 79; 26 Barb. 419; 17 Johns. 548; 11 Paige, 377; 3 Edw. Ch. 59.

The statutes of 1848-9, 1860-2, did not remove the common law inability of the wife to take directly from the husband, which continued until L. 1880, ch. 472, which, by allowing a voluntary partition, enabled her in such a case to take a release of her husband's interest in the part of the premises partitioned to her. But not

1. BY GRANT.

2. BETWEEN HUSBAND AND WIFE.

until L. 1887, ch. 537, could she take without limit directly from her husband. *Johnson* v. *Rogers*, 35 Hun, 267.

The validity of promissory note purporting to have been given by a husband to his wife for a valuable consideration can not be impeached. *Benedict* v. *Driggs*, 34 Hun, 94.

Except as against creditors, a gift of personal property by a husband to his wife, is valid without the aid of the Married Woman's Acts. *Kelly* v. *Campbell*, 2 Abb. Ct. App. Dec. 492.

3. BY TRUSTEE TO MARRIED WOMAN.

L. 1849, ch. 375, sec. 2. "Any person who may hold or who may hereafter hold as trustee of any married woman, any real or personal estate or other property under any deed of conveyance or otherwise, on the written request of such married woman, accompanied by a certificate of a justice of the supreme court that he has examined the condition and situation of the property, and made due inquiry into the capacity of such married woman to manage and control the same, may convey to such married woman, by deed or otherwise, all or any portion of such property, or the rents, issues or profits thereof, for her sole and separate use and benefit."

In a case where, in 1844, certain premises were conveyed to plaintiff, a married woman, for life, as and for her own separate estate, free from the control of her husband, her husband covenanting for a consideration expressed that she should hold the premises to her own separate and sole use, free from any claim or interference from him, the law of 1849, ch. 375, sec. 2, need not be resorted to. *Wood* v. *Wood*, 83 N. Y. 575.

The fact that a general power of appointment is reserved does not prevent the application of L. 1849, ch. 375, sec. 2. *Thebaud* v. *Schermerhorn*, 30 Hun, 332.

A trustee of a married woman's property is to decide whether to comply with request of the beneficiary under L. 1849, ch. 375, sec. 2. *Matter of Brewer*, 43 Hun, 597.

4. MARRIAGE SETTLEMENT.

The four following statutes confer upon a married woman the capacity to receive certain property during her coverture as a jointure barring her dower interest:

L. 1896, ch. 547, sec. 177—see statute at p. 180.

L. 1896, ch. 547, sec. 178—see statute at p. 181.

L. 1896, ch. 547, sec. 179—see statute at p. 181.

L. 1896, ch. 547, sec. 181—see statute at p. 196.

L. 1845, ch. 115, sec. 7 (repealed by L. 1896, ch. 547, sec. 300) allowed a resident alien woman of this state to take estates by devise and hold same.

L. 1845, ch. 115, sec. 8 (repealed by L. 1896, ch. 547, sec. 300) allowed a resident alien woman of this state to take lands or beneficial interests therein by devise or marriage settlement.

Every agreement, promise or undertaking made upon consideration of marriage, unless in writing and subscribed by the parties, is void; and a settlement made subsequently in pursuance of such void agreement is invalid as against creditors. *Dygert* v. *Remerschnider*, 33 N. Y. 629.

1. BY GRANT.

5. ANTENUPTIAL AGREEMENT.

L. 1848, ch. 200 (passed April 7). Sec. 4. "All contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place."

L. 1849, ch. 375 (passed April 11). Sec. 3. Same.

Prior to the statute (2 R. S. 60, sec. 21) a married woman could make a will of her separate personal estate, which would be valid in a court of equity.

But after the enactment of the Revised Statutes and before the passage of the act amending the act for the more effectual protection of the property of married women (L. 1849), a married woman could not dispose of her separate personal estate by an instrument in the nature of a will, although she was authorized by an antenuptial contract to enjoy, control and dispose of it during coverture, in the same manner and with the like effect as if she were a *feme sole*. Nor could she so do even where the antenuptial agreement contained an express provision that she might dispose of it by will. An instrument which confers upon a married woman power to control and dispose of her separate estate during coverture, does not authorize her to make a testamentary disposition of it.

The original act for the more effectual protection of the property of married women (L. 1848, p. 307) did not confer power upon a *feme covert* to devise or bequeath her property *Wadhams* v. *The American Home Missionary Soc.*, 12 N. Y. 415.

An oral agreement to marry, and pay the then existing debts of the proposed husband, in consideration that he convey to the proposed wife certain premises of which he is the owner, if fully performed by the wife, is valid and binding in equity upon the husband; and a conveyance made to her of the premises in pursuance thereof is upon a good and sufficient consideration.

Every agreement, promise or undertaking, made upon consideration of marriage, unless in writing and subscribed by the parties, is void; and a settlement made subsequently in pursuance of such void agreement is invalid as against creditors. *Dygert* v. *Remerschnider*, 32 N. Y. 629.

See, also, Pierce v. Pierce, 71 N. Y. 154.

As to sufficient consideration to support ante nuptialagreements, see, also, Curry v. Curry, 10 Hun, 366; Clark v. Clark, 28 id. 509; Van Allen v. Humphrey, 15 Barb. 555; Foster v. Foster, 5 Hun, 557; Mahon v. Smith, 60 How. Pr. 385.

The fact that, at the time of making an antenuptial contract, the intended husband is indebted to a large amount does not, in the absence of fraud, invalidate the contract. *Starkey* v. *Kelly*, 50 N. Y. 676.

A promissory note given in consideration of a promise to marry, which promise is afterward performed, is for a good consideration, and is valid under the statute of frauds. (2 R. S. 135, sec. 2.)

A note given in consideration of a promise to marry is valid in the hands of the wife, after marriage (L. 1849, ch. 375, sec. 3), and an action may be maintained thereon by her against her husband. *Wright* v. *Wright*, 54 N. Y. 537.

While an antenuptial contract, by which the future wife releases all claims against the estate of her husband upon his decease, will be sustained when fairly made, yet, from the confidential relations between the parties, it will be regarded with the most rigid scrutiny; and where the circumstances establish that the woman has been deceived, or induced by false pretenses to enter into the contract, it will be held null and void.

It seems that the presumption is against the validity of such a contract, and the burden of proof is cast upon the husband, or his representatives, to show perfect good

faith; and strict proof will be required, particularly where the provision made for the wife is inequitable and unreasonably disproportionate to the means of the husband. *Pierce* v. *Pierce*, 71 N. Y. 154; s. c., 9 Hun, 50.

On the same point in general, see, also, Warner v. Warner, 18 Abb. N. C. 151; Fargo v. Fargo, 34 St. Rep. 536; Davis v. Wood, 31 id. 604; Starkey v. Kelly, 50 N. Y. 676; Curry v. Curry, 10 Hun, 366.

The mutuality of the stipulations in an antenuptial contract is a sufficient consideration and need not be acknowledged. *Morris* v. *Wall*, 28 Hun, 510.

An infant entered into an antenuptial contract conveying all her real estate to a trustee in trust for her separate use. The facts did not show that the contract had been disaffirmed. The antenuptial contract operated as a release of the marital rights of the husband. *Beardsley* v *Hotchkiss*, 96 N.Y. 201, modifying 30 Hun, 605, digested, p. 994.

See also Helck v. Reinheimer, 105 N. Y. 470.

As to infancy of the wife see also, Temple v. Hawley, 1 Sandf. Ch. 153; Jones v. Butler, 30 Barb. 641; Wetmore v. Kissam, 3 Bosw. 321; Wetmore v. Holsman, 23 How. Pr. 202; McIlvaine v. Kadel, 3 Rob. 429.

By an ante nuptial agreement the woman covenanted that if, after marriage, the man died first, she would accept $1,500 "in full satisfaction of her dower in his estate, and shall bar her from claiming the same, either in his real or personal estate." He covenanted to provide by will for the payment of that sum "in lieu of dower, or her rights as his widow in his estate." The parties married and the husband died, having made provision by will as covenanted. Held, that the agreement was valid and remained in full force after marriage (L. 1849, ch. 375, sec. 3); that the intent was that the woman should take nothing as widow from her husband's estate; and that, therefore, there being no children living, the issue of such marriage, she was not entitled to the specific articles given by the statute (2 R. S. 83, sec. 9) to a widow; that, although not to be appraised, they were part of the estate, and she by her agreement, was estopped from claiming them.

Also held, that the surrogate, on application of the widow to compel the executor to set apart said articles for her, had jurisdiction to determine the question. *Young* v. *Hicks*, 92 N. Y. 235, s. c., 27 Hun, 54.

As to similar covenants of the wife see further.

Carpenter v. Carpenter, 40 Hun, 263; Ennis v. Ennis, 48 id. 11; Watson v. Bonney, 2 Sandf. 405; Curry v. Curry, 10 Hun, 366; Warner v. Warner, 18 Abb. N. C. 51; Davis v. Wood, 31 St. Rep. 604.

Testator, in promise of marriage, agreed to will a person, afterwards his wife, one-half of his property, which he did not do. Action therefore was sustained. *Peck* v. *Vandemark*, 99 N. Y. 29, aff'g 33 Hun, 214, digested p. 66.

Antenuptial contracts intended to regulate and control the interest which each of the parties to the marriage shall take in the property of the other during coverture or after death, are favored by the courts and will be enforced in equity according to the intention of the parties. (2 Kent's Com. 165; Matter of Youngs, 27 Hun, 54; affirmed 92 N. Y. 235.)

In order to effectuate such intention courts of equity will impose a trust upon the property agreed to be conveyed, commensurate with the obligations of the contract.

It is immaterial whether a trustee is appointed in the contract or not, or whether the property agreed to be conveyed be then owned by the parties, or is expected to be subsequently acquired.

The contract also will be enforced in equity to accomplish the object the parties had in view, without reference to the validity of the agreement at law. (See notes to this case below. p. 66.)

1. BY GRANT.

5. ANTENUPTIAL AGREEMENT.

By an antenuptial agreement between G. (the man) and E. (the woman), G. covenanted and agreed that, in case of his death, without leaving lawful issue by the contemplated marriage, previous to the death of E., all of the real and personal property, of which he should die possessed, should belong to her, The parties intermarried, but had no children, and G. died intestate seized of certain real estate, upon which was a mortgage. E. died thereafter intestate, leaving no lawful heir. Controversy as to the right to the surplus money arising on foreclosure sale.

Construction:

Upon the death of G. the legal title to the real estate went to his heirs; but by force of the marriage settlement E. became the equitable owner, and a trust by implication arose in her favor; the heirs holding the title as a naked trust for her and subject to her right to be vested with it ondemand, Giddings v. Eastman, 5 Paige, 561; Wood v. Mather, 38 Barb. 473, 479; and upon her death without heirs her interest and rights reverted to the state and it was equitably entitled to the surplus. *Johnston* v. *Spicer*, 107 N. Y. 185; 41 Hun, 475.

NOTE.[1]—"No especial formality is requisite in such instruments, and, In order to effectuate the intentions of the parties, courts of equity will impose a trust upon the property agreed to be conveyed commensurate with the obligations of the contract, or will decree their specific performance, and when such relief is inadequate or impracticable from the situation of the property or the character of the contract, will award damages for its breach. De Barante v. Gott, 6 Barb. 496; Peck v. Vandemark, 99 N. Y. 29; Pomeroy's Eq. Juris., secs. 1297, 1403; Schouler on Domestic Relations, 263–266, *et. seq.;* Pierce v. Pierce, 71 N. Y. 154, 156. It is entirely immaterial whether a trustee, to carry it into effect, has been appointed in the contract or not, or whether the property agreed to be conveyed be then owned by the parties, or is expected to be subsequently acquired, if the contract is fair and reasonable and such as it is lawful for the parties to make, and the rights of creditors or third persons have not intervened, it will be enforced in equity in such a manner as to accomplish the object which the parties had in view, without reference to the validity of the agreement at law. Blanchard v. Blood, 2 Barb 354; De Barante v. Gott, 6 id. 496; Schouler's Domestic Relations, *supra;* Atherley on Marriage Settlements (London, 1813), 58. The rule as stated by Pomeroy in his work on Equity Jurisprudence is: "Among the agreements which the original common law treated as invalid irrespective of statutes, but which equity in the application of its conscientious principles regards as binding and enforces by granting its relief of specific performance, are the following: Agreements for the assignment or disposition of a possibility; expectancy or hope of succession; agreements to assign things in action; executory agreements made between a man and woman who afterwards marry, which then became absolutely void at common law, but which equity may specifically enforce against either husband or wife at the suit of the other." (Sec. 1297.) See Stover v. Eyeleshimer, 46 Barb. 84.

It is said in Bright's Husband and Wife, pp. 471, *et seq.*, "a jointure which has been agreed by the husband before marriage to be made upon his intended wife will be good in equity although it be not actually so settled, but is permitted to remain in articles, or upon the husband's covenant; for such a jointress being a purchaser of the provision by the marriage, is entitled in that character to the aid and protection of a court of equity; accordingly such articles or covenant will be specifically performed." He further says that "in Tooke v. Hastings, 2 Vern. 97, where A. covenanted to settle lands of a certain value, and had no land at the time but afterwards purchased land, it was held that such land should be liable." (Pp. 191–193.)

NOTE.[2]—"The general rule as stated by Story (2 Eq. Jur. sec. 976), is that wherever a trust exists, either by the declaration of the party, or by intendment or implication of law, and the party creating the trust has not appointed any trustee to execute it, equity will follow the legal estate, and decree the person in whom it is vested to execute the trust." The heirs at law being infants it was directed that a referee be appointed to sell and convey the real estate and pay the proceeds to the plaintiff.

In Peck v. Vandemark, 99 N. Y. 29, it was held that an antenuptial agreement was established by the letters of the parties to the effect that the intending husband

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would, in case the plaintiff intermarried with him, make provision by giving her by will one-half of his property, and the use of the other half for her life. The parties having intermarried, and the husband failing to make the provision agreed upon, it was held that this was a valid contract binding upon the testator, and the plaintiff could maintain an action against the executor to recover damages for the violation of the contract. The damages were held to be the value of one-half of the estate, both real and personal, absolutely, after paying debts and expenses of administration, and the use of the other half during her life.

It has been the constant practice of the courts of this country, as well as of England, to enforce antenuptial agreements according to their terms, whether they relate to existing or after-acquired property, and to decree a specific or substituted performance of them according to the nature of the case. 2 Kent's Com. 172; 2 Story's Eq. Jur., sec. 775, 1370; Bradish v. Gibbs, 3 Johns. Ch. 523; Reed v. Livingston, id. 481; Pom. Eq. Juris. secs. 1297, 1403; Smith v. Osborne, 6 H. of L. Cas 375; In re Pedder, 10 L. R. Eq. 585; Hammersley v. Bonan De Biel, 12 Cl. & Fin. 45; In re Wilson's Exrs., 2 Barr. 325." (P. 194-5.)

See, also, Mundy v. Munson, 40 Hun, 304; Tisdale v. Jones, 38 Barb. 523; Jones v. Butler, 30 id. 641; Wetmore v. Kissam, 3 Bos. 331; Wetmore v. Holsman, 23 How. Pr. 202; McIlvaine v. Kadel, 3 Rob. 429; Foster v. Foster, 5 Hun, 557; Mahon v. Smith. 60 How. Pr. 385.

Under an antenuptial agreement, containing the following clause: "All the furniture, plate, horses, carriages, and other personal property *in use by the parties for family purposes*, at the time of the death of either, shall vest absolutely in the survivor;" only such property is included as both parties had been accustomed to use in their domestic life, and whose continued enjoyment was essential to the personal comfort and convenience of those habituated to its daily use and not such as was employed for the use and enjoyment of the respective parties individually. *Gorham* v. *Fillmore*, 111 N. Y. 251.

As to the construction and effect of contracts made in contemplation of marriage, see, also, Stewart v. Stewart, 7 Johns. Ch. 229; Loomis v. Loomis, 35 Barb. 624; Strong v. Skinner, 4 id. 546; on conflict of law, Le Breton v. Miles, 8 Paige, 261; Ordronanz v. Rey, 2 Sandf. Ch. 33; Wainwright v. Low, 57 Hun, 386.

Deed in contemplation of marriage created a valid trust. *Genet* v. *Hunt*, 113 N. Y. 158.

See, on the same point, also, Shepherd v. Shepherd, 7 Johns. Ch. 57.

Antenuptial contract did not create a trust. *Wainwright* v. *Low*, 132 N. Y. 313,

2. BY WILL.

By L. 1849, ch. 375, § 1 (quoted *ante*, p. 58), a married woman may take property by "devise or bequest, from any person other than her husband," etc.

By L. 1887, ch. 537, sec. 1 (quoted *ante*, p. 62), a man may "transfer or convey" real estate directly to his wife.

R. S., pt. 11, ch. vi., tit. 1, sec. 3. "A * * * devise may be made to every person capable of holding real estate."

Sec. 4. "Every devise of 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. The interest so devised shall descend to the heirs of the testator; if there be no such heirs competent to take, it shall pass under his will to the residuary devisees therein named if any there be competent to take such interest.

2. BY WILL.

Rights of citizens and aliens to acquire real property by devise, see L. 1896, ch. 547, §§ 2, 5 (developed *ante*, pp. 1, 12).

Rights of female citizen, marrying an alien, to acquire real property by devise, see L. 1896, ch. 547, § 6 (developed *ante*, p. 25).

3. BY DESCENT.

By L. 1849, ch. 375, § 1 (quoted *ante*, p. 58), a married woman may take "by inheritance" real and personal property.

Rights of citizens and aliens to take by descent, see L. 1896, ch. 547, §§ 1, 5 (developed *ante*, pp. 10, 12.).

Rights of female citizen marrying an alien to take by descent, see L. 1896, ch. 547, § 6 (see p. 25).

II. CAPACITY TO CREATE ESTATES.

1. BY GRANT.

Acknowledgments:

At common law, a married woman's deed of conveyance of her property, other than her separate estate, was absolutely void. By the usage and custom of the colony of New York, a married woman's deeds of conveyance were recorded as valid, even without an acknowledgment or joint conveyance of her husband. Albany Fire Ins. Co. v. Bay, 4 N. Y. 9; Van Winkle v. Constantine, 6 Hill, 177; s. c. aff'd in 10 N. Y. 422; Hardenburg v. Lakin, 47 id. 109; Jackson v. Gilchrist, 15 Johns. 89. By a series of acts, L. of Feb. 16, 1771, 2 Van S. 311, L. of Feb. 26, 1788, ch. 44, sec. 3, L. of April 6, 1792, ch. 51, sec. 2, L. of April 6, 1801, ch. 155, sec. 2, 1 R. L., p. 369, sec. 2, passed April 12, 1813; 1 R. S. 758, sec. 10, passed Dec. 10, 1827, took effect Jan. 1, 1896; all being substantially a development of the same provision, enacted practically that a married woman's deeds of conveyance, if she were a resident within the state, should be valid upon the making of a prescribed acknowledgment before the proper authorities, etc. L. 1771, Albany Fire Ins. Co. v. Bay; Van Winkle v. Constantine; Hardenburg v. Lakin; Jackson v. Gilchrist, *supra;* L. 1801, R. A., 1 K. & R. 478, sec. 2; Gillet v. Stanley, 1 Hill, 121; L. 1813, 1 R. L. 369, sec. 2; Doe v. Howland, 8 Cow. 277; see, also, Jackson v. Stevens, 16 Johns. 110. See, also, Martin v. Dwelly, 6 Wend. 9; Bool v. Mix, 17 id. 119.

These provisions were made unnecessary since April 11, 1849, by the enactment of a superseding L. of 1849, ch. 375, sec. 1; (L. of April 7, 1848, ch. 200, contained no provision as to her conveyances); and they were not revived by L. 1860–2. Yale v. Dederer, 18 N. Y. 265–271;

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Wiles v. Peck, 26 id. 42; Richardson v. Pulver, 63 Barb. 67; Blood v. Humphrey, 17 id. 660; 12 How. Pr. 441; 36 Super. Ct. 297. Such parts of these statutes, 1771, etc., as pertain to the special acknowledgment of a married woman, were abrogated by L. of May 5, 1879, ch. 249; L. of May 15, 1880, ch. 300, adding to the repeal the provisions in regard to the proof of execution. Both substituted therefor provisions requiring her acknowledgment and proof of deeds to be thereafter made in the same manner as in the case of a *feme sole*. Both of these latter acts, L. 1879–80, were expressly repealed by L. 1896, ch. 547, sec. 300.

In the case of married women without the state, the L. of March 8, 1873, 2 Van S. 765, enacted substantially the same provisions as in the case of a married woman within the state. The L. of April 6, 1801 (R. A. 1 K. & R. 748), in substance re-enacted in 1 R. L., ch. 97, sec. 2, passed April 12, 1813, and 1 R. S. 758, sec. 11, passed Dec. 10, 1827, and taking effect Jan. 1, 1830, made practically the same provisions in regard to married women without the state as L. 1879–80 did in the case of married women within the state. 1 R. S. 758, sec. 1, repealed by L. 1896, ch. 547, sec. 300; see, also, L. 1835, ch. 275, at p. 71.

L. 1896, ch. 547, sec. 3. "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."

By L. 1849, ch. 375, sec. 1 (quoted *ante*, p. 58), a married woman may convey real and personal property, and any interest and estate therein in the same manner and with like effect as if she were unmarried.

L. 1860, ch. 90, sec. 2. "A married woman may bargain, sell, assign and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account and the earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property, and may be used or invested by her in her own name."

The provision of the act of 1860 (L. 1860, ch. 90, sec. 2) "concerning the rights and liabilities of married women," which authorizes a married woman "to perform any labor or service on her sole and separate account," does not wholly abrogate the rule of the common law entitling the husband to the services and earnings of the wife; she may still allow him to claim and appropriate the fruits of her labor, and in the absence of an election on her part to labor on her account, or of circumstances showing her intention to avail herself of the privilege conferred by the statute, the husband's common law right is unaffected. *Birkbeck* v. *Ackroyd*, 74 N. Y. 356.

A married woman may purchase property and carry on business on her separate account through her husband as her agent.

II. CAPACITY TO CREATE ESTATES — 2. BY POWERS.

The fact that his services are gratuitous does not impair her title to the property or income from the business. *Abbey* v. *Deyo*, 44 N. Y. 345.

Husband and wife may form a partnership and give notes in the firm name. *Graff* v. *Kinney*, 37 Hun, 405.

See, also, Fairlee v. Bloomingdale, 24 Am. L. Reg. (N. S.) 648 and note; Kaufman v. Schoeffel, 37 Hun, 140, *contra*.

A married woman can not carry on business as a partner with her husband. *Kaufman* v. *Schoeffel*, 37 Hun, 140. See same case 46 Hun, 571, aff'd 113 N. Y. 635.

Recognition by the husband of his wife's equitable claim to profits in a business conducted by them jointly—deed direct from a husband to wife, when sustained—parol trust, evidence required to sustain it. *Mason* v. *Libbey*, 19 Hun, 119, aff'd 90 N. Y. 683.

L. 1862, ch. 172, sec. 1 (passed March 20), amending L. 1860, ch. 90, sec. 3. "Any married woman possessed of real estate as her separate property may bargain, sell and convey such property and enter into any contract in reference to the same, with the like effect in all respects as if she were unmarried, and she may in like manner enter into such covenant or covenants for title as are usual in conveyances of real estate, which covenants shall be obligatory to bind her separate property, in case the same or any of them be broken."

L. 1860, ch. 90, sec. 3 provided that married women could convey, but only with the assent of the husband, except as provided thereafter.

L. 1860, ch. 90, secs. 4, 5, 6, specified the manner of and in what cases the giving of the consent could be dispensed with. See Wing v. Schram, 79 N. Y. 619, aff'g 13 Hun, 377. Secs. 3, 4, 5, 6, expressly repealed by L. 1862, ch. 172, sec. 2.

Under the provisions of the act of 1860, concerning the rights and liabilities of husband and wife (L. 1860, ch. 40), as amended in 1862 (L. 1862, ch. 172), the paraphernalia of a wife, given her by her husband, which prior to these statutes was her separate estate in equity, became clothed with all the incidents of a legal estate. *Rawson* v. *The Pennsylvania R. Co.*, 48 N. Y. 212.

The title of the paraphernalia of a wife, which has been paid for and furnished by the husband, is, in the absence of evidence of a gift thereof to the wife in him, and for an injury to it, he is the proper party to bring an action. *Curtis* v. *D., L. & W. R. Co.*, 74 N. Y. 116.

As incident to the right given to married women by the act of 1862 (ch. 172) to acquire property by purchase, she may purchase property, either real or personal, upon credit, and is personally liable for the purchase price as if she were a *feme sole*, and this although she had no separate estate at the time of the purchase, and without regard to the question as to the purpose for which the purchase was made. *Tiemeyer* v. *Turnquist*, 85 N. Y. 516.

2. BY POWERS.

L. 1896, ch. 547, sec. 123. "A special and beneficial power may be granted, 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 * * *

1 R. S. 733, sec. 87, same, repealed by L. 1896, ch. 547, sec. 300.

By 1 R. S. 737, sec. 130 (repealed by L. 1896, ch. 547, § 300), if a married woman

3. BY RELEASE OF DOWER.

was given the power to dispose of her estates in fee during marriage, she might by virtue thereof create estates as if she were a *feme sole.*

L. 1896, ch. 547, sec. 122. "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 real property conveyed or devised to her in fee."

1 R. S. 732, sec. 80, same, repealed by L. 1896, ch. 547, sec. 300.

By 1 R. S. 735, sec. 110 (repealed by L. 1896, ch. 547, § 300), a married woman could execute a power by grant or devise during marriage and without her husband's concurrence, unless the power giving her such power expressly prohibited it.

By 1 R. S. 735, sec. 111 (repealed by L. 1896, ch. 547, § 300), an infant married woman's powers could be executed by her until her majority.

By 1 R. S. 736, sec. 117 (repealed by L. 1896, ch. 547, § 300), the concurrence of a husband was not necessary to a married woman's powers by grant, but they were not valid unless she acknowledged as prescribed in the case of deeds. See note at p. 68.

L. 1878, ch. 300, sec. 1. "Any married woman being a resident of this state, and of the age of twenty-one years or more, may execute, acknowledge and deliver her power of attorney with like force and effect and in the same manner as if she were a single woman."

By L. of May 11, 1835, ch. 275, sec. 1 (repealed by L. 1896, ch. 547, § 300), a non-resident married woman's power of attorney for conveyance of New York real estate was as valid as if she had executed it herself, if acknowledged in the manner prescribed by R. S. sec. 11. See note, p. 68.

L. 1896, ch. 547, sec. 187. A married woman may release dower by power of attorney. See statute at p. 71.

3. BY RELEASE OF DOWER.

Code Civ. Pro., sec. 1571. "A married woman may release to her husband her inchoate right of dower, in the property directed to be sold by a written instrument, duly acknowledged by her and certified, as required by law with respect to the acknowledgment of a conveyance to bar her dower, which must be filed with the clerk. Thereupon the share of the proceeds of the sale, arising from her contingent interest, must be paid to her husband."

L. of April 28, 1840, ch. 177, sec. 2, substantially the same.

By L. 1848, allowing a married woman to convey by deed interest in estates, she may release her dower (statute, p. 57). But not to her husband until L. 1880, in the case of voluntary partition (statute, p. 61). After L. 1887 (statute, p. 62), she could in any case.

L. 1896, ch. 547, sec. 187. "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. of May 5, 1893, ch. 599, sec. 1 (repealed by L. 1896, ch. 547, § 300), substantially the same. See, also, L. 1878, ch. 300, sec. 1, and L. 1835, ch. 275, sec. 1, at p. 71.

II. CAPACITY TO CREATE ESTATES — 4. BY WILL.

By L. 1849, ch. 375, § 1 (quoted *ante*, p. 58), a married woman may "devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof in the same manner and with like effect as if she were unmarried."

The Law of 1848 (*ante*, p. 57), which this amends, contains nothing in regard to her capacity to create estates by will.

L. 1848, ch. 200, as amended by L. 1849, ch. 375, does not give to a married woman power to make a testamentary disposition of her real estate while she is an infant. Zimmerman v. Schoenfeldt, 3 Hun, 692.

2 R. S. 56, sec. 1 (passed Dec. 10th, 1828, took effect Jan. 1st, 1830, amended by L. 1867, ch. 782). "All persons, except idiots, persons of unsound mind and infants, may devise their real estate by a last will and testament, duly executed according to the provisions of this title."

As originally enacted the above section brought married women within the exception.

1 R. L. 364 (passed Mar. 5th, 1813), ch. 23, secs. 1, 5, substantially the same, except the latter (L. 1813), declares married women incapacitated to devise. This disability was removed by L. Apr. 25th, 1867, ch. 782.

General restriction.

L. 1860, ch. 360, sec. 1. "No person having a husband, wife, child or parent, shall by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate, after the payment of his or her debts (and such devise or bequest shall be valid to the extent of one-half, and no more)"

(See corporations, p. 38.)

Rights of citizens and aliens to devise real property, see L. 1896, ch. 547, §§ 3, 5 (quoted *ante*, pp. 2, 12).

Rights of female citizen marrying an alien to devise real property, see L. 1896, ch. 547, § 6 (quoted *ante*, p. 25).

2 R. S. 60, § 21 (passed Dec. 10, 1828, took effect Jan. 1, 1830, amended L. 1867, ch. 782). "Every male person of the age of eighteen years or upwards, and every female of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate by will in writing."

As originally enacted married women were excepted.

As to what law governs a non-resident's will of New York personal property, see Code Civ. Pro., sec. 2694.

Prior to the statute (2 R. S. 60, sec. 21) a married woman could make a will of her separate personal estate which would be valid in a court of equity. But after the enactment of the Revised Statutes, and before the passage of the act amending the act for the more effectual protection of the property of married women (L. 1849, ch. 375), a married woman could not dispose of her separate personal estate by an instrument in the nature of a will, although authorized by an antenuptial contract to enjoy, control and dispose of it during coverture, in the same manner and with the like effect as if she were *sole*.

Nor could she do so even where the antenuptial agreement contained an express provision that she might dispose of it by will. Per Denio, J., "An instrument, which

4. BY WILL.

confers upon a married woman power to control and dispose of her separate estate during coverture, does not authorize her to make a testamentary disposition of it."

The original act for the more effectual protection of the property of married women (L. of 1848, ch. 300), did not confer power upon a *feme covert* to devise or bequeath her property. *Wadhams* v. *American Home Missionary Society*, 12 N. Y. 415.

R. S. pt. 2, ch. 6, tit. 1, sec. 49 as amended by L. Dec. 10, 1828, does not limit the testamentary capacity given to married women by the statute of 1849, ch. 375, sec. 1. *Cotheal* v. *Cotheal*, 40 N. Y. 405.

VI. PERSONS "CIVILLY DEAD."

Will of S. devised his real estate to his wife for life if she remained unmarried, and upon her decease or marriage, to C.; in case of the death of the latter without children, the remainder to go to A. The wife of the testator survived him, and after her death C., who, at the time was unmarried and without children, was convicted of murder in the second degree and sentenced to imprisonment for life. In an action of ejectment wherein plaintiff claimed under A., brought while C. was living, *held* (EARL, J., dissenting), that the title of C. to the real estate devised was not divested as a consequence of his sentence, and that A. or his grantee had no present vested interest upon which to maintain ejectment.

By the general rule of the common law, civil death did not operate as a divestiture of the estate of the convicted. Whatever may have been the effect of the provision of the act of 1799 (L. 1799, ch. 57) declaring that where a person shall be convicted for felony and sentenced to imprisonment for life, such person shall be deemed to be "civilly dead to all intents and purposes in the law," when the language was changed by the provision of the Revised Statutes (2 R. S. 701, sec. 20), re-enacted in the Penal Code (sec. 708) enacting simply that a person sentenced to imprisonment for life "shall thereafter be deemed civilly dead," this was declaratory of and restored the will of the common law. (Earl, J., dissenting.)

It seems, the statutory provisions regulating the transfer and devolution of property upon the death of the owner, refer simply to a natural, actual death.

A rèsumè of legislation and of judicial decisions in this state and in England, upon the subject of property rights, as affected by civil death, given. *Avery* v. *Everett*, 110 N. Y. 317.

Section 707 of the Penal Code (N. Y.), which prescribed that "a sentence of imprisonment in a state prison for any term less than for life forfeits all the public office and suspends, during the term of the sentence, all the civil rights and all private trusts, authority or powers of, or held by, the person sentenced,", does not deprive a person so imprisoned, of the power to take or convey by grant or devise. *La Chapelle* v. *Burpee*, 69 Hun, 436, citing Avery v. Everett, 110 N. Y. 317.

As to acquiring property by crime, see p. 1210.

VII. STATE OR NATION.

The validity of a contingent bequest to United States questioned but not decided. *Burrill* v. *Boardman*, 43 N. Y. 254.

"The devise is, primarily, "to the people of the United States," to establish and maintain, perpetually, a school for the education of persons undefined, except as a class; and, secondarily, "to the people of the state of Virginia," for the same purpose. Now, conceding that the testator intended as the trustee of the charity, the United States, as a political body, has it, as such, capacity to take and act? We are not advanced a single step towards a solution of the point by a concession that the United States government may take directly by gift, grant, or devise, property for governmental use or benefit. If it takes, under the devise and bequest of the testator, it must be upon the trust and for the special charity, viz., to found and perpetually conduct a school for agricultural instruction of a certain class of children in the state of Virginia. Is it, therefore, within the scope of its political corporate capacity to administer indefinite charitable trusts? It seems to me there can be but one answer. The United States exists under grants of power, express or implied, in a written constitution, and the functions of all the departments are definitely limited and arranged. It is not within the express or implied powers of the government, as organized, to administer a charity. The action in the case of Smithson's bequest to found an institution of learning at Washington, furnishes no evidence of its capacity, simply as a politica lorganization, to take and hold property in trust for charitable purposes. That was an English charity. The case was determined by the law of the domicil. It was a charity under the statute of Elizabeth, and administered as such; and took effect only on a law of Congress organizing the institution. So, also, with regard to the state of Virginia, however comprehensive the state sovereignty, its officers are regulated in their duties by a written constitution, which does not contemplate special trust functions. Simply as a political corporation, neither government has capacity to take or act. If, then, the devises and bequests were intended to be made to the United States, and to the state of Virginia, as political bodies, I think they are void, because neither the United States nor the state is capable of taking as trustee for the management of the special charity." (Pp. 122–3.) *Levy* v. *Levy*, 33 N. Y. 97 rev'g 40 Barb. 585, digested p. 857.

The word "person" in statute of wills (2 R. S. 57, sec. 3) authorizing devises to any *person* capable by law of holding real estate, does not include a state or nation, but only natural persons and such corporations as are authorized by law of the state to take. Hence, devise of lands to United States is void. Levy v. Levy, 33 N. Y. 99; Riddall v. Bryan, 14 Md. 444; Story on Const. sec. 1441; Cooley on Const. Law, 525. The United States may acquire lands by voluntary conveyance authorized by law of state where land is situated or by eminent domain. *In re Fox*, 52 N. Y. 520, aff'g 63 Barb. 157, aff'd, 4 Otto, 315.

A devise of real estate to the United States is void. See *Matter of Merriam*, 73 Hun, 587.

A bequest to the government of the United States is valid. *Matter of Merriam*, 141 N. Y. 479; aff'g 73 Hun, 587.

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I. ENUMERATION OF ESTATES.

*Real Prop. L., sec. 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."

1 R. S. 722, sec. 1, Banks's 9th ed., p. 1789, repealed by Real Prop. L. "Estates in lands are divided into estates of inheritance, estates for life, estates for years, and estates at will and by sufferance."

EXPLANATORY NOTE TO SEC. 20.—An estate in land is the interest that the tenant has in the same, and is considered with reference (1) to the quantity of interest which the tenant has, or the duration of his interest; (2) the time at which such interest is to be enjoyed; (3) the number and connection of the tenants. Greenleaf's Cruise on Real Property, vol. 1, 44.

Sec. 20 treats of the quantity of the estate, that is, to its duration and extent, and this duration and extent is primarily measured by the division into estates of freehold and estates not of freehold, as provided by sec. 23.

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*The Real Property Law is contained in L. 1896, ch. 547 (ch. 46 of the General Laws), and took effect Oct. 1, 1896. The statutes repealed are enumerated in section 300 thereof. Sec. 1 provides, "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."

†Sec. 1 of the Real Property Law provides that "the term 'real property' and 'lands,' as used in this chapter, are co-extensive in meaning with lands, tenements, and hereditaments." See Real Prop. L., sec. 208.

As to what is comprehended in the word "lands," see Kent's Com. vol. 1, 401, *et seq.*; Greenleaf's Cruise on Real Prop. vol. 1, 36, *et seq.*; 41, *et seq.*; R. S. N. Y. vol. 1, p. 762, sec. 36; Banks's 9th ed. p. 1841; 2 R. S. 137, sec. 6.

II. ESTATES IN FEE SIMPLE AND FEE SIMPLE ABSOLUTE.

Real Prop. L., sec. 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.

1 R. S. 722, sec. 2, Banks's 9th ed., 1789, repealed by Real Prop. L.

"Every *estate of inheritance*, notwithstanding the abolition of tenures, shall continue to be termed a fee simple or fee; and every such estate, when not defeasible or conditional, shall be termed a fee simple absolute or absolute fee."

The term "fee simple" meant in the common law *pure inheritance*, and was the name of an estate in land which *might* pass from the owner to his heirs forever, and was the greatest estate capable of creation.* Kent's Com. vol. 4, p. *5. At common law fees were technically divided into "fees simple" or "absolute fees," and fees that *might* forever be inherited by the heirs of the owner thereof; but which, on the other hand, might be defeated by the happening of some event in the future that would interrupt the inheritance. The latter class is variously called "qualified," "conditional," "base," or "determinable fees."† Jackson v. Van Zandt, 12 Johns. 176; Van Rensselaer's Heirs v. Pennaman, 6 Wend. 569; Kent's Com. vol. 4, pp. *5, 9.

*"A fee, in the sense now used in this country, is an estate of an inheritance in law, belonging to the owner, and transmissible to his heirs. No estate is deemed a fee, unless it may continue forever." Kent's Com. vol. 4, p. *4.

†"*A qualified, base or determinable fee* (for I shall use the words promiscuously), is an interest which may continue forever, but the estate is liable to be determined without the aid of a conveyance, by some act or event, circumscribing its continuance or extent. Though the object on which it rests for perpetuity may be transitory or perishable, yet such estates are deemed fees, because, it is said, they have a possibility of enduring forever. A limitation to a man and his heirs, so long as A. shall have heirs of his body; or to a man and his heirs, tenants of the manor of Dale; or till the marriage of B.; or so long as St. Paul's church shall stand, or a tree shall stand, are a few of the many instances given in the books, in which the estate will descend to the heirs, but continue no longer than the period mentioned in the respective limitations, or when the qualification annexed to it is at an end. If the event marked out as the boundary to the time of the continuance of the estate, becomes impossible, as by the death of B. before his marriage, the estate then ceases to be determinable, and changes into a simple and absolute fee; but until that time, the estate is in the grantee, subject only to a possibility of reverter in the grantor. It is the uncertainty of the event, and the possibility that the fee may last forever, that renders the estate a fee, and not merely a freehold. All fees liable to be defeated by an executory devise, are determinable fees, and continue descendible inheritances until they are discharged from the determinable quality annexed to them,

By the twenty-first section all estates of inheritance, that is all estates that *may* be transmitted from the owner to his heirs forever, are termed "a fee simple or fee," those not defeasible or conditional, that is, those that *must* so descend, are termed "fees simple absolute or absolute fees." Hence, the term "fee simple" would include, and the term "fee simple absolute" would exclude conditional,* qualified, or base fees, in short, all fees to which possible bounds are set. Thus grant of land to A. forever is a fee simple absolute; but a grant to A. of lands, with a further provision that if A. die under age, or without issue, or that in case some event *not certain* to happen, do happen, then that the land shall pass from A. to B., is a fee simple, but, nevertheless, a fee limited or debased by a condition or limitation that may destroy it, and hence not a fee simple absolute under section twenty-one.

In qualified or base fees there is an estate of inheritance in the owner A. for his interest may, and if uninterrupted by the happening of the events named in the condition, must descend to his heirs, and he has the same right of enjoyment as if his fee were absolute (Kent's Com. vol. 4, p. *9); meanwhile B. has a future contingent interest.

In the second section of the R. S. repealed, the words "notwithstanding the abolition of tenures," have reference to the abolition of tenures by the statute, and also now by the constitution.† "It may be that the revisers of the statutes thought the use of the words was necessary, lest it be concluded that by the use of feudal terms feudal rights were also revived. But the feudal principle was never admitted into the United States as a feature of political government, but only as the *source* of the rules of holding and transmitting real property. The military and oppressive attributes of the feudal system, although already virtually dead in England, were formally abolished by statute, 12 Car. 2, and were never brought into the colonies. Grants of land on this continent by the Crown to patentees were to be held in free and common socage."‡

either by the happening of the event or a release. These qualified or determinable fees are likewise termed base fees, because their duration depends upon the occurrence of collateral circumstances, which qualify and debase the purity of the title." Kent's Com. vol. 4, p. *9.

*A conditional fee originally referred to one restrained to some particular heirs, exclusively, as to the heirs of a man's body (see, *post*, p. 84; Kent's Com. vol. 4, p. 11 *,) but the term is not now so restricted.

†Act of the general assembly of the colony of New York of May 13th, 1691, L. 1787, tenth sec. ch. 36; [see Kent's Com. vol. 3, p. *511]; sees. 1–4, part 11, ch. 1, tit. 1 R. S., secs. 11, 12, 13, art. 1, Const. N. Y.

‡While, since 1787, none of the incidents peculiar to feudal tenures can attach to estate granted, yet the grantee of the estate may be made liable to conditions of rent and services, if stipulations therefor be inserted in the deed and be consistent with rules of law, such conditions run with the land and bind the heirs and assignees

(Greenleaf's Cruise, vol. 1, p. 23 n.) In New York tenures, that is, holdings of land, were declared to be in free and common socage* by statute and by the constitution, which last provides that all the lands within this state are allodial, so that the entire and absolute property is vested in the owners, according to the nature of their respective estates, and subject to the liabilities to escheat, that is, to revert to the state, provided there be a defect or failure of heirs, as in the state is the original and ultimate right of property. Feudal tenures were thereby abolished, except *then lawfully created* rents and services certain. It was not intended by this to change any of the established rules of acquiring and transmitting real property; but rather to relieve real property from the servitudes of the feudal law. Kent's Commentaries, vol. 3. pp. *509 to *514; 4 id. *314.

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of the grantee, independently of tenure and of privity of contract or estate. In this case the lease was made in 1789, but in 1846 the constitution was changed so as to prevent the reservation of a perpetual yearly rent, in a grant in fee, as a condition of the estate. *Van Rensselaer* v. *Dennison*, 35 N. Y. 393. see, also, Van Rensselaer v. Slingerland, 26 id. 580; Van Rensselaer v. Barringer, 39 id. 9; Hosford v. Ballard. id. 147.

*Socage tenure denotes lands held by a fixed and determinated service, not military and not in the power of the lord to vary at his pleasure. Kent's Com. vol. 3, p. 646.

III. ESTATES TAIL ABOLISHED; REMAINDERS THEREON.

Real Prop. L., sec. 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."

1 R. S. 722, sec. 3, Banks's 9th ed., p. 1789, repealed by Real Prop. L. "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 R. S. 722, sec. 4, Banks's 9th ed., p. 1789, repealed by Real Prop. L. "Where a remainder in fee shall be limited upon an 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 at the time of such death."

EXPLANATORY NOTE TO SEC. 22.—In 1772, and again on February 23, 1786 (ch. 12), acts were passed converting all estates in tail into estates in fee simple. Under these acts, if a subsequent estate like a remainder or executory devise were created to take effect, if the estate in tail failed, or upon any other lawful contingency, it was held that the latter estate was cut off, and that the donee took the entire and only estate in fee simple.

Such was the decision in Vanderheyden v. Crandall, 2 Denio, 9; Van Rensselaer v. Poucher, 5 id. 35; Lott v. Wykoff, 1 Barb. 565; 2 N. Y. 355; Wendell v. Crandall, 1 id. 491.

Hence, the act of 1786 simply converted the estate tail into a fee simple absolute, cutting off all estates subsequent to that of the donee. In the revision of 1830, however, sections three and four were adopted.

These sections cut off the entail and vest the estate in the donee, but if a valid remainder is limited on the donee's estate, such remainder takes effect and is not cut off as was adjudged to be the case under the acts previous to the Revised Statutes.

See Nellis v. Nellis, 99 N. Y. 505.

"At common law, where an estate is conveyed or devised to A., and if he dies 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 (by a fine or common recovery), the fee will vest in B. or his heirs, in case of the failure of the issue of A., at any distance of time."

Reviser's note, appendix to Revised Statutes, second edition, vol. 3, p. 568.

An estate tail is an estate deriving its existence from the statute *de donis conditionalibus*, and descendible to some particular heirs only of the person to whom it is granted, and not to his heirs general. Greenl'f Cruise on R. P., p. 75.

In the earlier history of the common law, gifts of land were unqualified, and the donee took an estate of inheritance. However, with the primary motive of continuing the ownership of land* in those of the donor's blood, or in such line of descent as the donor preferred, gifts came to be made to the donee and the heirs of his body (estates in tail general), whereby the land passed to the donee's issue without exclusion of certain lines of heirs, or to the donee and *certain* heirs of his body, as those by a certain marriage (estates in tail special), whereby the land passed exclusively to the line of heirs designated.

There were estates to A. and his heirs male, whereby only his male heirs took *in tail male*, and estates to A. and his heirs female, whereby the females took in tail female to the exclusion of male heirs. The Courts, in hostility to such entails, interpreted such gifts to create conditional fees, viz.: an estate in fee to A., the donee, upon the condition that such donee should have heirs born alive, and it was considered that upon the birth of such heir (answering the description of the heirs named in the instrument creating the gift) the estate belonged to the donee in fee simple absolute, at least for the purposes of disposition. If such heir were not so born, then, at the death of the donee the estate returned to the donor or his heirs. To defeat this construction the Statute of Westminster 2, 13 Edw. 1, known as the statute *de donis conditionalibus* was passed. This statute, *de donis* (in relation to conditional gifts), was interpreted to command that the gifts of the kind described should vest an estate of inheritance in the donee and his heirs, special or general, and that the estate must descend to the heirs according to the terms of the gift, notwithstanding any effort of an ancestor to

* An estate tail in personal property could not be created, and if attempted, the first taker took an absolute estate. Patterson v. Ellis, 11 Wend. 259; Norris v. Beyea, 13 N. Y. 280, 282.

divert the same.* The estate so coming to any tenant in respect to the manner or scope of its enjoyment by occupation did not differ from an estate in fee simple; but in theory no alienation, either by any tenant or through any act of his, could disturb the rights of those subsequently entitled. Each tenant might, with impunity, commit waste, and the estates of dower or curtesy might arise upon a tenant's death. Hence, an estate tail in no wise differed from an estate in fee, save that it was perpetuated from one taker to another by force of the instrument of gift. The tenant was not obliged to discharge incumbrances nor to keep down interest. 4 Kent's Com. p. *12.

*These estates "were very conducive to the security and power of the great landed proprietors and their families, but very injurious to the industry and commerce of the nation," and in the Taltarum Case, 12 Edw. IV, the court held that "an estate tail might be cut off and barred by a common recovery; hence, it resulted that a common recovery removed all limitations upon an estate tail, and an absolute, unfettered, pure fee simple passed as the legal effect and operation of a common recovery, and also by fine the tenant in tail could bar his issue, but not subsequent remainders." Kent's Com. vol. 4, pp. 12, 14. (On the subject of conditional fees as here understood, see Kent's Com. vol. 4, pp. *11–13; and of Fees Tail, vol. 4, pp.* 13–21.)

IV. FREEHOLDS.

Real Prop. L., sec. 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.

Sec. 24. When estates 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."

1 R. S., 722, sec. 5, Banks's 9th ed., p. 1789, repealed by Real Prop. L. Substantially the same.

1 R. S., 722, sec. 6, Banks's 9th ed., p. 1789, repealed by Real Prop. L. Substantially the same.

EXPLANATORY NOTE TO SECTIONS 23, 24.—Freeholds. An estate in fee simple is always a freehold; an estate for life is always a freehold during the life of the tenant; and if it be for the life of another, the estate after the death of the first tenant is a chattel real; an estate for years is also a chattel real, and an estate at will or by sufferance is a chattel interest.

Estates of freehold, at common law, and even now, carry certain privileges and capacities to the owner of them, and require certain formalities in alienation. The tenant was called a freeholder because he might maintain possession against his lord, and for this reason *liberum tenementum*, frank tenement or freehold, was a holding both of dignity and profit. A freeholder became a member of the County Court, was entitled to be summoned on juries in the King's Court, and could vote at the election of a knight of the shire.* Greenleaf's Cruise on Real Prop. vol. 1, p. 48.

Such an estate could only be created by a livery of *seizin* (delivery of possession by a ceremony similar to the investiture of the feudal law). So, at present, freehold estates can only be alienated in fee by grant in the special manner prescribed by statute. Real Prop. L., secs. 205–234.

*The tenant became a suitor of the courts, and the judge in the capacity of a juror; he was entitled to vote for members of parliament, and defend his title to the land; as owner of the immediate freehold, he was a necessary tenant to the *præcipe* in a real action, and he had a right to call in the aid of the reversioner or remainderman, when the inheritance was demanded. These rights gave him importance and dignity as a freeholder and freeman." Kent's Com. vol. 4, p. *24.

V. ESTATES OF INHERITANCE.

For discussion of estates of inheritance see *ante*, p. 80.

VI. ESTATES FOR LIFE.

An estate for life is an interest in land that may continue for the life of the person owning it, or for the life of another. Kent's Com. 4, p. *26. Such an estate may arise by agreement of the parties, and in that case is called a conventional estate. Such are estates by grant or will. It may also arise by operation of law and in that case it is called a legal estate. Such are estates by dower, curtesy or descent.* Kent's Com. vol. 4, *24.

Except incidentally to illustrate the statutes and principles of the law here treated, this work does not include a review of the decisions relating to estates created by grant, or lease, although cases relating thereto are given when pertinent to any subject here treated, and the statutes relating to Chattels Real are given at p. 225 *et seq.*

The following decisions relate to the question whether estates in fee or for life are created, to the rights and duties of the life tenant, and to estates arising from dower† and curtesy.†

I. WHETHER AN ESTATE IS IN FEE OR FOR LIFE.

1. RULE IN SHELLEY'S CASE, p. 87.
2. EFFECT OF POWERS IN CREATING A FEE, p. 92.
    1. POWER OF SALE AND DISPOSITION, p. 93.
    2. POWER TO USE OR CONSUME THE PRINCIPAL, p. 106.
    3. POWER TO USE PRINCIPAL FOR SUPPORT, 111.
3. PRECATORY CLAUSES, p. 113.
4. REPUGNANT LIMITATIONS, p. 115.
5. CHARGE OF LEGACY ON DEVISEE, p. 129.
6. ESTATE ENLARGED TO FEE ON CONDITION, p. 129.

1. RULE IN SHELLEY'S CASE.

Real Prop. L., sec. 44 (L. 1896, ch. 547; ch. 46 Gen. L.). When heirs of life tenant take as purchasers. "Where a remainder shall be

* See Real Property Law, secs. 284, 285.

† While the subjects of "Dower" and "Curtesy" are not within the general purpose of this book, they are so connected with it as to make necessary their inclusion.

1. RULE IN SHELLEY'S CASE.

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."

1 R. S. 725, sec. 28, Banks's 9th ed., 1792, repealed by Real Prop. L. Substantially the same.

The term "heirs" or other words of inheritance are not requisite to create or convey an estate in fee." Real Prop. L., sec. 205 (1 R. S. 748, secs. 1 and 2 repealed by it.)

EXPLANATORY NOTE TO SEC. 44.—This section is intended to abolish the rule "in Shelley's case." The following is from the Reviser's notes to section 28 (present sec. 44), 3 R. S. 575 (2d ed.):

Sec. 28 R. S. "This section is introduced to abolish a technical rule, commonly described by lawyers as the rule 'in Shelley'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, etc., are always words of limitation of the estate, and not words of purchase.' Shelley'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 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. * * *

Whatever reasons may have existed for the original adoption of the

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rule in Shelley's 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 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 following is from Kent's Com. vol. IV, pp. *215-216:

"In Shelley's case, the rule was stated, on the authority of several cases in the Year Books, to be 'that when the ancestor, by any gift of conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, in fee or in tail, *the heirs* are words of limitation of the estate, and not words of purchase. Mr. Preston, in his elaborate essay on the rule, gives us, among several definitions, one of his own, which appears to be full and accurate. 'When a person takes an estate of freehold, legally or equitably, under a deed, will or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate. The word *heirs*, or *heirs of the body*, create a remainder in fee, or in tail, which the law, to prevent an abeyance, vests in the ancestor, who is tenant for life, and by the conjunction of the two estates he becomes tenant in fee or in tail; and whether the ancestor takes the freehold by express limitation, or by resulting use, or by implication of law; in either case the subsequent remainder to his heirs unites with, and is executed on, his estate for life. Thus, where A. was seized in fee, and covenanted to stand seized to the use of his heir, male, it was held that, as the use during his life was undisposed of, it of course remained in him for life by implication, and the subsequent limitation to his heirs attached to him.

The cases from the Year Books, as cited in Shelley's case, are 40 Edw. 111, 38 Edw. 111, 24 Edw. 111, 27 Edw. 111; and Mr. Preston gives at large a translation of the first of these cases, as being one precisely in point in favor of the rule. Sir William Blackstone, in his opinion in the case of Perrin v. Blake, relies on a still earlier case,

in 18 Edw. 11, as establishing the same rule. It has certainly the pretension of high antiquity, and it was not only recognized by the court in the case of Shelley, but it was repeated by Lord Coke, in his Institutes, as a clear and undisputed rule of law, and it was laid down as such in the great abridgments of Fitzherbert and Rolle. The rule is equally applicable to conveyances by deed, and to limitation in wills whenever the limitation gives the legal, and not the mere trust or equitable title, But there is more latitude of construction allowed in the case of wills, in furtheraunce of the testator's intention; and the rule seems to have been considered as of more absolute control in its application to deeds. When the rule applies, the ancestor has the power of alienation, for he has the inheritance in him; and when it does not apply, the children or other relations, under the denomination of heirs, have an original title in their own right, and as purchasers by that name. The policy of the rule was that no person should be permitted to raise in another an estate which was essentially an estate of inheritance, and at the same time make the heirs of that person purchasers.''

The text then states to what extent the rule was observed at that time in several states, and as to New York, states:

"In New York the rule, according to the English view of it, was considered, in the case of Brant v. Gelston, to be of binding authority; and so it continued to be until the revisers lately recommended its abolition, as being a rule 'purely arbitrary and technical,' and calculated to defeat the intentions of those who are ignorant of technical language. The New York Revised Statutes have accordingly declared that 'where a remainder shall be limited to the heirs, or heirs of the body of a person, to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs, or heirs of the body of such tenant for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them.' The abolition of the rule applies equally to deeds and wills, and in its practical operation it will, in cases where the rule would otherwise have applied, change estates in fee into contingent remainders. It sacrifices the paramount intention in all cases, and makes the heirs, instead of the ancestor, the *stirpes* or *terminus* from which the posterity of heirs is to be adduced. It will tie up property from alienation during the lifetime of the first taker, and the minority of his heirs. But this, it may perhaps be presumed, was the actual intention of the party, in every case in which he creates an express estate for life in the first taker, for otherwise he would not have so limited it. It is just to allow individuals the liberty to make strict settlements of their property, in their own discretion, provided there be nothing in such dispositions of it affecting the rights of others, nor inconsistent with public policy, or the settled principles of law. But this liberty of modifying at pleasure the transmission of property is in many respects controlled, as in the instance of a devise to a charity, or to aliens, or as to the creation of estates tail; and the rule in Shelley's case only operated as a check of the same kind, and to a very moderate degree. Under the existence of the rule, land might be bound up from circulation for a life, and twenty-one years afterwards, only the settler was required to use a little more explicitness of intention, and a more specific provision. The abolition of the rule facilitates such settlements, though it does not enlarge the individual capacity to make them." Kent's Com. vol. 4, pp. *232–233.*

*The curious reader may be interested in the note appended by Chancellor Kent to this subject:

"The juridical scholar on whom his great master, Coke, has bestowed some portion of the 'gladsome light of jurisprudence,' will scarcely be able to withhold an involuntary sigh as he casts a retrospective glance over the piles of learning devoted to

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destruction by an edict as sweeping and unrelenting as the torch of Omar. He must bid adieu forever to the renowned discussions in Shelley's case, which were so vehement and so protracted as to rouse the sceptre of the haughty Elizabeth. He may equally take leave of the multiplied specimens of profound logic, skillful criticism and refined distinctions which pervade the varied cases in law and equity, from those of Shelley and Archer, down to the direct collision between the courts of law and equity, in the time of Lord Hardwicke. He will have no more concern with the powerful and animated discussions in Perrin v. Blake, which awakened all that was noble and illustrious in talent and endowment, through every precinct of Westminster Hall. He will have occasion no longer, in pursuit of the learning of that case, to tread the clear and bright paths illuminated by Sir William Blackstone's illustrations, or to study and admire the spirited and ingenious dissertation of Hargrave, the comprehensive and profound disquisition of Fearne, the acute and analytical essay of Preston, the neat and orderly abridgment of Cruise, and the severe and piercing criticisms of Reeve. What I have, therefore, written on this subject, may be considered so far as my native state is concerned, as a humble monument to the memory of departed learning." Kent's Com. vol. 4, p. 233, note 1a.

Cases relating to the rule in Shelley's case.

Where lands are devised by will which took effect prior to the Revised Statutes, and there are no words of inheritance, the devisee takes a life estate only. *Olmstead* v. *Olmstead*, 4 N. Y. 56; digested p. 1606.

A testator, before the Revised Statutes, devised a lot of land to his wife during her widowhood, and on her death to be "equally divided" between his two sons, and there were no words of inheritance in the will.

Construction:

The two sons took a life estate only. *Edwards* v. *Bishop*, 4 N. Y. 61; digested p. 539.

Construction of "I give the use of" lots "to my grandson and then to his child or children *as the other real estate is given*," viz.: to testator's grandson with power of disposal to latter's children or grandchildren, and for want of the same, the estate to descend to testator's son and his heirs. Grandson took a life estate with remainder in fee to his children or grandchildren, with executory limitation over to testator's son. *Baker* v. *Lorillard*, 4 N. Y. 257.

By a will which took effect before the rule in Shelley's case was abolished by the Revised Statutes, lands were devised to O. H. "to hold during her life, and then to descend to the heirs of her body and their heirs and assigns forever."

Construction:

The devisee, under our statute abolishing estates tail, took an estate in fee in the premises. *Brown* v. *Lyon*, 6 N. Y. 419.

2. EFFECT OF POWERS IN CREATING A FEE.

Where the introductory clause in a will shows that the testator designed to dispose of his whole estate, a subsequent devise of lands without words of perpetuity, may be held to convey the fee.

But this will not be the effect unless the subsequent parts of the will confirm such an intention in the testator. Will made before the Revised Statutes. *Vanderzee* v. *Vanderzee*, 36 N. Y. 231.

"If the will of Anson Cary had taken effect previous to the first of January, 1830, Albert G. Cary would have taken under the rule in Shelley's case a fee simple in the land in question, but not having taken effect until after that time, the devise is subject to the provisions of the Revised Statutes, and under them Albert G. Cary took a life estate only in the land, and his heirs took the remainder as purchasers. 1 R. S. 725, sec. 28". *Barber* v. *Cary*, 11 N. Y. 401.

Since the abrogation of the rule in Shelley's case, and the R. S., a grant to "A. for life and after his decease to his heirs and assigns forever," gives to his children a vested interest therein, although liable to be defeated wholly or in part by his death before his father, or the subsequent birth of other children. *Moore* v. *Littel*, 41 N. Y. 66, aff'g 40 Barb. 488, digested p. 298.

Devise without words of limitation before Revised Statutes carried a fee if such was the intent. *Provoost* v. *Calyer*, 62 N. Y. 545; digested p. 1610.

The rule in Shelley's case is not applicable where the estate of the first taker is equitable and that of the remaindermen legal *Smith* v. *Scholtz*, 68 N. Y. 41.

The rule is applied only to the first taker. *Hennessey* v. *Patterson*, 85 N. Y. 91; digested p. 321.

For further decisions under this title, see Craine v. Wright, 114 N. Y. 307; Campbell v. Rawdon, 18 id. 412.

Where a testator by will, after giving to his wife during her widowhood the income and profits of certain lands, devised the latter to R., *his daughter, and the heirs of her body forever, from and after the decease or remarriage of the wife*, with a limitation over to the children of one N. in case R. died without issue. *Held*, that R.'s interest under the will was not a mere life estate, with remainder to her issue, but a fee simple. *Grout* v. *Townsend*, 2 Hill, 554; aff'g 2 Denio, 336.

2. EFFECT OF POWERS IN CREATING A FEE.*

L. 1896, ch. 547 (ch. 46 Gen'l L.) (in effect Oct. 1, 1896), sec. 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

*See Powers, *post*, *p.* 955.

2. EFFECT OF POWERS IN CREATING A FEE.

encumbrancers, but subject to any future estate limited thereon, in case the power of absolute disposition is not executed, and the property is not sold for the satisfaction of debts."

1 R. S. 732, sec. 81. In effect Jan. 1, 1830, repealed by L. 1896, ch. 547, sec. 300.

L. 1896, ch. 547 (ch. 46 Gen'l L.) (in effect Oct. 1, 1896), sec. 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.

1 R. S. 732, sec. 82. In effect Jan. 1, 1830, repealed by L. 1896, ch. 547, sec. 300.

L. 1896, ch. 547 (ch. 46 Gen'l L.) (in effect Oct. 1, 1896), sec. 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 R. S. 733, sec. 83. In effect Jan. 1, 1830, repealed by L. 1896, ch. 547, sec. 300.

L. 1896, ch. 547 (ch. 46 Gen'l L.) (in effect Oct. 1, 1896), sec. 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."

1 R. S. 733, sec. 84. In effect Jan. 1, 1830, repealed by L. 1896, ch. 547, sec. 300.

L. 1896, ch. 547 (ch. 46 Gen'l L.) (in effect Oct. 1, 1896) sec. 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."

1 R. S. 733, sec. 85. In effect Jan. 1, 1830, repealed by L. 1896, ch. 547, sec. 300.

L. 1896, ch. 547 (ch. 46 Gen'l L.) (in effect Oct. 1, 1896), sec. 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."

1. POWER OF SALE AND DISPOSITION.

A testator devised all his estate, real and personal, to his wife and daughter, in equal shares, and gave each a power of testamentary disposition, unaffected by any trust or limitation; but imposed the restriction that, in case either died intestate and without issue, whatever might remain of the property was devised to the survivor.

Construction:

A joint conveyance by the devisees of land so devised, with a cove-

nant of warranty, passed all the title of the grantors, either vested or contingent; such title was good, and the purchaser was bound to accept it; and no execution of the power of testamentary disposition, made after the conveyance, could have effect on the estate conveyed.

Freeborn v. *Wagner*, 2 Abb. Ct. App. Dec. 175.

From opinion.—"By sec. 84 of 1 R. S., title 'Of Powers' (p. 733), where a general and beneficial power to devise the inheritance shall be given to a tenant for life * * * 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.

This power is both general and beneficial.

It is, therefore, an absolute power of disposition within section 81; which says that where such power of disposition is given to the owner of a particular estate for life, or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon in case the power should not be executed, or the lands should not be sold for the satisfaction of debts." (At pp. 182–3; see, also, opinion at p. 178.)

A will of personal property took effect after the Revised Statutes. There was an absolute bequest of personalty, and then provision that it should go over by remainder in the event of the first legatee dying under age; the remainder was held good and the case was distinguished from those in which the limitation over was preceded by an absolute power of disposition in the first taker, the court saying: "In such cases a further limitation was clearly hostile to the nature and intention of the gift." *Norris* v. *Beyea*, 13 N. Y. 273.

There was a devise and bequest of realty and personalty to B., daughter, her heirs and assigns forever, and in the event of her dying without issue a legacy was given to C., and a guardian was appointed for the daughter during her minority and directed to apply such part of the estate as he should deem necessary for her maintenance and education and support. The provision for the legacy was held good upon the ground that the power of disposition was limited to a special purpose and during a definite period, but it was admitted that an absolute power of disposition would have been repugnant to the bequest of the legacy. *Trustees, etc.*, v. *Kellogg*, 16 N. Y. 83.

By the will the absolute power of disposition is given to the executors, and if no other person has any interest in its execution and it be construed as unaccompanied by any trust, it is a beneficial power in them and they take an absolute fee. (Secs. 79, 82, 83, 1 R. S. 732–3.) *Kinnier* v. *Rogers*, 42 N. Y. 534.

A devise of lands, with power of absolute disposal for the use of the devisee, without anything to qualify the words, is a gift in fee simple.

2. EFFECT OF POWERS IN CREATING A FEE.

1. POWER OF SALE AND DISPOSITION.

The word "estate" used in a devise refers to the testator's title, and indicates an intent to give all the estate or interest in the property which the testator can dispose of by will, unless by express terms or by necessary implication it appear, that it was used as descriptive of, or referring to the *corpus* of the property, but it may be controlled by other portions of the will.

After a devise, in fee, the will contained a devise of other "real estate" to the same devisee for her own *personal* and independent use and maintenance, with full power to sell or otherwise dispose of the same, in part or in whole, if she should require it or deem it expedient, and upon her death a devise over to a religious society.

Construction:

By the last devise, the devisee took a life estate only, with a conditional power of disposal annexed, which did not operate to enlarge the estate to a fee, and only authorized a disposition by the devisee, by a conveyance which should take effect during her lifetime, not by will; also the limitation over was not repugnant to this devise, and was valid.

Terry v. *Wiggins*, 47 N. Y. 512; 2 Lans. 272.

From opinion.—"The statutes of this state have to some extent modified the rigor and relaxed some of the technical rules of the common law in respect to estates. It is provided, among other things, that, where an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or years, such estate shall be changed into a fee absolute in respect to creditors and purchasers, but subject to any future estates limited therein in case the power should not be executed or the lands sold for the satisfaction of debts (1 R. S. 732, sec. 81)." On same point see s. c. below, 2 Lans. 276.

Will gave all property, real and personal, to daughter C., excepting sums necessary to pay certain legacies, after enumerating which it contained the clause: "All my remaining property * * * I give, devise and bequeath to my daughter C. for her support and comfort, to be held and controlled by her, and at her death to pass to her heirs, and if she have no heirs, to be disposed of by her will, etc."

Construction:

Gift in first clause was qualified and limited by residuary clause, so that daughter took estate for life in lands of which testator died seized, with remainder to her issue living at her death, and with power in default of issue to appoint the fee by will, and, therefore, a conveyance by C. and living children did not give an absolute title, as after-born children would take interest under the will.

The personal estate of a testator will not be discharged from the pay-

ment of debts, unless it clearly appears by the will that he so intended. This will not be inferred simply from the fact that authority is given to sell all or some part of the real estate for the payment of debts, especially in a case where no disposition is made of the personalty. *Vernon* v. *Vernon*, 53 N. Y. 351.

There was a bequest to B., widow, of a sum of money during her life or widowhood, with power to use so much of the principal as might be necessary for her support, with remainder to her children. The court sustained the validity of the gift and remainder on the ground that the power of disposition was not absolute, but limited and conditional. Judge Rapallo said that "the cases sustain the proposition that where an absolute power of disposal is given to the first legatee a remainder over is void for repugnancy, but they also recognize the principle that if the *jus disponendi* is conditional, the remainder is not repugnant; the power of disposition in the present case is only for a special purpose—the support of the widow." *Smith* v. *Van Ostrand*, 64 N. Y. 278.

Life estate was not enlarged by power of sale. *Ackerman* v. *Gorton*, 67 N. Y. 62, digested p. 301.

Direction that residuary estate be divided equally among children, the shares of the daughters "to be secured to them for their separate use during their natural lives", and in case of one dying without issue, so much of her portion "as may remain at the time of her * * * death" should revert to the surviving children subject to the right of each daughter to dispose of one-half of her share by will.

By another clause the real estate was devised to the executors in trust, to sell and apply proceeds as will directed. By codicil, stated to be for the purpose of making clear any obscurity in title of children, the testator gave to each of his children an equal portion; to each son a portion absolute; to each daughter an estate for life, with remainder to her lawful issue, subject to her right to dispose of one-half by will, and subject to the power in executors to sell and convey; and in case of a daughter's death without issue, such portion of her share as she had not disposed of by will to go to her brothers and sisters.

Construction:

The corpus of each daughter's share should be kept entire, and she was only entitled to use the income thereof; the power of disposal given daughter did not enlarge her estate during life; no trust was created in favor of executors and each daughter was entitled

to have her share paid to her upon giving adequate security for the preservation of the corpus. *Livingston* v. *Murray*, 68 N. Y. 485, modifying 4 Hun, 619.

There was a gift to B., wife, of real and personal estate with a gift over of the property or such portion "as may remain" after the death of B. The limitation over was repugnant to the power of disposition. *Campbell* v. *Beaumont*, 91 N. Y. 464.

There was a devise and bequest of real and personal property to B., daughter, but in case of her death, leaving no issue, before the death of his wife, then all the property, both real and personal that should be left by B., to his wife, her heirs and assigns forever. Although the language "shall be left" imported a power of disposition in the daughter, the remainder to the wife was valid. *Wager* v. *Wager*, 96 N. Y. 164.

A valid executory devise can not, at common law, be limited after a fee, upon the contingency of the non-execution of an absolute power of disposition vested in the first taker,and such a limitation over is void. An absolute power of disposition annexed to a primary devise in fee is deemed conclusive of the existence in the devisee of an absolute estate

It seems the rule is the same as to bequests of personal property.

As to whether this rule of common law has been changed by the Revised Statutes (1 R. S. 725, secs. 32, 33), *quære.*

F. died in in 1791, leaving a will by which he devised certain real estate to his wife for life, remainder over to his son D., his heirs and assigns forever. He devised another parcel to his son H. A subsequent clause of the will provided that if either of the testator's "two sons shall die *seized of the estate hereinbefore bequeathed*, or any part thereof, without lawful issue, that then the estate of him so dying seized hereby bequeathed shall descend to the other." After the death of the widow D. took possession of the parcel so devised to him; he died intestate without issue, and without having conveyed or otherwise disposed of the land. Action of ejectment in which the plaintiff claimed title under H.

Construction:

The words "shall die seized of" imported an absolute power of disposition in D.; therefore, the limitation over was void, and D. took an absolute title. *Van Horne* v. *Campbell*, 100 N. Y. 287.

The will of C. gave his residuary estate to his wife M. "to be used and enjoyed and *at her disposal* during the term of her natural life."

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One-third of said estate "that may remain" at the decease of his said wife, the testator gave to an adopted daughter during life; and the other two-thirds and the remainder of the one-third to four persons named, who were described as "the present heirs" of M. Held, that, upon the death of C., his widow took a life estate with a limited power of disposition during her life, for her use and enjoyment, and any interest in the other beneficiaries was dependent upon the contingency of the exercise by her of this power of disposition. *Matter of Cager*, 111 N. Y. 343.

"It is contended further, on the part of the defendants, that, as the widow has full power to use so much of the principal of the estate as she might deem necessary for the support of herself and children, and as she has full power of sale, the testator meant her to have dominion of the entire estate, and that her children should take what she did not use, and that such disposition confers upon her a fee; and the cases of Beaumont v. Beaumont, 91 N. Y. 474; Wager v. Wager, 96 id. 164, and Crane v. Wright, 114 id. 307, are cited to uphold this contention. These cases, as well as certain provisions of the Revised Statutes (1 R. S. 733, secs. 81, 83), would have been controlling if the testator had given his widow the absolute power to dispose of the estate for her sole benefit. But she was not solely interested in the estate. She was a trustee and was clothed with a power for the benefit of others as well as herself, and, therefore, she took no greater or other estate under the will than its terms gave her." *Haynes* v. *Sherman*, 117 N. Y. 433, 438.

Where a will and codicil are plainly inconsistent, the latter must control, to the extent necessary to give it full effect.

Where a predominant purpose is apparent in a will, but a doubt arises as to the method devised to effect that purpose, the doubt will be so resolved as to accomplish the purpose, by presuming the testator intended a legal, not an illegal method.

The will of W., after giving his personal property to his wife "forever," gave his farm to his wife and two daughters, T. and H., "to occupy and dispose of as they may deem proper," with these provisions: That his wife and T. "have a comfortable home in the house, together with all the fuel, fruit and proceeds of the farm to which they will be entitled as joint owners," and that if H. should die without leaving a child, her share "to be equally shared by" his wife and T. The devise was made subject to certain legacies, which the testator directed his executors to pay "at or before the expiration of four years" after his death and that of his wife. A codicil which the testator declared therein was "to be taken as part" of his will, contained this provision:

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"I, therefore, will and direct that all that may remain of the property of my wife * * * both real and personal, at her decease, be made over to and become the property of Cyrus Bray." His wife died before the testator; she had no separate property.

Construction:

The words "all that may remain of the property of my wife" should be construed as meaning all that might remain of the property the testator had provided for her use; he either construed the will as giving her a life estate, with power to sell or intended by it and the gift over in the codicil, to effect that result; and, upon the death of the testator, Bray took one-third of the real estate. *Crozier* v. *Bray*, 120 N. Y. 366.

Aff'g 39 Hun, 121. Citing, on widow's estate, Taggart v. Murray, 53 N. Y. 233, 236; Norris v. Beyea, 13 id. 280, 284; Terry v. Wiggins, 47 id. 512; Wager v. Wager, 96 id. 164; Campbell v. Beaumont, 91 id. 464; Smith v. Bell, 6 Pet. 68; Colt v. Heard, 10 Hun, 189; Greyston v. Clark 41 id. 125; Wells v. Seeley, 47 id. 109; Leggett v. Firth, 53 id. 152.

H., by her will gave to her husband all her property "in trust" for purposes thus stated: "to be by him held, enjoyed and disposed of as follows: * * * 1st. To his own proper use, benefit and advantage during his natural life, meaning and intending that out of the said estate, its income, substance, profits and avails, my said husband may and shall derive his support in whole or part accordingly as said estate may be made available and my said husband may determine; but it is my desire that as much of said estate or its profits or avails as my said husband shall die seized or possessed of, shall be by him left, secured and disposed of as to be devoted to the support and education of orphaned children, in such way and manner as in his judgment may best conserve this object." The testatrix then expressed a desire that her husband shall "make such gifts or mementoes in my name to such of my surviving relatives and friends as I have heretofore verbally named and requested of him." She appointed her husband sole executor, and conferred upon him "full power and authority * * * to bargain, sell and convey" any and all of the estate. Then followed this clause: "The trust hereby created is intended to confer such right and authority unqualified, as well as to authorize and empower my said executor and trustee to make, execute and deliver any such deed or conveyance as shall be needful and proper to fully carry out and complete any sale, transfer or encumbrance, and to use or invest the proceeds;" also, that if any portion of the estate or its avails "be used by my said husband, such use shall be restricted to his personal wants and necessities."

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In an action of ejectment plaintiff claimed under a deed of certain of the real estate sold under an execution against the husband. After such sale, the husband, as executor and trustee, sold said real estate to raise money to pay the debts of the testatrix.

Construction:

The trusts sought to be created by the will were void; the husband took a life estate in the property (1 R. S. 728, sec. 47), with the right to use so much of the principal as might be required for his personal wants, but did not take an absolute fee. Terry v. Wiggins, 47 N. Y. 512; Smith v. Van Ostrand, 64 id. 278; Ackerman v. Gorton, 67 id. 63; Campbell v. Beaumont, 91 id. 464. The provisions of the Revised Statutes (1 R. S. 732, sec. 84), turning an estate for life into a fee, "where an absolute power of disposition, not accompanied by a trust, shall be given to the owner," did not apply, as an absolute power of disposition was not given within the definition of that term stated in the said statutes (sec. 85); also, as to the remainder there was no valid disposition thereof, and so, as to it, the testatrix died intestate.

Also, a valid power of sale was given to the husband and was properly executed; and, therefore, when he conveyed the real estate, any interest in the land which he had as life tenant, was destroyed, and the lien of the judgment and the title acquired by virtue of the sale on execution were subverted and the purchaser from the executor acquired a good title; also, a wrong motive on the part of the executor in making the sale, and the misappropriation of the proceeds, would not defeat the purchaser's title. *Rose* v. *Hatch*, 125 N. Y. 427: aff'g 55 Hun, 457.

The will of F., after legacies to the testator's children and a gift to his wife "forever" of the residuary personalty, also a provision that in case the personalty was insufficient to pay the said legacies enough real estate should be sold for that purpose, contained this clause: "I also give, devise and bequeath to my wife E. all the rest and residue of my real estate, but on her decease the remainder thereof, if any, I give and devise to my said children or their heirs respectively, to be divided in equal shares between them." Action for the specific performance of a contract for the purchase of land which formed part of the residuary real estate, title to which plaintiff claimed through the widow.

Construction:

The widow took only a life estate; by necessary implication a beneficial power was conferred upon her to dispose of the residuary real estate, with a limitation over in case of her death without exercising

the power; and, therefore, she could convey a good title. *Leggett* v. *Firth*, 132 N. Y. 7.

From opinion.—"The nature of the widow's estate is pointed out by the event, upon the happening of which the devise of the remainder is to take effect. That event is her death, and as she was to hold until that event happened, she took a life estate. Crozier v. Bray, 120 N. Y. 366; Van Horne v. Campbell, 100 id. 287; Wager v. Wager, 96 id. 164; Terry v. Wiggins, 47 id. 512; Norris v. Beyea, 13 id. 280; Smith v. Bell, 6 Fed. 68; 1 R. S. p. 748, sec. 1. But the remainder itself was in turn limited by the words "if any," which show that the testator did not intend that necessarily there would be anything left upon the death of his wife. 'The remainder, if any,' means the same as 'if there shall be any remainder,' and the gift over is of what may be left. As it would all be left unless there was a right to dispose of it, it follows by necessary implication that he intended his wife should have that power. Otherwise the words 'if any' must be rejected as having no meaning whatever. As was said by the learned general term the words under consideration 'confer a beneficial power of disposition of all the property upon the wife during her lifetime, with a limitation over in the event of her death without an exercise of the power. Whether the children took anything under the devise over of all the remainder depended upon a contingency, not indeed expressed, but plainly implied from the words 'if any' and the power of the primary devisee to dispose of the entire estate is implied from the same words of limitation.' At common law the gift over would have been void as repugnant to the prior estate, upon the ground that a valid executory devise can not be defeated at the will of the first taker. Jackson v. Bull, 10 Johns. 19; Van Horne v. Campbell, 100 N. Y. 287. Under the Revised Statutes, however, an expectant estate may be defeated by any means which the party creating the estate 'shall in the creation thereof have provided for or authorized,' and such an estate can not be adjudged void in its creation because it is thus liable to be defeated. 4 R. S., 8th ed., p. 2434, secs. 32, 33; Terry v. Wiggins, 47 N. Y. 512, 518; Thomas v. Wolford, 49 Hun, 145; Colt v. Heard, 10 id. 189."

Devise to B., wife, of real and personal "absolutely to have and hold the same for her own use and benefit forever, and with full power and authority to sell or mortgage, as she thinks proper" with remainder over of what she died seized of that "belonged to me and remains in her by virtue of this will" gives the property to B. for life for any purpose that she should judge to be for her use and benefit, but she could not dispose of any portion by will, and so much as remained in her hands undisposed of at the time of her death passed over under a remainder. *Greyston* v. *Clark*, 41 Hun, 125.

Manley Griswold, by his last will and testament, after providing for the payment of all his lawful debts, gave and bequeathed to his wife, Laura Griswold, "all the real estate of which I may die seized or possessed in the village of Forestville, with full power to sell and convey the same as she may see fit, and to give a deed of conveyance thereof."

Construction:

The words of the grant were sufficient to convey a title in fee to the devisee of the lands.

A gift of land by will, with an absolute power to sell and convey the same by the devisee, without any subsequent provision or words to qualify the power to sell, is a gift in fee simple.

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Same will:

The will also contained the following provision: "I also give and bequeath to my said wife the full and absolute use and control of all my personal estate, to be held, used and enjoyed by her as she sees fit, to use in repairs for her separate estate, to pay hired labor as well as to repair our cemetery lot, erecting a family monument thereon, and for any and all purposes she sees fit to use the same for; and I hereby direct that she shall lay out the sum of $150 on the lot in the old cemetery in which my father and mother are buried, in erecting a monument on said lot for my father and mother aforesaid. Whatever property shall be left at the death of my said wife I give and bequeath the same to my nephew, Benjamin Griswold, should he be living at the death of my said wife. If he is not living, then the same to be divided among my wife's heirs at law."

Construction:

Mrs. Griswold took an absolute and unqualified title to the real and personal property of the testator after applyiug so much of the personal property as was necessary to carry out the special provisions of the will relative to the erection of monuments on the cemetery lots.

This comprehensive language gave the legatee the unqualified power to use and dispose of the same in her lifetime, or to bequeath the same by will; and if she did neither, then the same would, by operation of law, go to her next of kin unless by other words or provisions of the will the legal effect of these words was changed or limited,

Same will:

Upon the death of the wife a portion of the personal property received by her remained in her possession undisposed of.

Construction:

The provision of the will giving such remainder to the nephew of the testator was repugnant to the gift of the same property to his widow, and for that reason was inoperative and void. *Griswold* v. *Warner*, 51 Hun, 12; following Campbell v. Beaumont, 91 N. Y. 464, distinguishing Terry v. Wiggins, 47 id. 512; Flanagan v. Flanagan, 8 Abb. N. C. 413; Tyson v. Blake, 22 N. Y. 558.

The will of a testator gave to his widow the use of his real and personal estate, with full power of sale of the real estate "as to her shall seem just." After her death one-half or the estate was to pass to each of two daughters for life, with remainder to their children. The widow was also the executrix named in the will.

Construction:

The power of sale given to the widow was only for the benefit of the estate, and she was not entitled to the proceeds of sales made by her thereunder.

A gift of a life estate, with a power of sale, and a remainder over of all the property, are consistent dispositions. *Matter of Blauvelt*, 60 Hun, 394, rev'd in part 131 N.Y. 249.

A devised and bequeathed to B. all his real and personal property, in trust, to sell and dispose of the same and out of the proceeds to pay debts and legacies, the residue to belong to B., but the will contained no provision entitling the latter to the actual possession of the lands or authorizing him to receive the rents and profits.

At common law, when an absolute power of disposition is added to the gift of a particular estate, such estate will be magnified into a fee. (See Helmer v. Shoemaker, 22 Wend. 137, for cases.) And it is so under our statute (1 R. S. 732, sec. 81.) But here there was no particular estate for life or years in B. to be

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enlarged into a fee. He had nothing but a power. Still the absolute power of disposition, although no estate is limited to the grantee of the power, will sometimes carry a fee. But that is only where the power is not accompanied by any trust. (Id. secs. 81–3.) Here there was a trust to pay debts and legacies. And, besides, the power of disposition is only deemed absolute when the grantee of the power is enabled "to dispose of the entire fee for his own benefit." (Id. 733, sec. 85.)

If this was a beneficial power in the execution of which no person was interested but the grantee (id. 732, sec. 79), it would then carry a fee of the land (id. 733, secs. 83, 85). But though the grantee be entitled to the residue here creditors and legatees were to be paid out of the avails of the land. *Germond* v. *Jones*, 2 Hill, 569, 574.

NOTE.—As to the rule before the Revised Statutes, see Jackson v. Robins, 16 Johns. 537. Also, see Jennings v. Conboy, 73 N. Y. 230.

The power of S. G., after the death of her sons without issue, to dispose by will of one-half of the said estate, was a general beneficial power, she having the power to devise in fee to any person whatever, and no person but the grantee having any interest in the execution of the power. Sec. 81 provides that where an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate for life or years, such estate shall be changed into a fee, etc. Sec. 83 provides that in all cases where such power of disposition is given and no remainder is limited upon the estate of the grantee of the power, such grantee shall be entitled to an absolute fee. Sec. 84 provides that where a general and beneficial power to devise the inheritance shall be given to a tenant for life or years, such tenant shall be deemed to possess an absolute power of disposition within the meaning and subject to the provisions of the preceding sections.

S. G., upon the death of her two sons without issue, had by the clause of this will above quoted conferred upon her, she being a tenant for life, a general and beneficial power to devise the inheritance, and this was brought directly within the provisions of section 84, giving her an absolute power of disposition of one undivided half of the estate. This absolute power of disposition being unaccompanied by any trust and no remainder being limited upon the estate of Mrs. G., the grantee of the power, she, by section 83, became entitled to an absolute fee in the one undivided half of the estate and could and did give her grantee good title. *American Bible Society* v. *Stark*, 45 How. Pr. Rep. 166.

A devise to A. of "all my real and personal estate that I may die possessed of during her (A.'s) life, and at her death the property, should any be left, to be divided," etc., gives her a power of disposition of corpus and such as had not been consumed for her support and maintenance to be divided as directed. *Thomas* v. *Wolford*, 21 Abb. N. C. 231.

A power of sale is not an estate or interest in lands. The statutes require an absolute power of disposition and define such power to be one by means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit. In such a case the grantee takes a fee subject to any future estate limited thereon, but absolute in respect to creditors and purchasers. *Blanchard* v. *Blanchard*, 6 Sup. Ct. (T. & C. at p. 555); s. c., 4 Hun, 290, aff'd 70 N. Y. 615.

See further on this subject, Low v. Harmony, 72 N. Y. 408; digested p. 1009.

See, also, Repugnant Limitations, p. 115.

NOTE OF ADDITIONAL DECISIONS.—Cases where the estate is given to B. with *absolute* power *of disposition*, either express or implied, and the will gives another estate in the property at the death of B.

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Devise to B. forever and proviso that if she "at her decease should make no disposal of the property" and leave no children to inherit it, then over, gives power to will or convey. Kimball v. Sullivan, 113 Mass. 345; Albert v. Albert, 10 Central, 567; Lienau v. Summerfield, 41 N. J. Eq. 381.

Devise to B., wife, of land of little benefit, with power of disposal "in her own name and for her own purposes," and that at her death she "make an equal devise of her estate to such children as shall survive her," gives wife absolute title. Sears v. Cunningham, 122 Mass. 538; see Davis v. Bawcum, 10 Heisk. 406.

General power of disposition to B., and what may remain unused over to C., gives the fee to B. Bolman v. Lohman, 79 Ala. 63.

See Pierce v. Simmons, 16 R. I. 689; Rood v. Watson, 54 Hun, 85; Markley's Estate, 132 Pa. 352; Boyd v. Saltenwhite, 10 S. C. 445.

Chancellor Kent held that "there is not a case to be found in which a valid executory devise was held to subsist under the absolute power of alienation in the first taker." Jackson v. Robbins, 15 Johns. 169; s. c., 16 id. 537.

There was a devise to B., wife, *without words of limitation* and that "all the avails of the property that might remain" at her decease should go over. B. took absolute fee by reason of the power of disposition. Helmer v. Schoemaker, 22 Wend. 137.

A devise was to B. of realty, to be at her entire disposal, but if any part remained unsold at her death, devise of same to testator's children and grandchildren. The will took effect before the Revised Statutes and it was held that the wife took an absolute fee and that the subsequent limitation was repugnant and void; the judge saying: "Here the whole estate was made defeasible by the disposition of the property of the testator, and by a consequence it could not be deemed an executory devise." McDonald v. Walgrove, 1 Sandf. Ch. 274.

There was a devise to B., son, his heirs and assigns forever, and also a devise of personal estate in words denoting an absolute interest, and subsequently a clause declaring "and, further, it is my will, that if my son shall die and leave no lawful issue, what estate he shall leave to be divided between" persons named. The limitation over was void for repugnancy to the power of disposition. The power of disposition was implied from the words "what estate he shall leave." Ide v. Ide, 5 Mass. 500.

There was a devise to B., son, and his heirs, and if he should die without a son, and not sell the land, then to son C. The devise over was void. Nelson v. Doe, 4 Leigh, Va., 408.

The same was held in Riddick v. Cohoon, 4 Rand. 547, where the power of disposition was implied from the words "so much of the estate as may remain undisposed of."

It was stated to be an incontrovertible rule obtaining in the state of Georgia that an estate given either by deed or will to a person, generally or indefinitely, with an unlimited power of disposition annexed, invariably vests an absolute fee in the first taker, and that neither a remainder nor an executory devise could be limited on such an estate. Cook v. Walker, 15 Ga. 457.

To the same effect was Flynn v. Davis, 18 Ala. 132.

It was held that a gift over of real and personal estate of what remains on the death of the first taker was void, and the doctrine that the absolute power of disposition in the first taker was fatal to a limitation over was declared in Ramsdell v. Ramsdell, 21 Me. 288; in Williams v. Jones, 2 Swan, Tenn., 620; Davis v. Richardson, 10 Yerg., Tenn., 290, and also in 1 Jones, N. C., 463; Pickering v. Langdon, 22 Me. 413.

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See, also, to same effect, Attorney-General v. Hall, Fitzg. 314; Flanders v. Clark, 1 Ves. Sr. 9.

A gift over of personal property after a prior general gift accompanied with an absolute disposing power in the first taker, is void for repugnancy. Bull v. Kingston, 1 Mer. 314, and Ross v. Ross, 1 Jac. & W. 154.

See Homes v. Godson, 8 DeG., MeN. and G. 152; In re Stringer's Estate, L. R., 6 Chan. Div., 1; Shaw v. Ford, L. R., 7 Chan. Div. 669.

Contrary doctrine to Van Horne v. Campbell, 100 N. Y. 287, *supra*, was held in England in Doe v. Glover, 1 M., G. & S. 448, and Beachcroft v. Broome, 4 Term. Rep. 441.

Devise generally, and power of sale and remainder over gives life estate to first taker. Jones v. Jones, 66 Wis. 310.

Devise of real and personal to B. with power to sell and reinvest "as she may desire, any part of the same for her own support, use and benefit, and, at her death, the estate undisposed of to go to my three daughters" gives B. life estate. Anderson v. Hall, 80 Ky. 91.

Devise to B., wife, to remain hers as long as she continues unmarried, with power of sale of what is necessary, gives life estate only. Nash v. Simpson, 78 Me. 142.

There was a devise and bequest of personal property to several sons of a specific part of an estate, and "that if any of the sons should die without lawful issue, that then his or their heirs, excepting a certain amount to his or their widow, should be divided equally among the surviving sons." The question having arisen as to the personalty, Kent, Ch. J., was of the opinion that the executory devise was good; that although the language of the first devise imported an absolute intent, yet the limitation over qualified it and gave to the first devisee a life estate only. The Executors of Moffat v. Strong, 10 Johns. 17.

To same effect is Anderson v. Jackson, 16 Johns. 382.

The chancellor, in 1829, upheld an estate limited upon a prior devise in fee with implied power of disposal. Adams v. Beekman, 1 Paige, 631.

See, also, Bradhurst v. Bradhurst, 1 Paige, 331.

It was held that a devise of real property and remainder in fee would be limited by a fee in executory devise, although the will in terms implied an intention to give the devise of the principal estate and absolute interest, with express power of disposition. Blackstone states the rule to be that a fee simple or other lesser estate in real property may be limited on a fee simple by way of executory devise, although such a disposition would not be valid at common law as a remainder; but this was not so as to personal property. 1 Chitty Blackstone, Part 2, 319. Note that there is no power of disposition given. Bing v. Lord Strafford, 5 Beavan, 558; Parry v. Merritt, 18 Ex. Ch. 152.

It was held in 1793 that a devise to B. and his heirs, but if he died without settling or disposing of the estate or without issue, then over, gave a valid estate over only to be defeated in the manner stated. Beachcroft v. Broome, 4 Term Rep. 441.

To same effect is Doe v. Glover, 1 M., G. & S. 448.

Cases where there is a *life estate* given to B., and with an absolute power of disposition, and the will gives another estate in the property at the death of B.

There are decisions to the effect that the first taker has only a life estate.

Power of disposal will not enlarge a *life estate* to a fee against manifest intention.

2. EFFECT OF POWERS IN CREATING A FEE.

2. POWER OF SALE AND DISPOSITION.

Hull v. Holloway, 58 Conn. 210; Sanborn v. Sanborn, 62 N. H. 631; Rose v. Hatch, 55 Hun, 457; Lewis v. Pittman, Mo., 14 S. W. 52.

Devise to B. for life, with authority to dispose of the same by last will does not carry a fee, as the right to testamentary disposition is a mere power.

Bryant v. Christian, 58 Mo. 98; Dunning v. Van Dusen, 47 Ind. 423; Brant v. Va. Coal Co., 2 Hugh. 501; S. P. Low v. Harmony, 72 N. Y. 408.

Devise to B. for life with power of disposition at death gives life estate, but if the devise be general with general power of disposition the estate is absolute.

Toten v. McLellan, 50 Miss. 1; Donohugh v. Helme, 12 Phila., Pa., 525; Foos v. Scarf, 55 Md. 301.

A devise to B. for life is not enlarged by an unexercised power of sale to convey a fee. Harbison v. James, 90 Mo. 411; Lienau v. Summerfield, 41 N. J. Eq. 381.

Devise to B. of the use, income, etc., of estate, with power of disposition during life or of any that may remain at death, and if not so disposed of by B., over by remainder, creates a contingent remainder over.

Taft v. Taft, 130 Mass. 461; Deffenbaugh v. Harris, 4 Cent., Pa., 464.

Devise to B., wife, of entire control and use of property during her life, with power to dispose of it as she may think best, etc., gives B. an absolute estate, and subsequent bequests are void.

Re Will of Burbank, 69 Iowa, 378; Patty v. Goolsby, 51 Ark. 61; Brubakers' Appeal, 15 Atl., Pa., 708.

Bequest of personal property for use during life, with full power of disposition of the same during life, gives absolute title.

Brown's Appeal, 12 Central, 684.

Devise to B. for life and "to make what disposition she may see fit at her death," vests absolute title at her death.

Troup v. Hart, 7 Baxter, Tenn., 188; Davis v. Mailey, 134 Mass. 588.

2. POWER TO USE OR CONSUME THE PRINCIPAL.

Power to use up the corpus implies an absolute ownership thereof. repugnant to and destructive of the limitation over after death. *Livingston* v. *Murray*, 68 N. Y. 485, modifying 4 Hun, 619.

See Hill on Trustees, 74; Pierson v. Garnet, 2 Bro. Ch. Rep. 46; Bland v. Bland, 2 Cox, 349; Jackson v. Bull, 10 J. R. 19; Jackson v. Robins, 15 id. 169; Helmer v. Shoemaker, 22 Wend. 137; Annin's Exrs. v. Vandoren's Admr., 1 McCartee, N. J., 135; Ide v. Ide, 5 Mass. 500.

Y., by his will, after payment of debts, gave to his wife all of his "estate, both real and personal, she to have and to hold the same and to receive and enjoy as her own property, the rents, issues and profits therefrom during life;" remainder to his children. He died seized of two adjoining farms, upon one of which he lived at the time of his decease, and which had been used in connection and in part for dairy purposes. The personal property consisted of stock upon the farms and a quantity of farm produce, to wit, hay, oats, corn, wheat and potatoes. The widow used and disposed of the farm produce. Settlement of the accounts of the executor.

2. EFFECT OF POWERS IN CREATING A FEE.

2. POWER TO USE OR CONSUME THE PRINCIPAL.

Construction:

He was not chargeable therewith; it could not be presumed to have been the testator's intent to have the perishable property taken from the widow and sold by the executor, but rather, as they were essential to the support of the stock and the carrying on of the farm, from which only her maintenance could come, that she was to enjoy and use the property as the testator had done and in the form in which he left it. *Matter of the Settlement of Accounts of Yates*, 99 N. Y. 94.

NOTE.—From the operation of the general rule, which admits of a limitation over of a chattel interest after a life estate in the same, are excepted articles of which the use consists in the consumption.

Devise to B., wife, of residuary estate "to have and to hold the same and every part and parcel thereof to her and her assigns forever," with the provision that if any part of the property should remain unexpended or undisposed of at B.'s death this he gave to his son, his heirs and assigns; and then followed an expression of the testator's expectation and desire that his wife should not dispose of any of the estate by will in such a way that the whole that remained at her death would go out of his "own family and blood relations." The testator had one child, a son by a former wife. B., by will, disposed of so much of the residuary estate as remained at her death by giving a large portion to the son and also one-fourth of her residuary estate, and another one-fourth to a sister of her husband. B. had the right, by will or otherwise, to dispose of the property and her estate was not qualified by the concluding paragraph expressing the testator's expectation and desire. It was held that the wife, in the first instance took an absolute and unlimited fee with power to dispose of the property in any manner authorized by law, but that the condition annexed to the devise that if she died leaving any part of the property undisposed of at her death, etc., converted such fee into a qualified or base and determinable fee, but that such condition only took effect in case she died without having disposed of such property.

Here it was gathered that the subsequent clauses would affect the fee but not the power of disposition. *Matter of Gardner*, 140 N. Y. 122.

A testator gave to his wife all his "property, both real and personal, for her to use, occupy and possess, sell or dispose of, in any way that she may deem proper for her own use and benefit; * * * and it is my will that all the property that Esther, my wife, shall possess at the time of her death, both real and personal, shall be disposed of in the following manner: Let one-half be given to her heirs, or to whom she may see fit to bequeath it. Let the other half be divided between" relatives of the testator named in the will. Esther had a separate property of her own.

2. EFFECT OF POWERS IN CREATING A FEE.

2. POWER TO USE OR CONSUME THE PRINCIPAL.

Construction:

The wife was at liberty to enjoy the income and use the principal, if she desired to do so, but if she did not use all the principal, then whatever remained at the time of her death should go as provided in the will. *Spencer* v. *Strait*, 38 Hun, 228; following, Wager v. Wager, 96 N. Y. 164

By the second clause of his will a testator gave, devised and bequeathed unto his beloved wife all his estate, real and personal, of which he might die seized or possessed, and wheresoever situate, or so much thereof as she might use during her life. By the third clause he gave, devised and bequeathed unto certain persons therein named "the rest, residue and remainder of the estate of which I (the testator) may die seized or possessed, and which shall remain unused at the death of my (his) wife, share and share alike."

Construction:

The devise of the remainder was valid, and the wife had no power to assign moneys belonging to the estate which were, at the time of the assignment and of her death, deposited in a bank. *Wortman* v. *Robinson*, 44 Hun, 357, aff'd 113 N. Y. 628.

Devise in trust, interest to be used for W., and in later years principal if necessary, gave W. all the income and so much of the principal as he should need for his life Residue remaining at his death became a part of the residuary estate. *Matter of Fuller*, 22 St. Rep. 352.

Justus Beardsley died on September 30, 1879, leaving him surviving his widow, Emily R. Beardsley, and two children, Willis S. and Helen P. Beardsley, and leaving a last will and testament, by the fourth clause of which he provided as follows; "All the rest and residue of my estate, both real and personal, I give and bequeath to my beloved wife Emily R. Beardsley, to be held and used by her as she shall see fit and proper during the full term of her life; and at her death if any part of my said estate shall remain unexpended, then, and in that case, I give and bequeath such remaining portion to my said son, Willis S., and my said daughter, Helen P., in equal parts, each to each." Willis S. Beardsley died on April 14, 1883, intestate, leaving no child or descendant. Emily R. Beardsley died intestate on January 31, 1885, leaving Helen P. her only surviving child or descendant. Helen P. Beardsley died June 16, 1885, aged seventeen years, leaving no child or lineal descendant, but leaving a last will and testament, which purported to devise and bequeath all her real and personal property, which was duly proved and admitted to probate as a will of personal property only.

Construction:

The testator's widow did not acquire such an absolute title to the property in controversy as to render the limitation over to her children void, either under the rule at common law or under the Revised Statutes, *Wells* v. *Seeley*, 47 Hun, 109; Campbell v. Beaumont, 91 N. Y. 464; VanHorne v. Campbell, 100 id. 287, distinguished.

Citing, Smith v. Bell, 6 Peters, 68; The trustees, etc. v. Kellogg, 16 N. Y. 83; Terry v. Wiggins, 47 id. 512; Smith v. Van Ostrand, 64 id. 278; Wager v. Wager, 96 id. 164; Colt v. Heard, 4 W. D. 197; Flanagan v. Flanagan, 8 Abb. N. C. 413; Spencer v. Strait, 38 Hun, 228; Greyston v. Clark, 41 id. 125; 1 R. S. 725, secs. 32, 33; p. 732, sec. 81.

NOTE TO ADDITIONAL CASES.—Cases when the estate is given to B. *in fee*, with power to diminish or consume the property for his own purposes and at his discretion and the will gives what is left at the first taker's death to C.

2. EFFECT OF POWERS IN CREATING A FEE.

2. POWER TO USE OR CONSUME THE PRINCIPAL.

Devise to B., wife, of property to use and dispose of as she may please, and that after her death the daughter shall have the whole on paying a legacy to her sister, but if B. is obliged to diminish the property, other arrangements shall be made for the daughter, gives B. the fee.

Benkert v. Jacoby, 36 Iowa, 273; S. P., Clark v. Middlesworth, 82 Ind. 240.

Devise to B., the owner of the first estate, to consume property during lifetime, and devise over of what may be left, gives a fee to the first taker.

Stuart v. Walker, 72 Me. 145; same case, 39 Am. Rep. 311; Copeland v. Barron, 72 Me. 206.

See Henderson v. Blackburn, 104 Ill. 227; Lyon v. Marsh, 116 Mass. 232; Weir v. Michigan Stone Co., 44 Mich. 506; Hall v. Otis, 71 Me. 326.

Bequest to B., wife, and if there be any of the estate left at her death, to be divided among others, gives whole estate to B.

Jones v. Bacon, 68 Me. 34.

See Lightner v. Lightner, 87 Pa. St. 144.

There are numerous authorities to the effect that a valid remainder was created in whatever is left unused by the first taker, and that whatever was left did pass to the remainderman.

Devise to B., wife, "to her use and disposal during life" and "whatever is remaining at her decease undisposed of by her" to C., gave B. estate for life, with power to defeat the remainder.

Burleigh v. Clough, 52 N. H. 267; to same effect, Flanagan v. Flanagan, 8 Abb. N. C., N. Y., 413; see Wager v. Wager, 96 N. Y. 164; Crozier v. Bray, 120 id. 366.

Greve v. Camery, 69 Iowa, 220. (This case holds that life tenant could not convey remainder, and that it was subject to execution against remainderman.)

Siddons v. Cockrell, 131 Ill. 653; Glover v. Reid, 80 Mich. 228; McCullough v. Anderson, 11 Ky. L. R. 939; Miller v. Potterfield, 14 Va. L. J. 277; Jenkins v. Compton, 123 Ind. 117; Douglass v. Sharp, 52 Ark. 113; Park v. American Home, etc. Soc., 42 Alb. L. J., Vt., 130; Goudie v. Johnston, 7 West, 586; 109 Ind. 427. (This case also holds that life tenant can not waste or dispose of property except for her support.)

See Best v. Best, 11 Ky. L. R. 74; Thomas v. Walford, 49 Hun, 145; Re Williamson's Estate, 9 N. Y. Supp. 476; Lewis v. Pitman, 14 S. W. 52; McDonnell v. Wilcox, 11 Ky. L. R. 532; Whittemore v. Russell, 6 N. Eng. 443; 80 Me. 297.

Bequest over to B. of "such property as shall then (at death of wife, first taker), be in her possession," and "such of said property as shall be left" after the death of the first taker, gave wife life use and what had not been used or consumed at her death to B. Monro v. Collins, 95 Mo. 33; 13 West, 663.

Devise to B., wife, of real and personal to remain hers with power of disposal as seems to her proper, so long as she remains a widow, and then over to C., carries over only what remains. Little v. Giles, 25 Neb. 313.

See Colt v. Heard, 10 Hun, 189; Greyston v. Clark, 41 id. 125; Wells v. Seeley, 47 id. 109; Leggett v. Firth, 53 id. 152.

Cases where the estate is given to a trustee with power to diminish or consume the principal for the benefit or purposes of B., and the will gives what is left at the death of the first beneficiary to C.

Devise to trustees for the benefit of B. and power to use principal and interest, if

needed, and if any remains at B.'s death, over to others, gives trustees the discretion as to disposal and what remained after B.'s death went over. Dillin v. Wright, 73 Pa. St. 77.

Devise to trustee for the benefit of daughter "the proceeds and profits thereof to be for her use and benefit during her life, and at her death to go to the heirs of her body," gives daughter life estate only. Montgomery v. Montgomery, 11 Ky. L. R. 87; Trumble v. Trumble, 149 Mass. 200.

Devise in trust for B., weak-minded daughter, for life, of residue, interest to be paid her "as she may need or require," and after her death residue, with whatever may have accumulated, over to others, gives B. such part of the income only as the trustees should deem suitable and necessary. Corlies v. Allen, 36 N. J. Eq. 100.

Bequest to guardian of B., son, to be expended in his education, and balance of the estate, deducting said several sums, to C. upon the son coming of age, gives B., son, unexpended balance upon coming of age. Nyce v. Nyce, 59 Md. 111.

See, as holding the main doctrine that the power of disposition or consumption must be personal to the first taker. Rose v. Hatch, 125 N. Y. 427, digested p. ; Haynes v. Sherman, 117 N. Y. 438, digested p. 98; Bundy v. Bundy, 38 id. 410, digested p.

Devise to B., daughter, of estate to be held by trustees who are to pay her the income for life and then to convey to children, and in default of children to such person as B. shall appoint, and in default of appointment, to her heirs at law living at her death, as if she had owned the estate and died intestate, gives B. a life estate. Maltby's Appeal, 47 Conn. 349.

Cases where the estate is first given to B. *for life*, with power to diminish or consume the property for his own purposes and at his discretion, and the will gives what is left at the first taker's death to C.

Cases arise where, in terms, the first taker is given a *life estate*, with power to consume, and it has been held that a devise of whatever was left did not create a good remainder.

B., widow, was made residuary legatee, with power to use and hold all property during her life and expend all, if necessary, for her comfort, and she was held to be the sole judge of the necessity, and her deed conveyed a valid title. Hall v. Preble, 68 Me. 100.

See Johnson v. Barttelle, 125 Mass. 453; and compare Gibbons v. Shepard, id. 541; see Verrill v. Weymouth, 68 Me. 318.

But the authorities are numerous that a devise of an *express life estate*, with right to consume, and of what is left unconsumed of the estate over, creates a good remainder. Re Oertle, 34 Minn. 174; Wright v. Wright, 41 N. J. Eq. 382.

See Harbison v. James, 7 West, 293; 90 Mo. 411; Griswold v. Warner, 51 Hun, 12; and Wells v. Seeley, 47 id. 109.

Devise to B. for life, with power to sell land and appropriate the proceeds, gives a life estate which can alone be mortgaged. L. I. Hospital and Trust Co. v. Commercial Nat. Bank, 84 R. I. 625.

See Pierce v. Stidworthey, 81 Me. 50; Greenhalgh v. Marggraff, 55 Hun, 605; Peckham v. Lego, 57 Conn. 553.

Devise of life estate, with power of disposition, and remainder over is good.

See, generally, Van Horne v. Campbell, 100 N. Y. 316; Shaw v. Ford, 7 C. D. 769; Kelley v. Meins, 135 Mass. 231; Wead v. Grey, 8 Mo. App. 515.

2. EFFECT OF POWERS IN CREATING A FEE.

3. POWER TO USE PRINCIPAL FOR SUPPORT.

The testator gave to his wife and niece all his real and personal property, subject to his debts, and directed his executors to convert the same into cash and invest for each legatee one-half the proceeds, and give to each the use and enjoyment of so much of the interest arising therefrom as should be necessary and proper for their maintenance and support; and directed, that, if the interest of their respective parts or the proceeds should not be sufficient for their respective support a portion of the principal should be applied for that purpose; and that, in case either the wife or niece should die without heirs, the share of the one so dying should go to the heirs at law of the testator's mother.

Construction:

Although the entire principal might be exhausted for the support yet the power of disposition of the fund is not established unless the legatee herself may determine the amount necessary for that purpose; hence, in the event of the death of the legatee without heirs the heirs at law of the testator's mother would take the remainder. *Bundy* v. *Bundy*, 38 N. Y. 410, 421

A remainder may be limited upon a bequest of money confided to the legatee for life, who thereby becomes the trustee of the principal during his life. 2 Kent's Com. 352, 353, 11th ed.; Norris v. Beyea, 13 N. Y. 273; 2 Washb. Real Prop. 673, 3d ed.

Devise to wife of money for her support during her life or widowhood, and then to be transferred to testator's children, all to be paid to widow within six months, etc.

Construction:

The bequest gave widow the use of money during her life or widowhood, with power to apply so much of the principal as might be necessary to her support, but with no further power of disposition; the remainder to the children was valid, and was not repugnant to the prior gift; upon death of widow the children were entitled to so much of the fund as was undisposed of for her support. *Smith* v. *Van Ostrand*, 64 N. Y. 278, rev'g 3 Hun, 450.

Distinguishing, Tyson v. Blake, 22 N. Y. 558; Patterson v. Ellis, 11 Wend. 259; Hill v. Hill, 4 Barb. 419; and citing Upwell v. Haley, 1 P. Williams, 651; Surman v. Surman, 5 Madd. 123; Terry v. Wiggins, 47 N. Y. 512; Trustees, etc. v. Kellogg, 16 id. 83.

Devise to B., widow, of fifty acres of land "to have and to hold for her benefit and support," and bequest of all the remainder of the prop-

erty after paying legacies to son, gave B. absolute estate. *Crain* v. *Wright*, 114 N. Y. 307.

Distinguishing, Henderson v. Blackburn, 104 Ill. 227; Paine v. Barnes, 100 Mass. 470, where the gift was expressly given during the lifetime.

S. died, leaving a widow and brothers and sisters surviving, but no descendants; by his will he gave all of his property to his wife, "to have and to hold for her comfort and support * * * if she need the same during her natural life." In a subsequent provision he gave to a church society $1,000 after the death of his wife, if there should be enough of the property left at that time. The widow remarried and executed to her husband a mortgage on the real estate of which S. died seized. She thereafter died. In an action brought by the heirs at law of S. to have the mortgage declared fraudulent and void, and to have it canceled of record as a cloud on plaintiff's title, held, that the widow took under the will a life estate, with power, also, to take and convert to her own use so much of the corpus of the estate as she should need for her comfort and support; that, instead of selling, she had the right to mortgage for the purposes specified, and the presumption would be that the mortgage was executed for such a purpose; that, therefore, the mortgage was not void upon its face and could be enforced by the mortgagee without the disclosure of extrinsic facts rendering it invalid, and the burden of showing these was upon those assailing it; and so, that the jurisdiction of a court of equity was properly invoked to cancel the apparent cloud upon the title. *Swarthout* v. *Ranier*, 143 N. Y. 499.

Citing Rose v. Hatch, 125 N. Y. 428.

A testator, by his will, bequeathed to his wife the use of so much of his library and furniture as she might wish to retain for life, with power to dispose of the remainder thereof; and also all his real and personal estate, "to be possessed and used by her at her discretion, and for her support and comfort during her natural life, having confidence in her that it will be used and retained, and the amount, the increase and the residue, whether more or less, left sacred to the purposes to which we mutually agreed to devote it;" he further bequeathed all his "estate, real and personal, goods and chattels, of whatever nature or kind soever in her possession and held by her, up to and at the time of her decease," after payment of her funeral expenses, to certain benevolent societies therein named, "to be held in trust by my executor, hereinafter named, and after her decease he is to have it divided equally between the societies above named."

Construction:

The legal title to the whole of the testator's estate was, immediately upon his death, vested in his executor, with a right in the widow to draw from the estate, out of either principal or income, so much as she might judge necessary for her comfortable support and maintenance, and, upon her death, the whole estate as it then ex-

2. EFFECT OF POWERS IN CREATING A FEE.

3. POWER TO USE PRINCIPAL FOR SUPPORT.

isted. together with all accumulations thereon, was to be paid over to the residuary legatees named in the will. *Thomas* v. *Pardee*, 12 Hun, 151.

The testator, by his will, gave to his wife the use and income of his estate after the payment of debts, also the right to appropriate such part of the principal "as she might from time to time in her judgment require to properly support and maintain her, in manner and style suitable for one in her station in life." Also, that her funeral expenses be defrayed out of the fund. "The rest, residue and remainder" to his brother's children.

Construction.

It was within her sole discretion as to what was necessary for "proper support and maintenance;" and she was entitled to such sums as she required in advance, and not compellable to first advance from her own moneys and secure it by reimbursement from the executor. *Matter of Dickerman*, 34 Hun, 585.

Devise to wife of real estate for life, and a power to take and hold and convert into cash, for her support and maintenance and use, as much thereof as she may see proper for that or any other purpose.

Construction:

The widow was sole judge of her own necessities and desires, and an absolute power of disposition of testator's personal estate was vested in her. *Lininger's Appeal*, 110 Pa. St. 398.

Devise of use and income of testator's estate for life, if insufficient for support of devisee, so much of corpus to be sold as necessary therefor, gave devisee such money arising from the estate as was legitimately expended for her support, including an admitted, but doubtful indebtedness. *Matter of Grant*, 40 St. Rep. 944.

See cases under repugnant clauses, *post*, p. 115.

3. PRECATORY CLAUSES.

Will was as follows: "I * * give and bequeath all my property real and personal, to my beloved wife, Mary, only requesting her, at the close of her life, to make such disposition of the same among my children and grandchildren as shall seem to her good."

Construction.

The gift was absolute and the concluding words merely show of suggestion, not of direction, and created no trust. *Foose* v. *Whitmore*, 82 N. Y. 405.

From opinion.—"The tendency of modern decisions is not to extend the rule of practice which, from words of doubtful meaning, deduces or implies a trust. 2 Story's Eq. Jur. sec. 1069; Lamb v. Eames, L. R., 10 Eq. Cases, 267; In re Hutchinson and Tenant, L. R., 8 Ch. Div., 540. Yet, when this doctrine was applied, the object sought for was the intention of the testator, and for this the context of the will was looked at, first, to ascertain his wishes, if any were expressed, and next to see whether he intended to impose an obligation on his legatee to carry them into effect, or having expressed his wishes, he intended to leave it to the legatee to act on them or not in his discretion. Cases illustrating both divisions of this inquiry are collected, and to some extent analyzed by various learned text-writers, and it would be a useless task to reproduce them here. Perry on Trusts, ch. 4, vol. 1; Hill on

3. PRECATORY CLAUSE.

Trustees, 71–83; 1 Jarman on Wills, 341. They are, however, subject to the rule stated by Lord Cranworth in Williams v. Williams, 1 Sim. N. S. 358, that 'the real question always is whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion.' This rule is applied and illustrated in Bernard v. Minshull, Johns. Ch. (Eng.) 276; and in Howarth v. Dewell, 6 Jurist (N. S.) 1360, where a devise by a testator of all the residue of his property, real and personal, to his wife, with power to dispose of the same among all his children in her discretion, was held to be an absolute gift to the wife. There are later cases. In re Hutchinson and Tenant, L. R., 8 Ch. Div., 540 (1878). Where a testator gave all his property to his wife, 'absolutely, with full power for her to dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so,' the learned court said: 'Both on principle and in consonance with the most modern authorities. I decide that the widow took absolutely.'"

The words "I wish" often mean "I will or direct." *Blivin* v. *Seymour*, 88 N. Y. 469.

Devise and bequest to B., wife, of all estate, and a subsequent provision that "if she find it convenient * * * to give my brother, Edwin W., during his life, the interest on $10,000 (or $700 per annum), I wish it to be done," is mandatory, as it did not contemplate B.'s choice but her pecuniary condition each year, and if her condition permitted, it was necessary to be done. *Phillips* v. *Phillips*, 112 N.Y. 197.

The expressions of the testator's expectation and desire that his wife should not dispose of any of the estate by will in such a way that the whole that might remain at her death would go out of his family, etc., were held to be precatory words and it was said "similar terms have sometimes been considered to create a trust, or rather a power in trust, but never, so far as we have been able to discover, where, as, in this case, the words of the will clearly indicate a disposition in the testator to give the entire interest, use and benefit, to the donee." *Matter of Gardner*, 140 N. Y. 128.

Citing, Clarke v. Leupp, 88 N. Y. 228; Campbell v. Beaumont, 91 id. 464.

See Campbell v. Beaumont, 91 N. Y. 464, digested p. 120, and Clark v. Leupp, 88 id. 228, digested p. 118.

A testatrix directed that in case her child should die before reaching legal majority without lawful issue, that all her property should go to her three sisters, naming them, and her husband, share and share alike. "In case of the death of either of my sisters, the property herein bequeathed to them is to go to the survivor or survivors, and at the death of all the persons herein named as taking on the death of my child, it is recommended the amount of property coming to them shall go to the lineal descendants of John Moffat." The testatrix died without children.

Construction:

The sisters and the husband surviving the testatrix, took an absolute estate to all her property, which was not limited by the recommendation as to the disposition

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which should be made of the property upon their death, or that of the survivor of them. *Field* v. *Mayor*, 38 Hun, 590, aff'd 105 N. Y. 623.

Citing, Kelly v. Kelly, 61 N. Y. 47; Embury v. Sheldon, 68 id. 227; Miller v. McBlain, 98 id. 517; Willets v. Willets, 35 Hun, 401, 404; Warner v. Bates, 98 Mass. 274; Van Dyck v. Van Beuren, 1 Caine, 84; Lawrence v. Cook, 32 Hun, 126; Gilbert v. Chapin, 19 Conn. 342.

NOTE OF ADDITIONAL CASES.—Cases where an absolute estate in fee is given to B., and the testator expresses a wish or desire for a disposition of the property, or some portion thereof, for the benefit of some other person.

Devise to B., and request that if he died without issue he should will to another gives fee to B. Batchelor v. Macon, 69 N. C. 545.

Language in a will to the effect that the testator desires or requests the devisee to create an estate, is not mandatory. Hess v. Singler, 114 Mass. 56; Hopkins v. Glunt, 111 Pa. 287.

Provision that the testator "would rather prefer not to have divisions made" is precatory. Warner's Estate, 130 Pa. St. 359.

Devise of whole estate to sons "assuming that they will not fail to do for another son as their fraternal regard may require" is inoperative. Rose v. Porter, 141 Mass. 309.

Words were held precatory in Bells v. Bells, Iowa, 8 L. R. A. 696; 45 N. W. 748.

Devise to B., wife, for her sole use is not disturbed by provision that "said wife will by her last testament do what is right by my children." Sturgis v. Paine, 6 N. Eng. 76; 146 Mass. 354.

When the words "wish" and "desire" are used as expressing a desire they are precatory, but when they are expressive of intention they are mandatory. Taylor v. Martin, 8 Central, 139.

Devise and bequest of real and personal estate to B., wife, and "should at any time she give or bequeath any portion of such estate out of my family, I wish my estate which remains to go to my nephews," etc., gives B. life estate and nephews a remainder. Fox's Appeal, 99 Pa. St. 382.

Precatory words may include option or discretion in the devisee. Maught v. Getzendanner, 65 Md. 527.

Precatory words frequently create a trust by implication. Jones v. Jones, 13 West, 527; 124 Ill. 254.

See Noe v. Kern, 12 West, 232; 93 Mo. 367.

The word "desire" may be mandatory. Wood v. Camden Safe Deposit Co., 44 N. J. Eq. 460; Enders v. Tasco, Ky., 11 S. W. 818.

An implied trust may be raised by words "the testator relies on his wife to make needful provision for brother." Blanchard v. Chapman, 22 Ill. App. 341.

As to precatory words, see Warner v. Bates, 98 Mass. 274; Maline v. Keighley, 2 Ves. Ch. 232; Lawrence v. Cooke, 104 N. Y. 632.

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A gift of the absolute title can not be cut down to a gift of the use and so much of the corpus as the legatee may consume during life, with a gift over of what is left at his death, by a subsequent clause that the first gift is upon the express condition of such gift over by the testator, with the authority to his executor to see that the condition is carried out. *Hermance* v. *Mead*, 18 Abb. N. C. 90.

See Nellis v. Nellis, 99 N. Y. 505; Tompkins v. Fanton, 3 Dem. 4.

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Legacy was not void because repugnant to a power, conferred by a subsequent clause in the will upon the guardian of the testator's daughter, to apply all or such part of the estate as he should deem necessary, to the education, maintenance and support of said daughter, during her minority. The latter provision is not an absolute disposition of the whole estate in favor of the guardian, nor does it confer upon him a power to make such disposition, otherwise than conditionally, upon the reasonable necessity of its application for that purpose. The rule which sacrifices the former of two contradictory clauses in a will, is not applied, except where they are totally irreconcilable. The gift to the seminary was, therefore, valid, if there was personal estate, remaining at the death of the testator's daughter, out of which it could be paid. *Trustees of the Theological Seminary of Auburn* v. *Kellogg*, 16 N. Y. 83, 88.

NOTE 1.—The rule which sacrifices the former of several contradictory clauses is never applied, except where they are totally irreconcilable and can not possibly stand together. In such cases, to prevent the invalidity of both provisions from uncertainty, the one last in local position will prevail, as denoting a subsequent intention. 2 Paige, 129, 130; 1 Jarman on Wills, 411, 412, 415, 416.

Estate abridged by subsequent provisions in a will. *Chrystie* v. *Phyfe*, 19 N. Y. 344, digested p. 319.

Estates—whether cut down. *Tobias* v. *Cohn*, 36 N. Y. 363.

Effect is to be given, if possible, to all the provisions of a will, and no clause is to be rejected or interest intended to be given sacrificed on the ground of repugnance, when it is possible to reconcile the provisions supposed to be in conflict.

The will of T., by its first clause, gave to his daughter C. all his property, real and personal, excepting the sums necessary to pay certain legacies, after enumerating which it contained this clause: "All my remaining property * * * I give, devise and bequeath to my daughter C. for her support and comfort, to be held and controlled by her, and at her death to pass to her heirs, and if she leaves no heirs, to be disposed of by her will," etc. Held, that the gift in the first clause was qualified and limited by the residuary clause; that the will gave to the daughter an estate for life in the lands of which the testator died seized, with remainder to her issue living at her death, and with power in default of issue to appoint the fee by will, and that therefore a conveyance by C. and her living children did not give an absolute title to such lands, as it was subject to the contingency that children might thereafter be born who would take an interest as purchasers under the will. *Taggart* v. *Murray*, 53 N. Y. 233.

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Devise to B., sister, of full power to sell a certain house and land "and to receive the rent thereof." She was not executrix or trustee nor was there other disposition of land or proceeds of sale. The sister took the fee not cut down by power of sale. *Jennings* v. *Conboy*, 73 N. Y. 230.

Overruling 10 Hun, 77, S. P., Crosky v. Dodds, 87 Pa. St. 359; Millard's Appeal, id. 457.

All the estate was given to trustees and executors to be disposed of as directed; then gifts of certain premises were made to wife, with power to executors to sell said premises at not less than a specified sum and invest proceeds for wife's benefit during her life. Wife took a fee. *Vernon* v. *Vernon*, 53 N. Y. 351, digested p. 927.

When an estate is given in one part in clear and decisive terms, it can not be taken away or cut down by any subsequent words that are not as clear and decisive as the words creating the estate.

The will provided "I give and bequeath my beloved wife, S., one-third part of all my property, both real and personal, and to have the control of my farm as long as she remains my widow * * * and at the death of my wife, all my property, both real and personal, to be equally divided between my eight children."

Construction:

In an action for partition of the farm, it was held that widow took a fee of one-third of the premises.

Roseboom v. *Roseboom*, 81 N. Y. 356, aff'g 15 Hun, 309.

From opinion.—"The residuary clause is not repugnant to the prior gift, and the devise may take effect according to its terms. We thus follow the rule which requires a will to be so construed as to avoid, if possible, all repugnancy, and give effect to all its language. We have here no occasion to depart from it; the two clauses are not irreconcilable, and there is no occasion, therefore, to reject one in order to uphold the other—a desperate remedy, and to be resorted to only in case of necessity—so that one rather than both provisions should fail. Trustees, etc., v. Kellogg, 16 N. Y. 83; Van Nostrand v. Moore, 52 id. 20; Covenhoven v. Shuler, 2 Paige, 122. This case is within the rule stated by the lord chancellor in Thornhill v. Hall, 2 Clark & Fin. 22, as one which admits of no exception in the construction of written instruments, that where one estate is given in one part of an instrument in clear and decisive terms, such estate can not be taken away or cut down by raising a doubt upon the extent or meaning or application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that estate."

Will stated that testator was about to take a long and dangerous voyage and he deemed it his duty to make a will "for the benefit and protection" of his wife and his two children, and provided "I do, therefore, make this my last will and testament, giving and bequeathing to my

wife Caroline, all of my property, real and personal * * * and do appoint my wife Caroline Maria my true and lawful attorney and sole executrix of this my will, to take charge of my property after my death, and retain and dispose of the same for the benefit of herself and children above named."

Construction:

The widow took an absolute title to all the estate. The absolute gift was not cut down by the later words.

Clarke v. *Leupp*, 88 N. Y. 228.

From opinion.—"There can be no doubt that the testator employed the proper technical words to convey to his wife an absolute title to all his estate, whether real or personal. But it is contended that by the last clause of the will he has impressed a trust upon the estate given to his wife, for the benefit of herself and the two children. 'There can be no trust created of lands either at common law or by statute except such as arise by act or operation of law, unless the writing contains a proper declaration of trust (Dillaye v. Greenough, 45 N. Y. 445; Hill on Trustees, 63–4); and the writing must declare what the trust is, the nature of the trust, and the terms and conditions of it must sufficiently appear.' (Id.) We are of opinion that the discretionary power given to the widow to retain or dispose of the property for the benefit of herself and children was not intended by the testator to limit or cut down the prior absolute gift. These words are but a mere expression of the testator's wish that in the event of his death, his widow should make such use or disposition of the property devised as would in her judgment best provide for herself and her children.

It is well settled by a long succession of well-considered cases, that when the words of the will in the first instance clearly indicate a disposition in the testator to give the entire interest, use and benefit of the estate absolutely to the donee, it will not be restricted or cut down to any less estate by subsequent or ambiguous words, inferential in their intent. In Lambe v. Eames, L. R., 10 Eq. Cas., 267, Vice-Chancellor Malins, in giving his opinion, says: 'Whenever the will begins with an absolute gift, in order to cut it down, the latter part of the will must show as clear an intention to cut down the absolute gift as the prior part does to make it * * * it appears to me to be perfectly clear that the intention of the testator in beginning with an absolute gift to his wife, and going on to say it was to be at her disposal in any way she may think best for the benefit of herself and family was not an intention to cut down the absolute gift, but that the subsequent words were rather intended as a hint to her, which was not intended to be obligatory upon her. I am of the opinion, therefore, that the widow took the fee simple with the property.' This case was appealed to the lords justices of appeal, and the decision of the vice-chancellor was affirmed. Sir W. M. James, chief justice, in giving the opinion of the court, says: 'I may state that the testator in this case would have been shocked to think that any person, calling himself next friend, could file a bill in this court, and under pretense of benefiting the children have the estate taken from the wife. The testator intended his wife to remain the head of the family, and to do the best for the family.' L. R., 6 Ch. App., 597. So in the case Mackett v. Mackett, L. R., 14 Eq. Cas., 49; 2 Eng. Rep. 412, in which the testator devised certain property to Sarah Mackett, a married woman, to and for her own proper use and benefit forever, but not subject to the debts of her husband, the proceeds to be applied by her in the bringing up and maintenance of her children, it was held that as the testator began with an absolute gift, the subsequent

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words were the mere expression of the motive of the gift, and that Mrs. Mackett took an absolute interest in the property, unaffected by any trust. In Howarth v. Dewell, 1861 Pt. 1, 1360 N. S. 6 Jurist, the testator devised all the rest and residue of his real and personal estate to his wife, with power to her to dispose of the same unto and amongst all his children, or to any one or more of them, for such estate or estates as she should in her discretion think most fitting and proper, and appointed the wife executrix. In deciding this case, Sir J. Romilly, M. R., says: 'I am of opinion that there is an absolute gift to the widow. The testator gives all the residuary estate to his wife absolutely; and then he superadds words making a suggestion that after her life, she should dispose of the property among certain persons. These words are nothing more than a suggestion. They do not amount to a precatory trust. * * * *Held*, that the gift is absolute with superadded words.' In Parsons v. Best, 1 Sup. Ct., Thompson & Cook, 211, the testator devised to his wife the farm on which he then resided, 'with all its appurtenances, to have and to hold the same, and to her and her heirs and assigns forever; subject, however, to a distribution of the same among all my children in her discretion, and when she may deem proper so to do. * * * I give and bequeath also to my dearly beloved wife, Maria, all my personal property of which I may die possessed, which, together with my said real estate heretofore devised to her, shall be by her used and appropriated by her to the use of all my children in such portions, and at such time or times as she shall judge most practicable; but she to make no appropriation of my said property to deprive my children thereof, and also to divide the same among them in her discretion when she may think proper.' He appointed his wife the executrix of his will.' It was held, all the judges concurring, that the widow took an absolute estate in fee, with no power to control her use of it during her life. Judge Potter, in delivering the opinion of the court, says: 'A devise or bequest made in clear, positive, and express terms, in language known to the law and which calls for no interpretation, is not controlled or overcome by subsequent or ambiguous words inferential in their intent. In the second clause of this will the testator has employed the proper technical words to convey to his wife Mary an absolute estate in fee in the property described: The legal presumption to begin with is that these words were employed in their legal sense, and there was a conveyance to her, her heirs and assigns, of an estate in fee. By no subsequent clause of this will is this estate devised to anyone else. The second branch of the clause 'subject, however, to a distribution of the same among all my children in her discretion when she may deem proper to do so' has no effect to limit or qualify her title. It can be regarded only as an expression of a wish that, in the exercise of a discretion entirely consistent with the devise, his children may be permitted to enjoy from her, when in her discretion she shall determine to make distribution. The word 'subject' does not control the preceding devise, but is qualified by the positive language which precedes it and the qualification of it by the discretion which follows it. It is in no wise repugnant to, or irreconcilable with, the words of the preceding devise.' In Webb v. Wools, 2 Sim., N. S., 267, the language of the will was ''All my property of whatever description I give and bequeath the same unto my dear wife Jane, her executors, administrators and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her that she will *dispose* of the same to and for the *joint benefit of herself and my children.*' The court held that there was no trust created in favor of the children. In In re Hutchinson v. Tenant, L. R., 8 Ch. Div., 540, 25th English Rep. 459, the testator gave all his property to his wife 'absolutely, with full power to her to dispose of the same as she may think fit for the benefit of my family, having full

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confidence that she will do so,' and also appointed her his executrix. It was held that the wife took absolutely in her own right. In re Hutchinson v. Tenant, L. R., 8 Ch. Div., 540, 25th Eng. Rep. 459; Wilson v. Major, 11 Ves. 204; Fox v. Fox, 27 Beav. 301; Gilbert v. Chapin, 19 Conn. 342; Bardswell v. Bardswell, 9 Sim. 319."

V., by will, gave a bequest to her executors of $30,000 in trust "to pay over the net income of $10,000, part of such sum" to each of the three unmarried nieces of the testatrix who were named "so long as each remains single; upon the marriage of either to pay over to her $1,000 of the principal of which she has enjoyed the income;" and to pay over the residue of the $10,000 to the surviving nephews and nieces of the testatrix.

Construction:

Each legatee had a life interest in $10,000 of the trust fund, and upon her death or marriage the title to the same would immediately vest. *Matter of Will of Verplank*, 91 N. Y. 439.

B.'s will provided, "I leave to my beloved wife, Mary Ann, all my property * * * to be enjoyed by her, for her sole use and benefit, and in case of her decease, the same, or such portion as may remain thereof, it is my will and desire that the same shall be received and enjoyed by her son Charles * * * requesting him, at the same time, that he will use well and not wastefully squander the little property I have gained by long years of toil." Charles was son of the wife by a former husband.

Construction:

The widow took the absolute title unaffected by the provision as to the son.

The limitation, if intended as such, for the son was inconsistent with the absolute gift to the wife and void. *Campbell* v. *Beaumont*, 91 N. Y. 464.

Distinguishing Terry v. Wiggins, 47 N. Y. 512, and distinguishing and questioning Smith v. Bell, 6 Peters, 68.

From opinion.—"But if more was intended, then in view of the absolute gift to the wife in the preceding sentence, the bequest to her son is void. Ross v. Ross, 1 Jac. & W. 153; The Att'y-Gen'l v. Hall, Fitz-G. 314; Bull v. Kingston, 1 Meriv. 314; Patterson v. Ellis, 11 Wend. 260; Tyson v. Blake, 22 N. Y. 558; Norris v. Beyea, 13 id. 273; Smith v. Van Ostrand, 64 id. 278. In all these cases it was in substance held that when the property is expressly or by necessary implication to be spent by the primary legatee at his pleasure, a further limitation is clearly hostile to the nature and intention of the gift. Terry v. Wiggins, 47 N. Y. 512, cited by the respondent, is not necessarily adverse to this view; there reliance was placed upon the peculiar language of the will, and a devise 'for personal use and maintenance' was held to terminate at the death of the devisee. Smith v. Bell, 6 Peters, 68, also relied upon by him, is not easily reconcilable with the cases cited *supra*. But it is to

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be noticed in that case no counsel was heard in behalf of the party against whom the decision was made, and the remainder was the only substantial provision made by the will for the testator's only child. It was thought that the whole will showed a clear intention to limit the interest of the first taker to his life. It seems otherwise in the case before us. The gift appears absolute and entire in its terms; no child of the testator was to be provided for, and it better accords with decisions in this state to hold that, if a limitation over was attempted it is repugnant and void, Jackson v. Bull, 10 Johns. 19, and with still earlier cases which declare that where "a particular estate is devised, we can not, by any subsequent clause, collect a contrary intention by implication.' Popham v. Banfield, 1 Salk. 236. If done in this case, it must be by construction, for the clause in favor of the wife stands by itself; the property is bestowed upon her for her own use and benefit, and we can not suppose the testator intended to subject his wife to the responsibility of a trustee for a remainderman, and thus make her liable to exhibit an inventory, if not to give security. Westcott v. Cady, 5 Johns. Ch. 349. This would be inconsistent with the implied power to dispose of, and the express power to use the property at pleasure and for her sole benefit."

Interest given in one part of a will can not be cut down or taken away by raising doubts from other clauses, but only by express words or clear and undoubted implication. Thornhill v. Hall, 2 Cl. & Fin. 22; Rosebaum v. Rosebaum, 81 N. Y. 356; *Freeman* v. *Coit*, 96 id. 63.

The will of W. gave to his wife the use of $4,000, which was about one-third of his estate, during life, with privilege, in case the income thereof should not be sufficient to support her, to use sufficient of the principal for that purpose. To his daughter S. was given the residue of his estate, including what remained of the $4,000 at the wife's death. The will, in case of the death of the daughter without issue before the death of the wife, thus provided: "All the property, both real and personal, that shall be left by my daughter at her death which shall belong to me at my death, I give, together with what shall remain from the above-mentioned $4,000, devise and bequeath to my beloved wife, to her use, her heirs and assigns forever." The testator's daughter S., who was his only child, died before him leaving no issue. Action for construction of the will.

Construction:

It was the manifest intent of the testator to give to the survivor of the two legatees named his entire estate remaining undisposed of upon the death of the other, whenever that event shall occur; the gift to the wife, in case of her surviving the daughter, was not dependent upon the taking effect of the primary gift to the daughter (see note 1), and while the language employed in making the latter gift would generally import an absolute estate, yet as such a construction would render in-

operative the limitation over, and would defeat the manifest intent as above stated, it was the duty of the court to limit so as to render the whole will operative and to effectuate the intent; and, therefore, the widow was entitled to the whole estate. *Wager* v. *Wager*, 96 N. Y. 164.

Citing, Terry v. Wiggins, 47 N. Y. 512; Campbell v. Beaumont, 91 id. 464; Smith v. Bell, 6 Peters, 68; Norris v. Beyea, 13 N. Y. 273; Smith v. Van Ostrand, 64 id. 278.

NOTE.[1]—An ulterior devise, to take effect upon the defeasance of a former one, will attach as well when the failure of the primary devise is by the happening of some event, such as the death of the devisee, during the lifetime of the testator, as by an event occurring after his death, by which the first devise after it has taken effect is defeated, unless the ulterior devise is so connected with and dependent upon the primary one that it can not consistently with the provisions of the will have effect if the latter fails *ab initio*. McLean v. Freeman, 70 N. Y. 81; Downing v. Marshall, 23 id. 366.

Estate in fee — cutting down. *Byrnes* v. *Stillwell*, 103 N. Y. 453, digested p. 287.

The will of H., by its terms, gave his residuary estate to his children, their heirs and assigns, to be divided equally between them, subject, in regard to the portions of his daughters, to certain trusts thereinafter declared. Following this were provisions giving the portions of his estate designed for his daughter to his executors, as trustees, in trust, to invest the same as directed, and to pay over the interest and income to said daughters, respectively, during life. Upon the decease of a daughter, the executors were directed to pay over and distribute the principal of her share to her issue.

Construction:

While the language of the earlier provision of the residuary clause standing alone would have given an absolute estate to the daughters, the whole read together gave simply a life estate to each daughter, and the portion of one dying without issue was not disposed of, but would go to the heirs at law and next of kin of the testator.

Kellett v. Kellett, L. R., 3 H. L., 160; Norman v. Kingston, 29 Beav. 96; aff'd, 3 DeGex, F. & G. 129; McCulloch v. McCulloch, 3 Giff. 606, distinguished. *Howland* v. *Clendenin*, 134 N. Y. 305.

From opinion (after discussing authorities).—"These cases are discussed by Mr. Jarman in his learned treatise on Wills, vol. 1, 871, and it is there (after giving, with approval, the rules of Lord Cottenham above quoted), said: 'It is in the determination of this previous question whether, namely, the gift to the primary legatee is absolute or qualified that the real difficulty of these cases generally lies. The intention is, of course, to be collected from the whole will.' Hawk. Wills, 276; 2 Will. Ex., 6 Am. ed., 1398; Sch. Wills, sec. 559.

"This question and many of the cases are discussed in Redfield on Wills, vol. 2, secs.

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16, 17, who states the rule to be that if the testator intended to vest the legatee with title in the first instance, makes a clear gift, and then adds a qualification as to the mode of enjoyment or the direction in which it shall ultimately go, in case of the happening of a particular contingency, which never happens, the original gift to the primary legatee becomes absolute. All of the authorities recognize this rule, and it is not inconsistent with the conclusion we have reached in this case."

The will of McC., which was drawn by himself, after giving to his wife all his real and personal estate, provided as follows: "To have and to hold, with full power to collect all rents and income from the same, she to keep in repair and pay all taxes and insurance on the same, with full power to sell any or all such real estate, with the consent of my executors, should it be thought best for the estate; should she marry again, then her right of dower only in my estate. I recommend she appoint a good agent to take charge of my real estate. I also give her discretionary power to give such sums of money to any as she may think prudent, of my relatives." The widow and another were appointed executors. Upon the final accounting of the executors, it appeared that McC. was survived by several children and grandchildren, the children of two deceased sons.

Construction:

The widow took under the will only an estate for life, and as to the remainder, the testator died intestate. *Matter of McClure*, 136 N. Y. 238.

An estate granted in fee or absolutely by a will may not be cut down or limited by subsequent clause, unless the language is so clear, unmistakable and certain as to leave no doubt that such was the intention of the testator. See Byrnes v. Stilwell, 103 N. Y. 453; Roseboom v. Roseboom, 81 id. 356.

The will of W. gave to his daughter N. a legacy of $10,000, also a share of his residuary estate. In a separate and distinct clause, the will directed that, in the case of the death of N. without children, the portion given to her should be given to the testator's sons or their heirs. N. survived the testator and the executor paid over to her the legacy and her share of the residuary estate unqualifiedly, she receiving the money as absolute owner. Action brought by heirs of the testator's sons to compel N. to give security for the ultimate safety and forthcoming of the sums so paid to her.

Construction:

The death referred to was a death in the lifetime of the testator, and as N. survived him, she took absolutely.

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Same will:

The decree of the surrogate upon final settlement of the accounts of the executors contained a statement that the contingency of the death of N. without children related to her death at any time after, as well as before, the death of the testator, and that the gifts to her were for life only, The surrogate did not decide anything in regard to the payments to N., and he made no decree for further distribution of any portion of the moneys paid to her by the executors, or as to who might become entitled thereto upon her death.

Construction:

The statement was nothing more than an expression of the surrogate's opinion; and so, it was not conclusive upon N. *Washbon v. Cope*, 144 N. Y. 287, rev'g 67 Hun, 272.

Where in a will there is a clear and certain devise of a fee, about which the testamentary intention is obvious and without ambiguity, the estate thus given will not be cut down or lessened by subsequent words which are ambiguous or of a doubtful meaning.

The will of B. gave to his wife the use and occupation of two dwelling houses during life, and provided that "in case of the sale of either or both with her consent the income of the principal shall be paid to her;" he then devised said dwelling houses to two children, subject to the life occupancy of their mother, and also devised to them all of his other real estate subject to her dower right. By a subsequent clause it was provided that in case of the death of both children without issue the property devised to them "and their issue" shall not pass to the branches of his own or his wife's family, but is "given, devised," etc., to a beneficiary named. Action for specific performance of a contract for the purchase of a portion of the real estate of which the testator died seized Aside from the two dwelling houses the testator's real estate consisted principally of a large tract of sandy and barren land on the sea shore from which he had been selling lots for summer homes, and which was only valuable for such purposes.

Construction:

The death without issue referred to in the devise over meant a death in the lifetime of the testator, and as the two children named survived the testator they took an absolute fee in all the lands subject to their mother's life estate and dower right. Benson v. Corbin, 145 N. Y. 351, aff'g 78 Hun, 202.

Devisees took an absolute fee, unaffected by subsequent recommendation derogatory thereto. *Field* v. *Mayor*, 38 Hun, 590, aff'd by 105 N. Y, 623.

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A testator, gave to his daughter, Sarah, a certain house and lot as therein stated, "to her own proper use and behoof forever, also the sum of $1,400, to be paid to her in annual installments of one hundred dollars, and interest on the whole sum unpaid, annually, until the whole of said bequest is paid, commencing one year next after my decease."

By a subsequent clause of his will he provided: "It is hereby understood that the devises and bequests made, respectively, to my daughters, Elizabeth, Sarah and Louisa, are made, and are, for the absolute use, control of each of them during their natural lives, and after the decease of either of them then to their surviving children, respectively, according to law, as the said annual sums, devises and bequests may remain in the hands and under the control of either of my executors, at the free election of either of my said daughters, and upon such terms as either of my daughters may make with such executors."

Construction:

The house and lot devised to the daughter, Sarah, passed to her in fee, and her surviving children took no interest therein upon her death under the provisions of the will.

The words of the will, in the first item thereof above referred to, clearly indicated a disposition on the part of the testator to give the entire interest, use and benefit of this land absolutely to Sarah, and the subsequent provision relating to her surviving children was too ambiguous and uncertain in its terms to cut down to a life estate the estate given to Sarah by the former provision of the will. *Oothout* v. *Rogers*, 59 Hun, 97.

Citing, Clarke v. Leupp, 88 N. Y. 228; Campbell v. Beaumont, 91 id. 464; Lambe v. Eames, L. R., 10 Eq., 267; Byrnes v. Stilwell, 103 N. Y. 460.

A testator, by the fourth and fifth clauses of his will, devised certain real estate, separately, to his sons, P. and S. and also to his two daughters, in fee. In the seventh clause, after certain clear devises and bequests to other persons, was this recital and provision, viz.: "whereas my son P. to whom sundry bequests are made in the foregoing will, has unfortunately contracted habits of inebriation, and in consequence of which I fear he would squander or misuse the bequest to him made, I do therefore annul and make void this will, as to him, unless he reforms and continues a sober, industrious and moral man, for the space of two years after my decease, giving to my executors satisfactory evidence and assurance of a thorough reformation. And therefore it is my will that the property so willed to him should be held in *trust* for him not to exceed three years after my decease, and if within that time such reformation does not take place, I desire my said executors to divide his portion to such of my heirs as may seem to them most to need and deserve the same." The testator's son P. was one of the executors named in the will. Held, that the title to the estate devised to P. by the fourth and fifth clauses of the will was still in him, and was not defeated by the recital and statement in the seventh clause. Moore v. Moore, 47 Barb. 257 aff'd by Ct. of Appeals; see 6 A. L. J. 173.

Gift to wife absolute because limitation over was void. *McLeans* v. *McDonald*, 40 Barb. 534.

Whether a devisee takes an absolute estate. *Jackson* v. *Robins*, 16 Johns. 537.

When a wife takes a fee in the whole of the premises, instead of a life estate. *Parsons* v. *Best*, 1 Sup. Ct., T. & C., 211 (4).

When gift absolute and not cut down by subsequent clauses. *Hermance* v. *Mead*, 18 Abb. N. C. 90, digested p. 115.

NOTE.—*The testator's intention governs to the exclusion of technical rules.*

4. REPUGNANT LIMITATIONS.

The first cardinal rule is, that the intention of the testator must govern, and that intention must be gathered from the entire instrument, and extrinsic facts relating to the conditions that surround the testator and his family and the beneficiaries are not disregarded.

Section 2, title 5, chapter 1, part 11 R. S., third volume, Banks's 7th ed., provides that "in the construction of every instrument creating or conveying, or authorizing the creation or conveyance of any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole interest, and is consistent with the rules of law." (See cases there cited.) See Real Prop. L., sec. 205.

Defeating or abridging primary gifts.

Intent to overrule or abridge the primary gift must be clear.

Farnham v. Farnham, 53 Conn. 290; Sherburne v. Sischo, 143 Mass. 439; Snyder v. Baker, 7 Central, 351; 5 Mackey, 443; Crozier v. Bray, 120 N. Y. 366; but see Re Huntington, 103 id. 677; Patterson v. Read, 42 N J. Eq. 146.

An estate in fee granted by will can not be cut down or limited by a subsequent clause unless it is as clear and decisive as the language of the clause which devises the estate. Thornhill v. Hall, 2 Clarke & Fin. 22; Rosebaum v. Rosebaum, 81 N. Y. 356, 359; Freeman v. Coyt, 96 id. 63, 68.

In Terry v. Wiggins, 47 N. Y. 512, Allen, J., said, "there is no repugnancy to a general devise to one person in terms which would ordinarily convey a whole estate and a subsequent provision giving the same estate to another person on the happening of the contingent event."

In Taggert v. Murray, 53 N. Y. 236, it is said that "subsequent clauses in the will are not incompatible with or repugnant to prior clauses in the same instrument, when they may take effect as qualification of the latter without defeating the intention of the testator in making his prior gift." S. P. Crozier v. Bray, 120 N. Y. 377.

In Norris v. Beyea, 13 N. Y. 273, it is said that there is no repugnancy between the absolute gift of the whole estate in fee and a limitation over in the event of the first devisee dying under age and without issue; and in Thornhill v. Hall, 2 Clark & Fin. 22, it is said, it is a rule in construing written instruments that when an interest is given in the first clause in clear and decisive terms, such interest may not be taken away or modified by raising a doubt upon the extent and meaning of the subsequent clause nor by any inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the previous clause.

The plain intention of the testator will control the legal operation of words, however technical. Williams on Executors, 926, 928; and the court will give effect to the devisor's general intention, although they may thereby defeat a particular devise. Bean v. Holley, 5 T. R. 5; Smith v. Bell, 6 Pet. 68; Hoppock v. Tucker, 59 N. Y. 208; Van Horne v. Campbell, 100 id. 318.

In order to lead to the rejection of any provision on account of repugnancy, the inconsistency must be irreconcilable. Van Nostrand v. Moore, 52 N. Y. 12; Trustees of Auburn Seminary v. Kellogg, 16 id. 83; Van Vechten v. Keator, 63 id. 52; Van Horne v. Campbell, 100 id. 317.

"It has been truly said (3 Wils. 141) that cases on wills may guide us to the general rules of construction; but, unless the case stated be in every respect strictly in point and agree in every instance, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star to direct them in the construction of wills." Van Horne v. Campbell, 100 N. Y. 315; Smith v. Bell, 6 Pet. 658.

4. REPUGNANT LIMITATIONS.

Intention is to be gathered from the whole instrument. Totum v. McLellan, 50 Miss. 1; Phillips v. Davis, 92 N. Y. 199; Wood v. Mitcham, id. 382; Crossman v. Crossman, 192 Mass. 170; Sheriff v. Brown, 5 Mackay, 172, D. C.; Norris v. Beyea, 13 N. Y. 283; Sweet v. Chase, 2 id. 79, 81.

But when intent to limit the estate first given is unquestionable, it must prevail. Stowell v. Hastings, 4 N. Eng. 135; 59 Vt. 494; Mann v. Mann, 14 Johns. 9.

The rule upon this subject was stated by Lord Mansfield to be that "words of limitation shall operate as words of purchase, implications shall supply verbal omissions, the letter shall give way; every inaccuracy of grammar, every impropriety of terms shall be corrected by the general meaning, if that be clear and manifest." Chapman v. Broder, 3 Burrow, 1636. And it was stated in terms of similar import by the chancellor, in deciding the case of Pond v. Bergh, 10 Paige, 140, 152. He there declared that "the intention of the testator, so far as it is consistent with the rules of law, must govern in the construction of a will. When, therefore, the intention is apparent upon the whole will taken together, the court must give such a construction as to support the intent of the testator, even against strict grammatical rules. And to effectuate his evident intention, words and limitations may be transposed, supplied or rejected.

Devise to B., with power of appointment and provision on failure to appoint for remainder over to children, does not enlarge the life estate to B. *nor cut down the estate of inheritance.* Yarnell's Appeal, 70 Pa. St. 335; Wetter v. Walker, 62 Ga. 142; Chase v. Salisbury, 73 Ind. 506.

Specific devise to B., wife, for life is not enlarged because she is in another place referred to as residuary legatee. Miter v. Woodcock, 147 Mass. 613.

See Barnes v. Boardman, 149 Mass. 106.

Whether earlier or later provisions should prevail.

There has been no little variation of ruling as to whether the testator's intention can be better ascertained by giving greater force to the first or subsequent provisions in a will, when they are inconsistent, although it is generally admitted that such considerations are only aids, and not inflexible rules.

See cases, *supra.*

The decisions that regard the prior clause as more influential are to the effect that such prior provision should prevail unless an intent to modify, change or overrule it clearly appears. Campbell v. Beaumont, 91 N. Y. 464, 467; Snyder v. Baker, 7 Cent. 351; 5 Mackay, 43. See Price v. Cole, 83 Va. 343; Ball v. Ball, 40 La. 284; Campbell v. Crater, 96 N. C. 165; Sherburne v. Sischo, 143 Mass. 439.

There are decisions that the subsequent clause would be regarded as the more influential in construction.

In the absence of a clearly appearing intention to the contrary (Temple v. Sammis, 48 N. Y. Supr. Ct. 324), where the first devise imports an absolute estate to the first taker; and in the second clause a remainder is given to another, the first estate thereby becomes a life estate. Baxter v. Bowyer, 19 Ohio St. 490; Smith v. Meisee, 51 Ind. 419; Cowan v. Wells, 5 Lea, Tenn., 682; Hendershot v. Shields, 42 N. J. Eq. 317; Covert v. Sebern, 73 Iowa, 564; Ball v. Ball, 40 La. 284.

See Wells v. Wells, 99 N. Y. 505; Heard v. Horton, 1 Denio, 165; Tyson v. Blake, 22 N. Y. 558; Buel v. Southwick, 70 id. 581; Woodman v. Madigan, 58 N. H. 6; Barnitz's Lessee v. Casey, 7 Cranch. 456; Everett v. Everett, 29 N. Y. 83.

But there is no repugnancy in a general bequest or devise to one person, in language which would ordinarily convey the whole estate, and a subsequent provision that, upon a contingent event, the estate then given should be diverted and go over

to another person. Norris v. Beyea, 13 N. Y. 284; Tyson v. Blake, 22 id. 563; Everitt v. Everitt, 29 id. 82, 83; McNaughton v. McNaughton, 34 id. 201; Oxley v. Lane, 35 id. 348.

In case of invincible repugnancy, the later clause must prevail. Heidlebaugh v. Wagner, 72 Ia. 601; 34 N. W. 439; Armstrong v. Crapo, 72 Ia. 604; Lindenkohl v. Just, 12 Cent. 397.

Where an estate for life is given to B. in specified land, and he is made residuary legatee, he takes fee in the land. Davis v. Callahan, 78 Maine, 313.

Absolute estate to B. wife, and a further provision that "it is my desire and wish that after my wife's death the property shall" go over, carries a remainder. Taylor v. Martin, 8 Cent. 139.

In Chace v. Lamphere, 51 Hun, 524, it was thought to be the rule that the later clause must prevail over an earlier one. Goudie v. Johnston, 7 West. 589; 109 Ind. 427; Bailey v. Sanger, 6 West. 556; 108 Ind. 264; Allen v. Craft, 7 West. 516; 109 Ind. 476; Byrnes v. Stillwell, 5 Cent. 406; s. c., 103 N. Y. 453; Hockstedler v. Hockstedler, 7 West. 75; 108 Ind. 506; Drinker's Estate, 13 Phila., Pa., 330.

A right given to B. to live on land already devised in fee gives B. a life estate. Mayor, etc., of Huntington v. Mullens, 16 Lea, Tenn., 738.

Devise to wife for life in fee simple, and, by another item, a devise of the same land to children, gives wife life estate and a remainder to the children. *Vaughn* v. *Howard*, 75 Ga. 285.

Bequests to sons, and, in another place, provision that if any die without heirs the survivors shall take, should be read together. *Summers* v. *Smith*, 127 Ill. 645.

The following cases hold that where the provisions of a will are so repugnant that they can not stand together, the later provision must prevail. Bradstreet v. Clarke, 12 Wend. 602; Van Nostrand v. Moore, 52 N. Y. 12; Brant v. Wilson, 8 Cow. 56.

But the repugnancy or inconsistency by which the later clause may supersede the former one must be clear and explicit. Freeman v. Coit, 96 N. Y. 63, aff'g 27 Hun, 447.

But the rule is only to apply if there are no facts to aid in a reconcilable construction. Pierpont v. Patrick, 53 N. Y. 591.

And where the real intention of the testator can not be ascertained. Covenhoven v. Shuler, 2 Paige, 122.

See further on the subject of repugnant limitations: Chase v. Lamphere, 51 Hun, 524; 21 St. Rep. 676; Parsons v. Best, 1 Sup. Ct., T. & C., 211; Viele v. Keeler, 41 St. Rep. 187; rev'g 35 id. 904; McLeans v. MacDonald, 40 Barb. 534; Jackson v. Robins, 16 Johns. 537.

Influence of codicil on construction of repugnant provisions.

The provisions of a codicil to a will should have more influence than the language or provisions of the will itself, when the two are repugnant.

Devise to B., daughter, of a base fee was held to be changed into a fee simple by the codicil, that provided that the value of a devise in a codicil should be deducted from the devise in fee base or conditionally. *Jones* v. *Johnson*, 67 Ga. 269.

A codicil will not operate as a revocation beyond the clear import of its language, and an expressed intention to alter a will in one particular, negatives an intention to alter it any other respect. Wetmore v. Parker, 52 N. Y. 450; s. c., 7 Lans. 121.

"If a will and codicil are plainly inconsistent the latter must control to the extent necessary to give it full effect, as the presumption in such a case is much stronger than in the case of a later clause in the same instrument." *Crozier* v. *Bray*, 120 N.Y. 375.

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A codicil will not operate as a revocation of previous testamentary provisions beyond the clear import of its language.

An expressed intention to make a change in a will in one particular negatives by implication an intention to alter it any other respect. Redfield v. Redfield, 126 N. Y. 466; aff'g 36 St. Rep. 787.

A power of sale in a will is not revoked by a different disposition of the estate, made by a codicil unless there is some inconsistency between the exercise of the power of sale and some part of the codicil. *Conover* v. *Hoffman*, 1 Abb. Ct. App. Dec. 429; aff'g 1 Bosw. 214.

5. CHARGE OF LEGACY ON DEVISE.

In order to enlarge a devise without words of inheritance into a fee by implication by a legacy charged upon the devise, it was necessary that the payment of the legacy should be imposed upon the devisee as a personal duty in respect to the devise.[1] *Mesick* v. *New*, 7 N. Y. 163.

The will of N. devised to two grandsons, the parties hereto, certain real estate "jointly and in equal proportions * * * subject to the provisions hereinafter made and the bequests." After various bequests, which were made charges upon the real estate, the will provided in substance that in case of the death of either of the devisees without lawful issue the surviving devisee should take the whole; upon his death, if without issue, the estate to go to the testator's grandchildren, the children of his son H.

Construction:

When the language of the will is explicit and unambiguous and gives an estate less than a fee, although it charges the devisee personally with the payment of legacies, the payment thereof will not enlarge the estate to an absolute fee. *Nellis* v. *Nellis*, 99 N. Y. 505, citing, Mesick v. New, 7 id. 163.

6. ESTATE ENLARGED TO FEE ON CONDITION.

Life estate, converted into an absolute estate on the condition that executors give life tenant a written testimonial of the capability, prudence and kindness of her husband. *Viele* v. *Keeler*, 129 N. Y. 190, digested p. 1220.

[1] See case *in extenso post*, p. 1607.

II. RIGHTS AND DUTIES OF LIFE TENANT.[1]

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1. ACCRETIONS TO THE CORPUS.

The will of G. gave to his executors $10,000 in trust, with directions to invest the same in certain specified interest-bearing obligations, to pay "the annual interest, income and dividends thereof" to J., a daughter of the testator, during her life, and upon her death, leaving no issue, to divide "the principal or capital sum aforesaid" among the testator's other children. With the consent of all parties interested, a portion of the fund was invested in securities other than those named, but all of them, by their terms, drew fixed rates of interest, payable annually. A sale of the securities after the death of the life tenant resulted in a surplus over the amount of the original investment.

Settlement of the accounts of the trustees.

Construction:

The surplus was an accretion to the fund, and the remainderman was entitled thereto.[2]

The distinction between this case and those involving the division of gains or profits arising from investments in trade or corporate stock, pointed out.

It seems that even if the investment in unauthorized securities had not been assented to, they would have been subject to the same rules of division and distribution, as though made in accordance with the terms of the will. *Matter of accounting of Gerry*, 103 N. Y. 445.

NOTE.—"If the will had required the trustees to invest in real estate, the rents, incomes and profits of which were made payable to the life tenant with remainder over, it can not be questioned but that any increase of the value of the land from natural causes would have been an accretion to the capital and inured to the benefit

[1] See Addenda.

[2] See, also, Matter of Proctor, 85 Hun, 572, and cases cited at p. 574 thereof.

1. ACCRETIONS TO THE CORPUS.

of the remaindermen, Perry on Trusts, sec. 545, p. 486; Cogswell v. Cogswell, 2 Edw. Ch. 231, 240, and we can see no difference in principle between this case and the one supposed.

The question here presented was up in the cases of Townsend v. U. S. Trust Co., 3 Redf. 222, and Whitney v. Pharis, 4 id. 180, before the surrogate of New York, and it was there held that an enhancement of the value of United States bonds held in trust went to the remaindermen, and not to the legatee for life. These decisions accord with our views."

The will of B., who died in 1876, gave all of his estate to his executors in trust; among other things to set apart and invest $30,000, or one-third of the appraised value of the personal estate, as his wife might elect, and pay over to her the "income, interest, profits and earnings thereof" during her life "half yearly," and to divide the residue of the estate into six equal parts to be held upon certain specified trusts. The wife was appointed and acted as one of the executors and trustees and had the entire management and control of the estate. In 1878 the trustees purchased $40,000 of U. S. four per cent. bonds at a premium of one-fourth of one per cent.; the widow made no election until 1884, when she elected to have the $30,000 set apart. No particular item was set apart and no division of the residue into parts was made, but the whole estate was kept together. She took annually a sum equal to the interest at four per cent. on $30,000. It did not appear, however, that this was interest received upon the bonds. In 1888 said bonds were sold for $11,187.50 more than the amount paid for them. In an action, among other things to determine the rights of the parties under the will, the widow claimed three-fourths of that sum as the profit from the $30,000 invested for her.

Construction:

Untenable, having omitted to elect under the will until 1884, she could not claim that her election should relate back to the time the bonds were purchased, and there was no basis for the claim that the sum in controversy was the profit or income from any portion of the estate set apart for her benefit.

The widow was not entitled to the difference between the sum received by her and the legal rate of interest on $30,000 in the absence of a finding that more than four per cent. was earned. *Duclos* v. *Benner*, 136 N. Y. 560, reversing 62 Hun, 428.

See Whittemore v. Beekman, 2 Dem. 275; Reynal v. Thebaud, 3 Misc. 190; Scovel v. Roosevelt, 5 Redf. 121.

The will of W. gave his residuary estate to his executors in trust, with power to sell and keep the same and its proceeds invested, the net rents, incomes and profits to be applied to the use of his wife during life. Upon her death the executors were directed to allot and set apar four shares "each of the value and amount of twenty thousand dollars"

1. ACCRETIONS TO THE CORPUS.

one for the use of each of his four daughters or her descendants during life, etc., and upon her death to divide and distribute such share "and the proceeds and investment thereof" among the descendants of the daughters, etc. The balance of the estate the testator gave to his two sons. The testator's widow died in 1878. The residuary estate was then invested in various securities. The executor did not, upon the death of the widow, pay over in money or allot and set apart in securities the sum of $20,000 for either of the trust funds, but kept the residuary estate undivided, paying legal interest on that sum to the respective beneficiaries and paying the balance of the income to the sons. After the death of the widow the residuary estate largely increased in value, because of the appreciation of certain of the securities.

Construction:

The daughters were entitled to share *pro rata* in the increase; it was not necessary, in order that each should have the benefit of her proportion, to have a formal allotment made of the shares, but by the omission of the executor to make a specific allotment he must be deemed to have made it proportionally in all the securities in which the estate was invested; and each was entitled to a proportionate share of the income from and the principal of each security; the power to continue such investments did not terminate upon the death of the widow, but remained until the trusts had been accomplished; for the purpose of determining each daughter's share, the value of the estate at the time of the death of the widow should be ascertained, and after making certain deductions, as required by the will, the proportion which the sum of $20,000 bears to the total value of the residue is the proportion of the securities each is entitled to.

As between the daughters and those entitled in remainder, the former were entitled to the benefit of the increase in income and principal.

The receipt by the daughters of the interest paid to them was not, in the absence of evidence of knowledge on their part that their proportionate shares of the securities were earning more than enough to pay that amount, an acquiescence in the assumption that they were only entitled to interest, and the fact that for a number of years their brothers had received more, and they less, than they were entitled to, was not areason for continuing this injustice. *Monson* v. *N. Y. S. & T. Co.*, 140 N. Y. 498.

See Dividends, p. 133.

2. CONTRACTS OF PURCHASE — PAYMENT OF.

Real estate purchased by a testator and devised to tenants for life and to others in fee, had not been entirely paid for. *Held*, that the executors must pay the balance

2. CONTRACTS OF PURCHASE—PAYMENT OF.

like any other debt, out of the personal estate; that the tenants for life could insist upon it; and that the title would have to be taken to the executors in trust for the purpose of the will. *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231. See Matter of Pollock, 3 Redf. 100.

3. CROPS.

Life tenant took crops of growing grass where land was worked on shares. *Matter of Chamberlain*, 140 N. Y. 390.

4. DIVIDENDS.

The will of M. gave to his executors certain portions of his estate in trust "to receive the rents, interest and income," and to apply the net amounts thereof to the use of the testator's widow during her life, remainder to beneficiaries named. The testator died during the night of April 20, 1881. The trust fund included certain shares of stock of the P. R. R. Co. On April 14, 1881, a dividend of $25,000 was declared on this stock "payable May 2, 1881." On final accounting the executors charged themselves with this sum, treating the dividend as principal.

Construction:

No error; as soon as the dividend was declared the owner of the shares was entitled to it, and it became part of his estate; also the fact that it was made payable at a future time was immaterial; and the dividends to which the life tenant was entitled as income were only those declared after the testator's death. Cogswell v. Cogswell, 2 Edw. Ch. 231, distinguished.

See Brundage v. Brundage, 60 N. Y. 544.

On the same principle, the widow was entitled to the whole of an extra dividend, declared after such death, although made from net earnings accumulated before that time; whenever earned, they were not profits until so declared.

But as to interest on securities, see United States Trust Co. v. Tobias, 21 Abb. N. C. 400.

Same case.

Prior to the death of the testator the P. R. R. Co. had accumulated a fund from earnings which were set aside as a sinking fund to pay outstanding obligations. Certain of the stockholders, including the executors, entered into an agreement with another company for a sale of their stock to the company at $250 per share, the company to have the sinking fund, and to pay said shareholders a ratable portion thereof, which was equivalent to $15.74 per share. In the account this was included as part of the price received and credited as principal.

Construction:

No error; as it was received, not as a dividend, but as part of the price for which the stock was sold, and so belonged to the remaindermen.

4. DIVIDENDS.

The executors classed as income the value of certain options or privileges given to stockholders by various companies to subscribe for and take at par certain stocks and bonds.

Construction:

Error; as the right accrued only on condition the estate chose to purchase or pay for the bonds or stocks, if the options were accepted the purchases operated to increase the capital or change its manner of investment, and so the value of the options did not belong to the life tenant. *Matter of Kernochan*, 104 N. Y. 618.

Consult cases considered in opinion. Also, Goldsmith v. Swift, 25 Hun, 201, and cases cited at p. 205 thereof; also, Knight v. Lidford, 3 Dem. 88; Matter of Skillman, 2 Con. 161.

Husband by will gave to his wife "for her sole use, enjoyment and benefit, during her life, without restraint, deduction or interference in any manner whatsoever," one-half of the income of all his property, "of every kind," during her life; the remainder of the income, and the estate itself, after the death of the wife, he gave to his "legal heirs", subject to all taxes and charges against the estate; they were enjoined against attempting to interfere with the "full enjoyment, use, management and direction and disposition" of the estate. The wife was appointed sole executrix, with the direction that no bond or surety should be required of her, and she was authorized, in her discretion, to sell any portion of the property, if necessary, to pay the debts of the testator. At the time the will was made the testator had no children or other descendants; he owned, at the time of his death, stocks of certain railroad construction companies. Two of said companies constructed railroads, and upon their sale received land grants in payment; another received in part payment for a road constructed by it a certificate of indebtedness secured by a mortgage.

Construction:

The dividends received by the executrix upon said stocks were, under the circumstances, properly treated as income; the intention of the testator was not to create a technical trust, but that his property should remain in specie for his wife's benefit, and subject to her uncontrolled management, and she was entitled to her share of whatever came into the estate from the property in the form in which he left it.

Same case.

The other member of testator's firm died a few days before him. In an action brought by a firm creditor for the protection and distribution of the firm assets a receiver was appointed, who collected interest and dividends upon certain bonds and stocks. A judgment was rendered in said action settling the receiver's accounts and directing him to deliver over the assets to the widow, as executrix of the surviving partner.

4. DIVIDENDS.

Construction:

The judgment was not open to attack upon the accounting of the executrix, and she was entitled to treat as income the money collected by the receiver as dividends and interest paid over to her. *Matter of James*, 146 N. Y. 78, aff'g 78 Hun, 121.

By a clause in a will "to permit my said wife to take the interest or dividends on £3,000 British government three per cent. stock during her natural life," she was entitled to the dividends which might be declared or become payable at any time after the testator's death. *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231.

Stock dividends although unusually large and whether payable in stock or cash, go to the life tenant and not the remainderman (if declared or earned during life estate). *Millen* v. *Guorrard*, 67 Ga. 284; s. c., 44 Am. Rep. 720.

5. ENCROACHMENTS ON THE PRINCIPAL.

Encroachments on principal—seven per cent. interest on a fixed sum given to a life tenant and the sum not yielding that rate. *Warner* v. *Durant*, 76 N. Y. 133.

When a part of the corpus may be appropriated for the support of minors. *Matter of Muller*, 29 Hun, 418.

Ely v. Dix, 118 Ill. 477, holds, that when income is given for support of daughters for their lives, and support and education of their children, and corpus to grandchildren at majority, unimproved land should be sold to produce income. See *McKenzie* v. *Ashley*, 145 Mass. 577; 5 N. Eng. 489.

Pecuniary bequests in trust for certain persons for life, with remainder over. In case of deficiency in amount of estate, they must abate proportionally between life tenant and remainderman. *Wood* v. *Hammond*, 16 R. I. 98.

6. EXPENSES OF THE ESTATE.[1]

It was just to charge the costs of obtaining the construction of the will, upon the testator's estate, both real and personal, so that the appellant's life interest, and the respondent's residuary estate, should each bear its proportion. *Brown* v. *Brown*, 41 N. Y. 507.

When current charges were payable from income given to life tenant and not from the corpus. *Woodward* v. *James*, 115 N. Y. 346.

Where a will gives the net income of the residue of the testator's estate to a party for life, the estate of the life tenant must bear the burden of the taxes and ordinary repairs and the payment of interest upon liens, if any exist. *Wilcox* v. *Quinby*, 73 Hun, 524.

Where a complainant claims to make the remainder in fee of an estate, vested in infants, liable for a debt accruing for professional services performed in relation to the rights of the father and mother in such estate, it is necessary, for his success, that he should affirmatively show the debt in question was contracted for the preservation of the inheritance of the children or for its permanent improvement. And where this is not shown on the hearing, the court will not indulge him with a reference to a master to inquire how far his services contributed to preserve and benefit the inheritance so that a portion, at least, of the debt might be charged thereon. *Warner* v. *Hoffman*, 4 Edw. Ch. 381.

[1] See Expenses of Trustee, p. 600.

7. FORFEITURE.

L. 1896, ch. 547 (ch. 46 Gen'l L.) (in effect Oct. 1, 1896), sec. 212. Conveyance by tenant for life or years of greater estates 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."

1 R. S. 739, sec. 145. In effect January 1, 1830, repealed by L. 1896, ch. 547, sec. 300.

The denial, orally, by a tenant for life or years, of his landlord's title, and the assertion that he owns the lands in fee, and owes no rent for them, does not work a forfeiture of the term, nor authorize the landlord to maintain ejectment for the lands demised. *De Lancey* v. *Ganong*, 9 N. Y. 9.

Mere words can never work a forfeiture of an estate for life or years.

Default in the payment of the rent, where there is a covenant for its payment, and no condition in the lease providing for a re-entry in case of such default, does not work a forfeiture of the term.

The words "yielding and rendering" in a lease, import a covenant, but not a condition, unless the landlord would otherwise be without remedy in case the rent should not be paid. *DeLancey* v. *Ganong*, 9 N.Y. 9

"His (a life tenant's) alienation, or attempted alienation, by feoffment, fine and recovery, or otherwise, of a greater estate than his own, could not forfeit the life estate, or determine it, because feoffment and livery of seizin are abolished here; we have no fine and recovery; and, finally, conveyances here by a tenant for life, although in form conveying a greater estate than he possesses, do not work a forfeiture of his estate, but will pass to the grantee such estate, title and interest as he can lawfully convey. 1 R. S. 738, sec. 1, p. 739, secs. 143, 145.

Whatever effect the disclaimer of his landlord's title, by a tenant for years, in any possible form, by record or otherwise, may have had upon his rights as between him and his landlord, no disclaimer by John Jackson (the life tenant), could operate to extinguish the life estate." *Moore* v. *Littel*, 41 N. Y. (66) 78.

See Jackson v. Noyes, 11 J.R. 33; Jackson v. Vincent, 4 Wend. 633; 1 Washburn on Real Property, 92.

See Grout v. Townsend, 2 Hill, 554, aff'g 2 Denio, 336.

8. IMPROVEMENTS. (See Addenda.)

Life tenants can not compel executors, in the absence of any direction by the testator, to use the residuary estate in improvements upon vacant lots. They can make leases for their lives and do anything to benefit themselves which does amount to waste, or is not prejudicial to the inheritance, without requiring the aid of the court.

8. IMPROVEMENTS.

Lots with buildings upon them devised to tenants for life and then to others in fee. After the testator's death, ten feet of the fronts were taken off to widen the street, which destroyed the buildings. It was considered desirable to erect new ones. The court *directed* the executors to appropriate a sum out of the residuary personal estate to build them, reserving an interest of six per cent. upon the actual cost to be paid out of the rents, and a reasonable allowance for the depreciation and repair until the life estates should fall. *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231.

9. INCOME—WHEN PAYMENT OF BEGINS.

When payment of interest and income begins. *Cooke* v. *Meeker*, 36 N. Y. 15.

See this subject fully treated at p. 1517.

By another clause, the executors were to invest in stock a sum of money which would produce an annual income of $1,000. And from time to time, as the same should become payable, permit his wife to take such income. *Held*, that the executors, in analogy to paying legacies, might take one year for the investment. *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231.

10. INCOME — WHETHER LIFE TENANT TAKES NET.[1]

Bequest to wife of life use of $10,000, with direction to executors to pay her the lawful interest of same semi-annually, and after her death said sum to pass to any heirs of wife by testator; if none, then to his son, O., with residue and remainder of his estate.

Construction:

There was a bequest of income of the specified sum and not of an annuity of $700, and taxes and expenses of trust were payable from income. *Whitson* v. *Whitson*, 53 N. Y. 479.

Citing, Lansing v. Lansing, 1 Abb. N. S. 280; Pinckney v. Pinckney, 1 Bradf. 269; Lawrence v. Holden, 3 id. 142; Williams on Executors, 1389; Dayton on Surrogates, 419, 466.

A testator, by the fourth clause of his will, gave to his wife the use and income of one-third part of certain real property in the city of New York during her natural life. By the sixth clause thereof he directed his executors to lease that portion of the real estate not theretofore bequeathed, being two-thirds of the property mentioned in the fourth clause of the will, "from time to time to collect the rents and income thereof, to pay all taxes, expenses and repairs, and all other charges thereon, and to divide the residue of the income thereof, and pay the same in equal proportions to my five children (naming them) during their natural lives, and after their death I do devise and bequeath the same to their heirs in fee forever."

Construction:

The widow was entitled to one-third of the gross rents or profits of this property.

The executors were required, out of the rents and income of the other two-thirds of the lands, to pay the taxes and repairs, and all other charges on the whole land and to divide the residue of the income thereof among the children. *Starr* v. *Starr*, 54 Hun, 300.

Direction to invest estate on certain securities and pay income to life tenant, requires whole of income; no part can be kept back to make good premiums.

[1]See Mortgages and Interest thereon, p. 138; also, Taxes and Assessments, p. 142; also, Annuities, p. 1529.

12. INCOME—WHETHER LIFE TENANT TAXES NET.

When bonds to be held to pay income to life tenant are with premiums, no portion of interest can be used for benefit of remainderman. *Shaw* v. *Cordis*, 3 N. E. 439; 143 Mass. 443.

When life tenant entitled to full six per cent. interest. *Reighard's Appeal*, 125 Pa. St. 628.

11. LIFE TENANT HOLDING OVER.

A tenant for life or lives who continues in possession, without the consent of the owner, after the determination of the life estate, is not entitled to notice to quit.

The statute, 1 R. S. 749, sec. 7, declares him a trespasser, and ejectment without previous notice to quit will lie. *Livingston* v. *Tanner*, 14 N. Y. 64.

12. MORTGAGES AND INTEREST THEREON. (See Addenda.)

L. 1896, ch. 547 (ch. 46, Gen'l L., in effect Oct. 1, 1896), sec. 233. When remainderman may pay interest owed by life tenant. "Whenever real property held by any person for life is incumbered 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 (in effect April 1, 1894), repealed by L. 1896, ch. 547, sec. 300, the same.

Devise of real estate, and "all the rents, issues and profits thereof," to the testator's widow, for life, with remainder to the residuary legatees of his personalty, the latter to be applied to the payment of debts, and such debts as could not be paid thereby to remain a charge on the real estate, "to be paid therefrom after the life estate of my wife therein," with directions to the executor to defer the payment of certain mortgages on the real estate, during the lifetime of the widow, or to make loans for the payment thereof, secured by mortgage on said real estate, to be paid therefrom after her decease.

Construction:

The mortgages were charged upon the estate in remainder, in exoneration of the life estate.

There being no direction in respect to the payment of interest on the mortgages during the life estate, the general intention of the testator, to give the life tenant the rents and profits without deduction, requires the interest to be paid at the expense of the residuary legatees; and the executor is bound to keep it down, out of their estate. 4 Kent's Com. 74; House v. House, 10 Paige, 158. *Moseley* v. *Marshall*, 22 N. Y. 200.

12. MORTGAGES AND INTEREST THEREON.

DeB. died in 1878, leaving a widow, but no descendants. By his will he gave his residuary estate to trustees named, in trust, to apply the rents, income and profits to "the sole use" of his wife during her life; after her death he directed his trustees to pay out of the capital of the trust estate certain legacies "and to convey, transfer and distribute the remainder of the capital" to certain persons named. He empowered the trustees "to sell the whole or any part of the real estate belonging to such trust estate." He directed that "the proceeds of such sales * * * shall be held and managed by the said trustees * * * upon the same trusts and for the same purposes and be disposed of in the same manner as such real estate would in case of no such sale." It was provided, however, that the trustees should not sell the testator's farm during the lifetime of his wife except with her consent, to be signified by her joining in the deed, and that she should be permitted to use and occupy the farm free of rent so long as she lived. He also directed the trustees during the time that his wife so used and occupied the farm to pay out of the estate "all taxes upon said farm and the expenses of keeping the buildings thereon in proper repair, and all other expenses attending the proper upholding and maintaining of the same, and also the interest upon any and all mortgages which shall be upon said farm at the time of his death." During the widow's lifetime the trustees paid the interest accruing upon a mortgage on the farm and the insurance premiums, taxes, etc., from the income of the estate in their hands. On their accounting these charges were objected to by the executors of the widow on the ground that the items were chargeable to the capital of the estate.

Construction:

Untenable; the words "pay out of my estate" were not, in themselves, sufficient to support the construction contended for, as the other parts of the will disclosed an intention to preserve intact the corpus of the estate for the ultimate disposition arranged with respect thereto upon the death of the life tenant.

To sustain a construction of a will, whereby the capital of a trust fund may be impaired by using it in payment of taxes and of interest on mortgages and in maintaining the realty used by the life tenant, it must contain words of the most unmistakable import pointing unequivocally in that direction. *Matter of Albertson*, 113 N.Y. 434, aff'g 46 Hun, 566.

Where the heir at law has the right to redeem the mortgaged premises and the wife is entitled to dower in the equity of redemption, she has the equitable right to redeem her dower as against the mortgagee and those claiming under him, upon the payment of such portion of the incumbrance as is just and equitable.

12. MORTGAGES AND INTEREST THEREON.

Where this equitable right is vested in the wife, by the death of her husband in possession of the premises, the mortgagee can not deprive her of this right except by such proceedings against her, to foreclose her equity of redemption, as are by law required to bar the equity of redemption of the heirs at law in the same premises.

For all substantial purposes the mortgagor in possession, and those who have derived title to the mortgaged premises or to any interest therein under him, are considered as the real owners of the premises to the extent of their several interests therein; and the mortgagee is considered as a mere creditor who has a specific lien upon the premises for the payment of his debt.

And where the mortgagee has thus taken possession, the wife of the mortgagor who is entitled to dower in the premises, and who was not made a party to the foreclosure suit, can not redeem her life estate except upon the payment of legal interest upon one-third of the amount due on the mortgage, for the residue of her life; and possession of one-third of the premises can not be decreed to her without an actual redemption.

The mortgagee in possession of the mortgaged premises can in no case be divested of that possession until his claim under the mortgage is fully satisfied.

Where a mortgagee in possession has foreclosed the equity of redemption of the person who has the estate in remainder in the mortgaged premises, but not of the owner of the estate for life therein, the latter is not entitled to the possession of the premises during the continuance of his life estate, upon merely paying the interest which becomes due on the mortgage from year to year for life; but he must pay a gross sum, to be ascertained, under direction of the court, upon principles on which the present value of a life annuity is calculated, considering the annual interest on the amount then due on the mortgage as the annuity. And upon the payment of such gross sum, he will be permitted to redeem his interest in the mortgaged premises and will be let into possession thereof during the continuance of his life estate therein; or the decree may direct his life estate to be sold, for the purpose of satisfying his proportion of the debt thus ascertained, and that the surplus arising from the sale be paid to him.

The same mode must be adopted to settle the relative proportions which the owner of the life estate and the remainderman should pay to redeem the premises, where the mortgage has not been foreclosed as to either.

Where the widow is entitled to dower in the equity of redemption, and the mortgagee declines to enforce payment of the principal of his debt, she must, as between her and the heir or other owner of the equity of redemption, contribute sufficient from time to time to keep down one-third of the interest on the amount due. But where the mortgage money is due and the mortgagee insists upon the payment of his debt, the court will not require him to relinquish the possession of any part of the mortgaged premises and to receive the payment of the proportion of the debt which is chargeable on that part of the premises in periodical payments, during the life of the party entitled to redeem.

Where the widow elects to redeem, by the payment of a gross sum equal in value to the proportion of the interest on the amount due for life, or where her equitable right of dower has been redeemed by the rents and profits received by the mortgagee in possession, or where her life interest in one-third of the premises is sold to satisfy the mortgagee for her proportion of the debt, the admeasurement of her dower must be made upon the principles adopted in the Revised Statutes relative to the proceedings for the admeasurement of dower.

The principles upon which a mortgagee who takes possession of the mortgaged premises without a regular foreclosure is to account, are substantially the same as those which the Revised Statutes have adopted in relation to the damages of the

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doweress, where her dower has been withheld from her, after demand; that is, the mortgagee will be charged with the net rents and profits which he has received, or which he might have received without any negligence on his part, after payment of taxes and ordinary repairs and other expenditures of that character. But he will not be charged with the increased rents and profits arising from the use of any permanent improvements made by himself. *Bell* v. *Mayor, etc., of N. Y.*, 10 Paige, 49.

Where a widow is entitled to dower in the equity of redemption of mortgaged premises, she must keep down one-third of the interest upon the amount unpaid upon the mortgage at her husband's death, until the amount which was thus unpaid is required to be paid off; and then she must contribute, towards such payment, a sum which will be equal to the then value of an annuity for the residue of her life upon the amount of principal and interest which was unpaid when her estate in dower commenced, by the death of her husband.

But where the husband mortgages property, after his wife has acquired an inchoate right of dower therein, and she does not join in such mortgage, the heirs at law or devisees of her deceased husband must pay off the whole of the incumbrance themselves. *House* v. *House*, 10 Paige, 158.

A life estate in a house and lot under mortgage is given by a testator to three persons, equally and then to others in fee. *Held*, that the tenants for life must keep down the interest equally out of the rents.[1] That when the life estates fall in, the mortgage remains a charge to be borne by those in fee. The tenants for life are not bound to extinguish it. If the mortgages are called in during the lives of the tenants for life, and it should be found expedient to pay the same out of the residuary personalty of the devisees in fee, the latter will stand in the place of the mortgagees so far as to collect the interest payable by the tenants for life. And, as in this case the executors had paid off the mortgage, it was also held that the tenants for life must bear the interest which accrued upon it from the testator's death to the time of payment, and continue to be charged with interest as if the mortgage remained. *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231.

13. RENTS—APPORTIONMENT OF.

L. 1896, ch. 547 (ch. 46, Gen'l L., in effect Oct. 1, 1896), sec. 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."

1 R. S. 747, sec. 22, in effect Jan. 1, 1830, repealed by L. 1896, ch. 547, sec. 300.

As between tenant for life and remainderman, rent accruing upon leases executed by the testator of the parties, and becoming due afte the termination of the life estate, can not be apportioned.

It is immaterial that the tenancy for life is created by the testator as a provision for his widow.

The devisees in remainder of the premises out of which the rent issued, may maintain a joint action against the executor of the life tenant for rent collected by him, which became due after the termination of the life estate.[2] *Marshall* v. *Moseley*, 21 N. Y. 280.

See Moseley v. Marshall, 22 N. Y. 200; Wright v. Halbrook, 32 id. 587; Brown v. Brown, 41 id. 507.

[1] See *ante*, p. 137; *post*, 144, 145.

[2] See Code of Civil Pro sec. 2720, *post*, p. 1529.

13. RENTS — APPORTIONMENT OF.

Where a lessor dies before the rent becomes due, the rent goes to the heir as incident to the reversion, and the executor can not maintain an action to recover it.

No apportionment of rent is allowable between the executor of a lessor owning the fee, and the remainderman. A remainderman who succeeds to the reversion is entitled to the whole rent as entire rent due to him. The words "had accrued" in the section of the statutes specifying what shall be deemed assets which shall go to the executor (2 R. S. 82, sec. 6, subdiv. 7), signify rents that "had become due and payable" at the time of the testator's death. *Fay* v. *Halloran*, 35 Barb. 295

14. TAXES AND ASSESSMENTS. (See Addenda.)

Tenant for life should pay a portion but not the whole of a municipal assessment for flagging sidewalk; and some portion of the expenses thereof should be apportioned to the remainderman, so also of the expense of insurance of buildings and placing lightning rods thereon, and trustee is entitled to join in meeting such expenses. *Peck v. Sherwood*, 56 N. Y. 615.

A municipal assessment for the flagging of sidewalks is not in the nature of an annual tax, to be paid entirely by a tenant for life of the premises assessed. Nor is it such a permanent improvement as that he should not contribute to its payment, but it should be apportioned between him and the remainderman. So, also, of the expense for insurance of the buildings and placing lightning rods thereon.

Under a devise of a life estate, remainder to an executor in trust, the joining with the tenant for life in the insurance of the buildings upon the premises devised, and in the protection of them by lightning rods, are proper and judicious acts on the part of the executor, which he is authorized to do, and he is entitled to be allowed the proportion properly chargeable to the trust estate. *Peck* v. *Sherwood*, 56 N. Y. 615.

Devise to wife of life estate in a farm and other real estate in J., and then "which devise I make to my said wife for a home for herself and for my infant children, but my intent is nevertheless that the same shall be, at all times during said term, wholly subject to her will and control." There was other provision for the wife. Provision was made for the payment of taxes on all other real estate, and disposition was made of all the anticipated revenue from his property.

Construction:

The widow as life tenant of the farm was liable for the taxes thereon. *Deraismes* v. *Deraismes*, 72 N. Y. 154.

The owner of mortgaged premises died, leaving a will by which he devised the premises to one for life, with remainder to others.

Construction:

The equities as between the life tenant and the remaindermen, in regard to taxes and assessments, did not, in the absence of any evidence

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of fraud and conspiracy to impose upon the remaindermen an obligation belonging to the life tenant, affect the right of the owner of the mortgage to protect his security by paying the same, and to have the amount so paid allowed to him as part of the mortgage debt.

It seems that the life tenant can in such case be charged with the burden of the taxes as well after payment by the owner of the mortgage as before, also that the same may be charged against the interest of the life tenant in any surplus arising on foreclosure.

It seems, also, that the remainderman, in case of default in the part of the life tenant in the payment of taxes or assessments, is entitled to have a receiver appointed to collect the rents and profits, and to apply the same to such payment. *Sidenburg* v. *Ely*, 90 N. Y. 257.

Certain lands, of which G. died seized, descended to plaintiff as heir at law, subject to an estate for two lives in a trustee, created by the will of G. Taxes had been assessed upon the lands prior to the death of the testator. These were paid out of the proceeds of sales of the land pursuant to judgments in a foreclosure suit and in an action for dower commenced after the death of G. Plaintiff and defendant, the executor and trustee under the will of G., were parties defendant to said actions. In an action to compel defendant to restore to the trust fund, out of the personal estate, the amount of the taxes, it appeared that the personal estate amounted to more than the taxes, but that there were claims of unpreferred creditors of the decedent largely exceeding the personalty.

Construction:

While it was the duty of the executor to pay the taxes before paying the unpreferred debts (2 R. S. 87, sec. 27), while the proceeds of the sale of the land, as between the heir at law and the next of kin or legatees were to be treated as realty, and while the executor, as such, was not vested with administrative authority to sell lands for the payment of debts, yet as, if the executor was required to pay over to himself, as trustee, out of the personalty the amount taken from the real estate to pay taxes, the fund would be liable to be reappropriated on the application of creditors to the payment of general debts, and as, without any action on the part of the executor, the taxes have been paid, the relief asked for was properly denied. *Smith* v. *Cornell*, 113 N. Y. 320, aff'g 20 J. & S. 494.

Distinguishing 111 N. Y. 554.

The will of S., who died in 1856, after giving to his wife the use and income of one-third of his house and lot and of his store and lot in the city of New York, authorized and directed his executors to lease and

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rent that portion not devised, to pay all taxes, expenses and charges, "and to divide the residue of the income thereof" among the testator's five children during life, and after death he devised "the same to their heirs in fee forever." In settlement of a suit brought by the widow for dower, the children agreed to keep the house and store in good repair and pay to her one-third of the gross income. The executors thereafter leased both premises, paying her the one-third so agreed upon. In an action brought by a son of one of said children upon the death of his father for partition, the trial court ordered a sale and partition, and that the widow refund one-third of the taxes, repairs, etc., paid for six years prior to the commencement of the action.

Construction:

Error; the testator's intention was to give the executors power to rent the whole premises, paying to the widow one-third of the income, and out of the remainder to pay all expenses; also while the grandchildren as remaindermen might not be bound by the contract of the parties as life tenants, the construction given by them to the will and acted upon for many years would not be overturned when the provisions were reasonably capable of that construction. *Starr* v. *Starr*, 132 N. Y. 154, aff'g 54 Hun, 300.

C. died leaving a will by the terms of which he devised to his widow the use of his "homestead premises," the only real estate left by him, during her life, and the remainder to the testator's legal heirs. The will directed that the taxes and repairs on the premises should be paid by the executor from the general estate in his hands "without burden or charge" upon an annuity also given the widow. It was further provided that in case the widow "should rent the whole or any part of said homestead she shall pay a part of the taxes * * * proportionate to the part so rented," and that the executor, on paying such taxes as she should pay, might retain the same out of the annuity. The general estate became exhausted, and thereafter the taxes and annuity were not paid. The property was sold for unpaid taxes and was redeemed by plaintiff, one of the remaindermen. Action to compel payment of the taxes by the widow, or the appointment of a receiver to rent the premises and apply the rents and profits to such payment.

Construction:

The intent of the testator was that the general estate should bear the burden of the expenses connected with the maintenance of the life estate, and that in no event, save in that specified, *i. e.*, a rental by the

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widow, should her life estate be charged with the taxes; and so, it was the duty of the remaindermen to pay the same. *Clarke* v. *Clarke*, 145 N. Y. 476.

Distinguishing Woodward v. James, 115 N. Y. 346.

Where the will gives the net income of the residue of the testator's estate to a party for life, the estate of the life tenant must bear the burden of the taxes[1] and ordinary repairs[2] and the payment of interest upon liens if any exist. *Wilcox* v. *Quinby*, 73 Hun, 524.

A tenant for life must keep down ordinary taxes; and where she did not do so, the court directed a temporary receiver to be appointed to pay them, unless the tenant for life, within forty days, showed they were paid.

It would seem, that where assessments, going to permanent benefit, occur, it might be right to apportion the payment between tenant for life and remainderman, but not to throw it all upon the tenant for life. *Cairns* v. *Chabert*, 3 Edw. Ch. 312.

NOTE.—"Power is given to the court of chancery by act of 1841, upon bill filed, to make apportionment among tenants for life and owners in reversion and remainder who are liable to contribute thereto, of taxes and assessments upon real estate situated in any *city or village* of the state, which has been sold or is liable to be sold to satisfy them. L. 1841, ch. 341, p. 325. This power now belongs to the supreme court. Fleet v. Dorland and others, 11 How. Pr. R. 489, L. 1847, ch. 280, sec. 16, p. 323. As to proceedings under this act see Dikeman v. Dikeman, 11 Paige, 484."

Where there was a bequest of the income of a sum, it meant net income. *Re Cushing's Will*, 58 Vt. 393.

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The reversioner may recover for waste by a tenant, although after its commission he alienate the estate and have no interest therein at the time of suit brought. *Robinson* v. *Wheeler*, 25 N. Y. 252.

Relative rights of life tenant and remainderman as to cutting timber and liability for waste of third person acting under contract from life tenant determined. *Van Deusen* v. *Young*, 29 N. Y. 9.

The felling of trees for the purpose of sale by a tenant for life, to the injury of the reversioner, is waste, and an action lies by the latter immediately to recover damages for the injury to the freehold.

It is not a defense to such an action that the tenant acted in good faith, or under a claim of right, or that he was in possession, claiming title in fee to the land upon which the waste was committed.

As the reversioner can not bring trespass or ejectment against the tenant so long as the tenancy continues, he is not debarred from his remedy for waste, because the proceedings may involve the determination of a disputed title. *Robinson* v. *Kime*, 70 N. Y. 147; s. c., 1 S. C. 60.

It is *waste* for a tenant to cut down and use wood growing on the demised premises to burn *brick* for sale, where he has covenanted not to cut down, destroy, or carry away any more wood or timber than should be actually used and employed on the farm, and that he would not make any manner of waste, sale or destruction of the wood or timber. *Livingston* v. *Reynolds*, 26 Wend. 115; s. c., 2 Hill, 157.

[1] See Thomas v. Evans, 105 N. Y. 612; Matter of Deckelmann, 34 Hun, 477; but not for taxes confirmed at testator's death. Matter of Babcock, 115 N. Y. 450.

[2] Hancox v. Meeker, 95 N. Y. 529

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A tenant for life has the right to take from the premises reasonable firewood for the use not only of the house which she herself occupies, but also sufficient to supply the house of her servant who cultivates the land, provided it can be done without injury to the inheritance. *Gardiner* v. *Deering*, 1 Paige, 573.

Where wild and uncultivated land, wholly covered with wood and timber, is leased, lessee may fell part of the wood and timber, so as to fit the land for cultivation, without being liable for waste; but he can not cut down *all* the wood and timber, so as permanently to injure the inheritance.

And to what extent the wood and timber on such land may be cut down, without waste, is a question of fact for a jury to decide, under the direction of the court. *Jackson* v. *Brownson*, 7 Johns. 227.

In a bill for waste, proof of a single clear instance of waste committed intentionally, is sufficient to entitle the complainant to a continuance of the injunction and to a decree for an account.

It is scarcely possible to estimate the injury which the destruction of a few valuable timber trees by a tenant for life on a farm with a scanty stock of wood and timber, may occasion to the owner of the inheritance. Hence bills to restrain waste of this character, are not to be frowned upon by the court.

A tenant for life of a farm of one hundred and sixty-five acres, is not entitled to fire-bote for the dwelling house of a farm or laborer, in addition to fire-bote for the principal dwelling house or mansion. And a custom to that effect would be unreasonable and invalid.

In an account decreed against a tenant, for waste of timber, he may be allowed in mitigation, for fire wood and timber furnished by him for the farm, from other premises.

It is not waste for a tenant for life of a farm, to sell hay to be removed from the farm where it is the custom of husbandry in the vicinity, to sell hay from farms for consumption by others.

The removal of coarse bog grass from a farm, which had usually been foddered on the farm, held to be waste.

So of the impoverishment of fields, by constant tillage from year to year.

The erection of a new out-house, with timber from the farm, in place of one which had become ruinous, is not waste.

In a suit for waste against a tenant for life and her under tenant, on a decree for an account against both, the former may insert a provision that the master ascertain what portion of the sum reported against her, should be paid by the under tenant.

Directions in a decree for an account of waste committed by a tenant for life and her under tenant, in respect of timber, dilapidations, undue tillage and withdrawing manure. *Sarles* v. *Sarles*, 3 Sandf. Ch. 601.

An action of *trespass* will not lie by a reversioner for an injury to the inheritance, committed by a person who acts under the authority or by the permission of the tenant for life; such person not being a *stranger* within the meaning of the statute authorizing actions by reversioners. *Livingston* v. *Mott*, 2 Wend. 605.

The statute (1 N. R. L. 527, sess. 36, ch. 56, sec. 33), giving the reversioner or remainderman an action of *waste* or *trespass*, for any injury done to the inheritance, notwithstanding an intervening estate for life or for years; gives the person in reversion or remainder, an action of *waste* only against the *tenant;* but he can bring an action of *trespass* against a *stranger* only. *Livingston* v. *Haywood*, 11 Johns. 429.

An action of *waste* does not lie by the heir against the assignee of the tenant by the curtesy, but only against the tenant himself. *Bates* v. *Shraeder*, 13 Johns. 260.

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A person having an expectant interest in land, less than the inheritance, can not maintain an action for waste. *Peterson* v. *Clark*, 15 Johns. 205.

NOTE.—See Lane v. Hitchcock, 14 Johns. 213.

If a tenant does an act, proper in itself, he can not be made a wrongdoer, by a consequence which he could not anticipate. As if, by turning the water of a creek, being an act of good husbandry, by causing the water to flow into a swamp, the timber growing there is killed, it would not be deemed *waste* so as to produce a forfeiture of a lease; especially, when the landlord has lain by for twenty years, during which time new trees had grown up, of more value than the old, and, therefore, no permanent injury had been done to the inheritance. *Jackson* v. *Andrew*, 18 Johns. 431.

The statute of limitations does not run against remaindermen or reversioners, during the continuance of the particular estate. It was aimed at those who may be guilty of laches in omitting to enter, or bring actions; which can not be said of remaindermen and reversioners, who have no right in law to do either. And this, whether the particular estate exist at the time of the disseizin, or arise subsequently, provided that in the latter case it be immediately preceded by a disability or disabilities within the *proviso* of the statute. *Jackson* v. *Johnson*, 5 Cow. 74.

An injunction to stay waste will be granted though there is no suit pending, and though no action can be maintained against the tenant at law. *Kane* v. *Vanderburgh*, 1 Johns. Ch. 11.

NOTE.—The bill, which was for an injunction to stay waste, stated that Abraham Tenbroeck, being seized in fee of the premises, devised them in fee to his daughter, Margaret, who devised them to her sister, Elizabeth Schuyler, for life, remainder to her children living at her death, and in default of children, remainder to the children of her brother, Dirck Tenbroeck, in fee. After the death of the two testators, Elizabeth Schuyler and her husband, released her interest to the plaintiff. Elizabeth is still living, but without issue, and the defendants are tenants from year to year. * * *

* * * "There are numerous cases in chancery, as Lord Hardwicke has frequently observed, Perrot v. Perrot, 3 Atk. 94; Robinson v. Litton, id. 210; Farrant v. Lovell, id. 723; Garth v. Cotton, 1 Ves. 556, in which the court has interposed to stay waste, by the tenant, where no action can be maintained against him at law. Thus, where there is a lessee for life, remainder for life, remainder in fee; the *mesne* remainderman can not bring waste, nor the remainderman in fee, but chancery will interpose and stay the waste."

Action by owner of the fee of a farm against the lessee of the tenant for life for waste. The alleged waste consisted in cutting growing timber for fuel. At the trial the court charged that if the trees which were down were unfit for fuel or would cost more than their value to secure them, the defendant was not bound to take them. *Held*, correct. The tenant for life of farming land is entitled to cut down and use so much of the standing timber therein as may be necessary for fuel, etc., and is not compelled to cut timber which may cost more than its value to secure. The complaint alleged that the defendant maliciously cut the timber and the plaintiff sought a forfeiture and eviction. *Held*, that defendant was entitled to testify that he cut the wood in good faith, believing that he had a right to do so. *Rutherford* v. *Aiken*, 2 S. C. 281.

Citing, Foster v. Janin, 50 N. Y. 437.

In an action for waste by the assignee of the reversioner against the sub-tenant of the tenant for life, *held*, (1) that an action for waste was maintainable under 2 R. S. 334, sec. 1, against the sub-tenant.*

*The case of Rutherford v. Aiken, reported in 2 S. C., at p. 281, was between

15. WASTE.

The waste was committed without malice and under the belief on the part of the defendant that he had a right to do the acts constituting it. *Held*, that this did not affect the right of the plaintiff to treble damages.* *Rutherford* v. *Aiken*, 3 S. C. 60.

Life tenant may work mines, open at commencement of tenancy, to exhaustion, and may cut trees, if value of inheritance be not diminished. *Sayers* v. *Hoskins*, 110 Pa. St. 473; 1 Cent. 347.

Wilson v. Galey, see 1 West. 488, Sup. Ct. of Ind.

16. WHAT CONSTITUTES THE CORPUS.

Devise of real estate in trust, to sell and convert into money and invest and apply income and profits to use of grandchildren, and principal to be paid at beneficiaries' death to his heirs and by codicil provision that, in case the proceeds of sale did not amount to $30,000, it should be made up to that sum out of the residue of the estate. Construction:

Beneficiaries were, after death of testator, entitled only to income of real estate and not from the residuary until it should be ascertained from sale of real estate that the proceeds did not amount to $30,000. *Fincke* v. *Fincke*, 53 N. Y. 528.

When life tenant's expectation is greater than expected duration of improvements, life tenant should pay.

Remainderman can be assessed for disbursements which in their nature are permanent and do not require renewals. This rule includes benefits to estate from opening and widening street, and for grading streets and permanent sewers. Reyburn v. Reyburn, 8 West, 281; 93 Mo. 326, under name Reyburn v. Wallace.

If life tenant put on permanent improvements and they remain at termination of estate, they inure to benefit of remainderman without contribution. Anstell v. Swann, 74 Ga. 278; see Watson v. Watson, 6 West, 257; Endicott v. Endicott, 4 Cent. 871; 41 N. J. Eq. 93.

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the same parties for alleged waste of the same character upon the same premises, but was for acts committed since the cause of action in above case arose.

*In Rutherford v. Aiken, in 2 S. C. 281, the question of malice (*mala fides*) was material under the complaint for *forfeiture* and *eviction*. The question of intent was not material in Rutherford v. Aiken, 3 S. C. 60, as there was an overt act of waste.

III. POSSESSION OF CORPUS BY LIFE TENANT.

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3. WHEN LIFE TENANT IS NOT ENTITLED TO POSSESSION OF THE CORPUS, p. 154.
4. INTRENCHMENT ON THE CORPUS BY REMAINDERMAN, p. 155.

1. WHEN LIFE TENANT ENTITLED TO POSSESSION OF THE CORPUS WITHOUT SECURITY.

Right of legatee to the possession of the corpus. *Matter of accounting of Denton*, 102 N. Y. 200, digested p. 632.

Where there is anything in the will from which it may fairly be inferred that the testator expected the tenant for life to enjoy the property specifically, it can not be converted into money or public funds; but the remainderman must take his chance of anything remaining after termination of the life estate.

Matter of James, 146 N. Y. 78.

From opinion.—"Howe v. Earl of Dartmouth, 7 Ves. 137, is considered to be the leading case in England, upon the question whether property bequeathed by a testator shall be retained in specie, or whether, if of the perishable class of securities, it shall be converted in such a way as to produce capital bearing interest. The rule as laid down by Lord Chancellor Eldon in that case, as explained by subsequent decisions, among which is particularly to be mentioned that of Lord Cottingham in Pickering v. Pickering, 4 My. & Cr. 300, is this; that where there is a residuary bequest of personal estate, to be enjoyed by several persons in succession, a court of equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that the legatees should enjoy the same thing in succession and, as the only means of giving effect to such intention, will direct the conversion of personalty into permanent investments of a recognized character. Lord Eldon laid down the rule in that case, because of the absence of language in the will from which the direction of the testator might be inferred that his estate should continue as it was. Some difference of opinion has existed among the English judges with respect to the application of the rule laid down in Howe v. Earl of Dartmouth, which, in the recent case of Macdonald v. Irvine, L. R., 8 Ch. D., 101, is adverted to in the opinion of Lord Justice Thesiger. In the previous case of Hinves v. Hinves, 3 Hare, 611, Vice-Chancellor Wigram had said: 'The court in applying the rule has leant against conversion as strongly as is consistent with the supposition that the rule itself is well founded.' In Morgan v. Morgan, 14 Beav. 72, the master of the rolls, Sir John Romilly, said that, 'the effect of the later cases has been to allow small indications of intention to prevent the application of the rule.' Lord Thesiger, referring to the leaning of these judges, with others, against the application of the rule, adopts the following words of Lord Romilly: 'That unless there can be gathered from the will some expression of intention that the property is to be enjoyed in specie, the rule in Howe v. Earl of Dartmouth is to prevail. It is, therefore, incumbent on the persons contesting the application of that rule,

and on the court which forbids that application, to point out the words in the will which exclude it, and if this can not be done the rule must apply. * * * In almost all, if not all, the cases which have been cited in argument, where such an intention was found to exist, * * * we find either words in their natural and literal sense importing use or enjoyment of the property in the state in which the testator left it at his death, or directions contained in the will as to the conversion of the property which were inconsistent with a conversion by the court taking place upon the death of the testator.' In that case the lords justices divided in opinion, as to whether any of the elements existed in the will under consideration to show the intention of the testator that the case should be taken out of the general rule; but they all agreed, if there was a sufficient indication of intention in the will itself to that effect, that the personalty should remain in specie until after the death of the testator's wife. While there the testator gave to his wife for life 'all the income, dividends, and annual proceeds of his entire estate,' there were not present these significant words of injunction against any 'deduction,' or any interference with her use, enjoyment, or management.

In Blann v. Bell, 2 DeGex, Macn. & G. 775, the principle was distinctly recognized that the intention in the will should govern upon the question of the retention of property in specie and that where it is seen to exist the case will be taken out of the general rule. In Collins v. Collins, 2 My. & K. 703, the language of the gift to the wife is not unlike, in its effect, to that in the present case. The testator there gave 'all and every part of his property in every shape and without any reserve and in whatever manner situated, for her natural life,' and at her death the property was to be divided among his father, brothers and a sister. Sir John Leach, M. R., held the rule in Howe v. Earl of Dartmouth did not apply. In this state the rule laid down in the Earl of Dartmouth's case was early adopted, as applicable in the absence of any indication of an intention on the part of the testator that the legatee for life should enjoy the property in its then state. See Spear v. Tinkham, 2 Barb. Ch. 211, and other cases cited on brief for heirs. In every case, in this, or any other state, however stringently that rule is applied as between a tenant for life and remaindermen, it is the absence of manifest or plain intention which sets it in operation.

In Clarkson v. Clarkson, 18 Barb. 646, the decision of the question of the disposition to be made of extraordinary dividends was referred to the discoverable intention of the testator. The case of King v. Talbot, 40 N. Y. 76, frequently cited, has no application. The question discussed was with reference to how the discretion of trustees is prudently and lawfully exercised in the investment of moneys held for the benefit of minors and a very strict rule was laid down." (P. 100-3.)

Testator, by his will, gave to his wife, after payment of debts, the "use, income and occupation" of his real estate for her life, and upon her death to his daughter for life; remainder to her heirs. The use and control of certain of his personal property he gave to his wife for her support and enjoyment during life, the residue thereof, if any there remain, to his daughter.

Construction:

The defendant (the testator's wife) should give to the plaintiff (the testator's daughter and executrix of his will) an inventory of the articles bequeathed, stating that they are in her possession under such bequest, and that at her death they, or so many or so much of them as shall not be consumed by a reasonable and proper use, are to be delivered up to the plaintiff. But as there is no proof of danger that the

1. WHEN LIFE TENANT ENTITLED TO POSSESSION OF THE CORPUS WITHOUT SECURITY.

articles will be wasted or otherwise lost to the remainderman, the defendant should not be required to give security. *Getman* v. *McMahon*, 30 Hun, 531 (534).

See Covenhoven v. Shuler, 2 Paige, 122, 132.

A tenant for life having absolute power of consumption may take possession of corpus without security, though there be a devise over of the residue. *Flanagan* v. *Flangan*, 8 Abb. N. C. 413.

Where the will evinces an intent that the life tenant should have the corpus, the executor may, unless it is extremely hazardous, pay the principal to him. *Matter of Fernbacher*, 17 Abb. N. C. 339.

Testatrix, having no other next of kin than A., gave to her a life estate in all her property, but not subject to control, etc., of any relatives or husband of A.

Construction:

A. had a right to the exclusive control during life of both principal and income, the residue of which devolved by operation of law upon the testatrix's husband. *Matter of Westcott*, 16 St. Rep. 286.

A gift of income, rents, issues and profits in a will to a life tenant, shows an intent that he should have possession. *Thomas* v. *Evans*, 16 Wkly. Dig. 273.

Donee for life of personal property is entitled to possession without security. *Re-Oertle*, 34 Minn. 173.

A legatee of a life estate is entitled to possession of the property without security or anything more than an inventory thereof, except in cases of real danger. *Matter of Oertle*, 34 Minn. 173.

So when it appears from the will that testator so intends. *Post* v. *Van Houten*, 41 N. J. Eq. 82.

Remainderman has no right to possession of any portion of money paid into court under condemnation proceedings, during continuance of life estate. Life tenant has same estate in said moneys as he had in the premises condemned. *Kansas City, etc., R. Co.* v. *Weaver*, 86 Mo. 473; 1 West. 748.

2. WHEN LIFE TENANT ENTITLED TO POSSESSION OF THE CORPUS UPON GIVING SECURITY.

Life tenant was required to give security. *Livingston* v. *Murray*, 68 N. Y. 484, digested p. 97.

Security may be required of life tenant before receiving property. *Matter of Blauvelt*, 131 N. Y. 249, digested p. 910.

By the will of S. he gave his residuary estate to his wife, "to be used and enjoyed by her," during life or as long as she should remain his widow, and at her death or re-marriage then the same to be equally divided between other persons named in the will; the same to be "received and accepted" by her in lieu of dower. The testator left personal estate only, which was converted into money. The executor died and an administrator with the will annexed was appointed, who incurred some expense as such. Upon the settlement of the executor's accounts the surrogate decreed that the whole fund should be paid over by the administrator of the executor directly to the widow, who was

then a resident of another state, and that she was entitled to the possession thereof without giving security.

Construction:

Error; the administrator with the will annexed was entitled to have the money paid over to him, and if he had made any disbursements, or incurred any obligations properly chargeable to the estate, he was entitled to an opportunity of proving this and to a decree for their payment; also, the will simply gave to the widow an estate for life or during widowhood, and upon the happening of either event the remaindermen were entitled to the whole corpus of the estate; as the property was not of a kind which must be individually possessed in order to be enjoyed, she was not entitled to possession without giving security. (See note 1.)

Smith v. Van Ostrand, 64 N. Y. 278; Flanagan v. Flanagan, 8 Abb. (N. C.) 413; In re Woods, 35 Hun, 60; Thomas v. Wolford, 1 N. Y. Supp. 610; Champion v. Williams, 36 N. Y. St. R. 706; In re Grant, 16 N. Y. Supp. 716, distinguished. *Matter of McDougall*, 141 N. Y. 21.

From opinion.—Possession of the corpus was not at all necessary to the enjoyment of the legacy in the manner and to the extent intended by the testator, as such intent can be gathered from the language he employed in his will. If the property were chattels or something of that nature which, in order to be physically used or enjoyed, must be possessed, then the proper course would be to exact an inventory of such property, and an acknowledgment that it was held for life only, with the title in the remaindermen subject to the precedent life estate. 1 Sto. Eq. Jur., sec. 604, note 1; Covenhoven v. Shuler, 2 Pai. 122, 132; Tyson v. Blake, 22 N. Y. 558; Livingston v. Murray, 68 id. 485.

The above cases also show that it is the right of the executor in a case like this, before paying over to a life legatee a life legacy in money, to exact security from such legatee for the forthcoming of the corpus of the legacy at the time of the termination of the life or other happening of the contingency provided for. Where the life tenant is insolvent or a non-resident of the state, it is still more certain that the remainderman has a right to demand that the life tenant shall give security before the corpus of the legacy is delivered to him. Clarke v. Terry, 34 Conn. 176; In re Petition of Camp, 126 N. Y. 377, 385." (p. 27–28.)

P., by his will, gave to his daughter F. $20,000 in trust, "the same to same to revert at her death without issue" to the testator's widow and son. In an action brought by the executors it was adjudged that the fund was payable to F.; that she was, however, not at liberty to spend or waste the principal, but was bound to keep it securely invested for the benefit of the remaindermen. The money was paid over to F. pursuant to the judgment. The widow thereafter died, and her executor made a motion at the foot of the decree for an order requiring F. to give security for the fund. These facts appeared thereon: The whole fund

2. WHEN LIFE TENANT ENTITLED TO POSSESSION OF THE CORPUS UPON GIVING SECURITY.

having been hopelessly lost by unfortunate investments, F. insured her life for $20,000 to provide for its ultimate restitution. Her mother protested against this, asked F. not to continue the policies, and promised to forgive her the loss, and not call upon her for the fund. F. paid the premiums for a time, and then notified her brother of her inability to continue this, and suggested that he continue the policies; this he refused; she thereupon allowed $10,000 of the insurance to lapse. The court required F. to give security for the one-half of the fund payable to the brother, but refused the application as to the one-half going to the mother. F. complied with the order. Appeal by the executor.

Construction:

There was no absolute legal right to the security sought, but the matter rested in the reasonable discretion of the Special Term; and this discretion had been exercised in behalf of the moving parties as fully as was justified. *Hitchcock* v. *Peaslee*, 145 N. Y. 547.

The testator by his will gave to his son J. a fund "in trust to be invested for the benefit of his heirs, he having use or interest of the same, also his widow so long as she remained his widow, he dying without heirs of his own begotten; the corpus to revert to certain other devisees.

Construction:

The will gave an estate to J. for life and created no trust, and as there was no trustee for the fund, the executrix should take charge of it, invest it, etc.; but if delivered to J., he should be required to give security therefor; had J. been trustee of the property he could have been compelled under sec. 1, ch. 482, L. 1871, to give security for its disposition as directed by the will, viz.: to his widow for life with remainder over to the devisees named in the will. *Montfort* v. *Montfort*, 24 Hun, 120.

Mrs. Shipman by will gave her residuary estate to her husband, Edgar J. Shipman, absolutely. By a subsequent clause she revoked the bequest should children be thereafter born to her and survive her, and in that event gave her residuary estate to her husband "during his life," to be divided equally between our surviving children after his death," and appointed her husband the executor. One child subsequently born survived the testatrix.

Upon the settlement of Mr. Shipman's accounts as executor, the Surrogate's Court authorized him to pay over to himself, as life tenant, the residuary estate, upon his giving security to protect the interests in remainder, and also directed that, in case Mr. Shipman should individually decline to receive the corpus of the estate upon the condition of giving security, he should then, as a condition of retaining it as executor, give a similar bond, and in default of giving such bond that he should deposit the entire fund with the chamberlain of the city of New York, to be by him invested, he to pay the income to the tenant for life and the principal to the remainderman upon the termination of the life estate.

Construction:

The latter part of the decree was made without authority, as the surrogate thereby attached to the executor's office a condition imposed neither by law nor by the testatrix.

2. WHEN LIFE TENANT ENTITLED TO POSSESSION OF THE CORPUS UPON GIVING SECURITY.

The surrogate's power was limited to the revocation of the letters testamentary for one of the causes specified in section 2685 of the Code of Civil Procedure.

As in the case at bar there was no trust relation other than that attached to every executor's office, nor any provision in the will calling for the exercise of judgment or discretion, there was no rule of law or requirement of public policy which, under such circumstances, and in the absence, as matter of fact, of any necessity therefor, which authorized the court to require security from the executor and, in case of noncompliance, to compel the deposit of the estate with a public official, thus, in effect, removing the executor from his office and frustrating the will of the testatrix. *Matter of Shipman*, 53 Hun, 511.

Residuary estate given for life; held, executor may pay the corpus to her if she give security therefor, otherwise not. *Matter of Gillespie*, 18 Abb. N. C. 41.

Where there is a bequest for life with remainder (or limitation) over, containing specific articles which, first, are not necessarily consumed in its use, the life tenant or tenants may be required to make an inventory of the goods, specifying that he only had a life estate therein, it belonging thereafter to remainderman, and security for the ultimate disposition according to provisions of the will, if there is danger that the articles will be lost, impaired or wasted; and, second, are consumed in their use, the whole fund must be converted into money and invested and the income thereof only paid to the life tenant. *Spear* v. *Tinkham*, 6 Ch. Sentinel, 72.

3. WHEN LIFE TENANT IS NOT ENTITLED TO POSSESSION OF THE CORPUS.

L. S. by his will gave to his wife the one-third of the residue of his personal estate after his debts and legacies were paid, and also the use of all their residue of the personal estate and the occupation and enjoyment of the farm on which the testator lived, so long as she remained his widow, and in case of her marriage, he gave to her during life the use and occupation of one-third of his real estate; and in that event, directed that the income of the remaining two-thirds should be applied to the education and maintenance of his children, and after the youngest child became of age, he directed his executors to divide all his real and personal estate equally among his children, to have and to hold to them and their heirs forever, and declared that he intended the bequest and devise to his wife should be in lieu of dower; the wife elected to take under the provisions in the will.

Construction:

The widow was entitled to the use of the whole estate during her widowhood; one-third of the personal estate was hers absolutely, and in case she married she would have the use of one-third of the real estate for life in lieu of dower.

The children of the testator could compel the widow to account for all the personal estate, and that their share of the same should be invested, and the income paid to the widow during her life or widowhood, and that the principal, after her death or marriage, should be divided among them according to the provisions in the will.

Where specific chattels not necessarily consumed in the use are bequeathed for life with a limitation over, the practice is to require from the first taker an inventory of the goods,* specifying that they belong to him for the particular period only, and afterwards to the person in remainder. And security is not required from the first taker unless there is danger that the articles will be wasted or otherwise lost by the remainderman.

*So held in Westcott v. Cady, 5 Johns. Ch. 334; Getman v. McMahon, 30 Hun, 531.

3. WHEN LIFE TENANT IS NOT ENTITLED TO POSSESSION OF THE CORPUS.

If there is a general bequest of a residue for life with remainder over, although it includes articles which are consumed in the using, the whole must be sold and converted into money, and the proceeds invested, and the interest only is to be paid to the legatee for life. *Covenhoven* v. *Shuler*, 2 Paige, 122.

T., having life estate charged with support of infants, was not entitled to enjoy the personal property for life, in specie; but it must be converted and permanently secured, so as to give her the income, and preserve the capital for the next of kin. *Emmons* v. *Cairns*, 2 Sandf. Ch. 369; 2 Barb. 243.

Life tenant was not entitled to possession where testatrix gave her property to executors with power to sell and convert, and gave an uncle the use and income thereof for life, with remainder to brothers and sisters. *Matter of Dow*, 7 St. Rep. 535.

Gift to A. for her use and benefit during her life with authority in the executors to convert real and personal into cash and invest same for purposes of will. Executors gave A. possession of entire property. This was unauthorized. *Matter of Millard*, 27 St. Rep. 789.

When corpus arising from foreclosure should be invested under direction of court. *Bolman* v. *Lohman*, 79 Ala. 63.

4. INTRENCHMENT ON THE CORPUS BY REMAINDERMAN.

Devise in trust to invest a fund, the income thereof to be paid to A. for life and upon his death the corpus to be divided among his children, etc. An application by A. to have a part of the principal paid to the children by reason of his inability to provide for them was granted. *Matter of Muller*, 29 Hun, 418.

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Real Prop. L. 170 (L. 1896, ch. 547; took effect Oct. 1, 1896).

"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."

1 R. S. 740, sec. 1, same.*

When damages may be recovered for withholding dower, see Code Provisions, *post*, p. 198.

*1 R. L. 56, sec. 1 (repealed by L. 1828, second meeting, ch. 21, sec. 1, ¶ 8) and for her dower shall be assigned unto her the third part of all the lands of her husband, which were his at any time during the coverture. L. 1787, ch. 4, sec. 1 same as 1 R. L. 56, sec. 1.

Dower recovered against an infant may be recovered by infant on attaining majority, see Code Provisions, *post*, p. 199.

Owner may bring action against a woman claiming dower to compel determination of her claim, see Code Provisions, *post*, p. 200.

Satisfaction of dower in lands held under contract of purchase, see Code Provisions, *post*, p. 202.

1. NATURE OF THE ESTATE.

1. BEFORE DECEASE OF HUSBAND.

"The right to dower is a title paramount to that of the husband, and when he devises the land, though without any qualifying words, an exception of the wife's right to dower is implied. *Havens* v. *Sackett*, 15 N. Y. 365, digested citing

Adsit v. Adsit, 2 Johns. Ch. R. 448; Church v. Bull, 2 Denio, 430.

Where a husband conveyed to a third party property in trust to receive the rents, issues and profits for the benefit of his wife, and subsequently husband and wife join in a mortgage of the property to secure his antecedent debt, the whole estate vested in the trustee, the husband had nothing to convey, and the wife's inchoate right of dower was incapable of being transferred or released during her coverture, except to one who already had, or who by the same instrument received, an independent interest in the estate, and as she could not bind herself personally by a covenant affecting her dower, she was not estopped from setting up a subsequently acquired title, and plaintiff took no interest under his mortgage. *Marvin et al.* v. *Smith et al.*, 46 N. Y. 571.

NOTE.—"An inchoate right of dower may be released to the grantee of the husband, by a proper conveyance executed and acknowledged in the form prescribed by the statute, but the right can not be transferred to a stranger, or to one to whom the wife does not stand in privity. Robinson v. Bates, 3 Metc. 40; Tompkins v. Fonda, 4 Paige, 448; Jackson v. Vanderheyden, 17 J. R. 167; 1 Washburn on Real Property, 252. * * *

The general rule that a vendor of real estate with covenants of warranty can not acquire an outstanding title, and set it up adversely to his conveyance, is not applicable to the deed of a *feme covert*, who unites with her husband in a conveyance with warranty. *Jackson* v. *Vanderheyden*, 17 J. R. 167. * * *

If therefore, the husband has no interest which was subject to the mortgage, and passed by means of it, the mortgagee took no title to the dower right. That could only be released by deed of her husband, conveying the estate to which it was incident, in which she should unite. Carson v. Murray, 3 Paige, 483–503; Jackson v. Vanderheyden, *supra;* Page v. Page, 6 Cush. 196."

As between wife and any other than the state or its delegates or agents exercising the rights of eminent domain, her inchoate right of dower in the lands of her husband is a subsisting and valuable interest, to protect and preserve which she has a right of action.

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1. BEFORE DECEASE OF HUSBAND.

Where, therefore, a husband and wife join in a conveyance of lands of the former, the sale being induced by fraud on the part of the grantee, the wife has a cause of action against him for damages sustained in the loss of her inchoate rights of dower. *Simar* v. *Canaday*, 53 N. Y. 298.

Limiting Moore v. The Mayor, etc., 8 N. Y. 110; citing, Jackson v. Edwards, 7 Paige, 386; s. c., 22 Wend. 498; Denton v. Nanny, 8 Barb. 618; Vartie v. Underwood, 18 id. 561.

Where a conveyance by a husband is set aside on the ground that it was fraudulent as to his creditors, the dower interest of his wife, which was cut off by her uniting in the fraudulent deed with him, is restored to her, and after the death of her husband she may recover her dower in the premises. *Wilkinson* v. *Paddock*, 57 Hun, 191.

A widower, engaged to be married to plaintiff on August 27, but whose engagement was postponed on account of sickness, conveyed on August 13 and without knowl edge of plaintiff nearly his whole estate to two daughters of a former marriage, and took back a lease for life.

After the marriage, plaintiff, upon learning that said conveyance had been made, brought this action to set the same aside.

Construction:

The conveyance was a fraud upon the rights of the wife and would be adjudged void as to her inchoate right of dower, and she should be adjudged entitled to a dower right in the lands as conveyed. She might maintain such action during the life of the husband. *Youngs* v. *Carter*, 10 Hun, 194.

NOTE.—It is as much a fraud for a husband to place his property out of his hands for the purpose of avoiding marital rights of wife as it is for a debtor to convey to defeat creditors. "The latter, it has been held, can not be successfully accomplished." Savage v. Murphy, 34 N. Y. 508; Case v. Phelps, 39 id. 164. And the same principle should maintain the action of the wife to vindicate herself against the success of a similar device. It has been applied in that manner in several instances, and expressly sanctioned in others. Smith v. Smith, 2 Halst. N. J. Ch. 515; Cranson v. Cranson, 4 Mich. 230; Swaine v. Perine, 5 Johns. Ch. 482; Thayer v. Thayer, 14 Ver. 107."

To the same effect is Douglas v. Douglas, 11 Hun, 406.

A wife has no estate in the lands of her husband during his life which she can convey; her inchoate right of dower is but a contingent claim, incapable of transfer by grant or conveyance, but susceptible only, during its inchoate state, of extinguishment.

Such an extinguishment can only be effected by a proper conveyance to the grantee of the husband.

Where, therefore, the wife joins with her husband in a deed of his lands, this does not constitute her a grantor of the premises, or vest in the grantee any greater or other estate than such as he derives from the conveyance of the husband.

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1. BEFORE DECEASE OF HUSBAND.

Construction:

In an action by a widow, who had joined with her husband in a deed of his real estate, brought against the grantee to amend the deed on the ground of fraud, so far as it affected her right of dower, defendant derived his title "through, from and under," the husband within the meaning of section 829 of the Code of Civil Procedure; and plaintiff was not a competent witness as to personal transactions with the decedent.

The authorities upon the subject of the nature and characteristics of dower right collated. *Witthaus* v. *Schack*, 105 N. Y. 332, rev'g 38 Hun, 590.

Inchoate dower right is a chose in action. *Matter of Dunn*, 64 Hun, 18.

A wife's inchoate right of dower is not derived from her husband, but it vests at the moment of the grant to her husband and she takes it constructively as purchaser from the grantor. *Kursheedt* v. *Union Dime Savings Inst. of the City of New York*, 118 N. Y. 358.

Citing, Sutliff v. Forgey, 1 Cow. 89; 5 id. 713; Priest v. Cummings, 20 Wend. 350; Connolly v. Smith, 21 id. 61; Lawrence v. Miller, 2 N. Y. 251.

Where an agreement is made between parties standing in a confidential relation, or in a relation which gives to one party great influence over the other, and the agreement is to the advantage of the party in whom the confidence is reposed or whose influence is the dominant one, and to the detriment of the other party, the former will not be permitted to enforce the agreement unless it appears that he acted in the utmost good faith and that disclosure was made of all the material facts, or that the other party acted with a clear comprehension of the object and effect of the agreement.

This rule applies in favor of a wife in respect to an antenuptial contract, and the courts will regard with rigid scrutiny such a contract where it deprives her of any prospective interest in the estate of her intended husband, and especially where no provision is made therein for her support in case she survives him. Pierce v. Pierce, 71 N. Y. 154; Kline v. Kline, 57 Pa. St. 120; s. c., 64 id. 122.

In an action by the wife to set aside an antenuptial agreement, by the terms of which she surrendered all claims to dower, it appeared undisputably that defendant at the time the agreement was made owned real estate of the value of $100,000; that the relinquishment of dower was not a condition of the engagement of marriage; that there was no negotiation between the parties on that subject before they met and executed the agreement; that defendant then stated that he wanted it arranged

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so that he could buy and sell real estate without interference from her, but did not disclose to her that this would mean a relinquishment of her dower right; that no consideration was paid for the surrender, and that she acted without the aid of counsel.

Construction:

The General Term properly reversed on the facts a judgment of Special Term in favor of the defendant, and plaintiff was entitled to the relief sought. *Graham* v. *Graham*, 143 N. Y. 573, aff'g 67 Hun, 329.

The inchoate right of dower is a valuable, subsisting, separate and distinct interest which is entitled to protection, and for which the wife may maintain a separate action. *Clifford* v. *Kampfe*, 147 N. Y. 383.

Citing Simar v. Canaday, 53 N. Y. 298–305; Mills v. Van Voorhies, 20 id. 412; Jackson v. Edwards, 7 Paige, 408; Madigan v. Walsh, 22 Wis. 501; Burns v. Lynde, 6 Allen, 305; Davis v. Wetherell, 13 id. 60; Petty v. Petty, 4 B. Monroe, 215; Babcock v. Babcock, 53 How. Pr. 97; Taggert v. Rogers, 49 Hun, 265.

An inchoate right of dower is not subject to a mechanic's lien although the wife agreed to pay for the improvement. *Johnston* v. *Dahlgren*, 14 Misc. 623.

2. AFTER DECEASE OF HUSBAND.

The statutes relating to the sale of the real estate of deceased persons, under a surrogate's order for the payment of debts, do not authorize the sale of the widow's estate in dower, where dower has been *assigned* to her.

Before assignment the widow has no estate in the lands of her husband. Until then her interest is a mere chose in action, or *claim* which is extinguished by a sale under a surrogate's order.

But after assignment the seizin of the heir is defeated *ab initio*, and the doweress is in of the seizin of her husband as of the time when that seizin was first acquired or held during the coverture.

Quære, whether a statute would not be unconstitutional which would authorize a sale under a surrogate's order of a widow's estate in dower, where the marriage and seizin of the husband occurred prior to the passage of such statute. *Lawrence* v. *Miller*, 2 N. Y. 245.

NOTE.—"The right of dower attaches at the instant of the marriage, and can not be defeated by the alienation of the husband alone. 1 Cruise's Dig. 136. In the case of Kelly v. Harrison (2 Johns. Cas. 29), the principal was established, that by the marriage and seizin of the husband, the wife's right to dower became a *vested right*, and could not be impaired by the subsequent acts of the government, and of course not by subsequent legislation. Mr. Justice Kent says: 'By the marriage the widow was capable of being endowed of lands purchased by the husband at any time during coverture, but the right could not attain till the land was purchased, and I distinguish

between the *capacity to acquire*, and the *vested right*. The revolution took away the one, and did not impair the other." So, in Jackson v. Edwards, 22 Wend. 498, the same principle is recognized by Senator Verplanck.

The English parliament, although unrestrained by constitutional limitations, deemed the right to dower so far vested, by marriage, that in a recent enactment, in which they virtually abolish dower (see 3 and 4 W. 4, ch. 105, passed Aug. 29, 1833), a special clause is inserted declaring that said act shall not extend to the dower of any widow, who shall have been, or shall be married, on or before the 1st day of January, 1834. Thus sanctioning, by parliamentary authority, the primary rule for the interpretation of statutes, which the English courts have adhered to with commendable firmness, '*Nova constitutio futuris formam debit imponere non praeteritis.*'

The 16th section of our statute concerning dower (1 R. S. 742) places the wife's claim on the same basis as that of jointure. She can not be barred or prejudiced by any act, in the one case, which would not prejudice the other. A jointress is considered a purchaser; marriage alone being considered a valuable consideration; and by the English law dower was not forfeited by the commission of adultery. But here, it is otherwise, by statute. 1 R. S. 734 sec. 15; 1 Cruise's Dig. 156, sec. 1. In Sutliff v. Forgey, 1 Cowen's R. 89; 5 id. 713, in error, it was decided, that the widow of an alien, who was herself an alien, was entitled to dower *as a purchaser*. So, a deed of lands to the husband will not be set aside for *fraud*, where it was an inducement to a subsequent marriage, because marriage forms a valuable consideration. Verplanck v. Sterry, 12 Johns. 536; 3 Cowen 537. In the case of Dartmouth College v. Woodward, 4 Wheat. 538, it was impliedly admitted by Chief Justice Marshall, and expressly asserted by Mr. Justice Story, that the marriage contract itself was within the constitutional protection." (p. 250–1.)

Widow's entry defeats seizin of heirs. *Gibbs* v. *Esty*, 22 Hun, 266.

A widow, after assignment of her dower in lands of which her husband died seized, is in possession of the seizin of her husband. Her title relates back to the time of the marriage, if the husband was then seized, and if not then seized it relates back to the time when he became seized.

By the assignment of dower the seizin of the heir is defeated *ab initio*, and the heir is not afterwards considered as ever having been seized.

The widow, after assignment of her dower, not holding under the heir, has no right to appear before the surrogate to show cause why the lands of which the husband died seized should not be sold for the payment of his debts; the statute only giving such right to heirs and devisees, and persons claiming under them.

An order of the surrogate directing the sale of the whole of the real estate of which the husband died seized, including the part assigned to the widow for her dower, is void, so far as relates to her life estate.

Service upon the widow of the order to show cause, as she had no right to appear and oppose the order for a sale, could not make her a party to the proceedings, so that the rights would be affected by the decree.

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If the widow after the sale of the estate under the surrogate's decree to pay debts, purchased the interest of the creditors in the proceeds of the sale, under a fraudulent representation that the value of her dower interest was to be taken out of those proceeds, such fraud could in no way affect the rights of the purchaser under the decree.

The receipt by her, as assignee of the creditors, of the whole purchase money, could not be regarded as an affirmance by her of the sale of her life estate in the lands, or as a surrender of her life estate, to the purchaser of the estate in remainder.

An attornment to such purchaser by a tenant of the widow is void. *Lawrence* v. *Brown*, 5 N. Y. 394.

A widow's right of dower has no connection with and is not affected by the will of her deceased husband, or by the adjudication of the surrogate thereon. *Carroll* v. *Carroll*, 60 N. Y. 121, rev'g 2 Hun, 609.

A widow's dower is no part of her husband's estate. *Olmstead* v. *Latimer*, 9 App. Div. 163.

The dower interest which a widow has in lands of which her deceased husband had been seized is, although unmeasured, assignable as a right in action and is liable in equity for her debts.

In pursuance of an order appointing a receiver in proceedings supplementary to execution against a widow who was entitled to dower, but which had not been assigned to her, she conveyed her dower interest to the receiver, he having also complied with the conditions prescribed by the Code (sec. 2468), for the vesting of the property of the judgment debtor in him.

Construction:

He was entitled to maintain an action to admeasure the dower; also the action was properly brought by him in his own name as receiver.

Also, plaintiff's position did not enable him to bring an action for partition. *Payne* v. *Becker*, 87 N. Y. 153, rev'g 22 Hun, 28.

Moak v. Coats, 33 Barb. 498; Jackson v. Aipell, 20 Johns. 410, distinguished.

Before assignment of dower, a widow has no estate in the lands of her husband; her right is a mere *chose in action.*

The receipt by the widow of one-third of the rent of the real estate, in lieu of dower, for several years after the death of her husband, does not constitute an assignment of dower, or bar her action therefor.

To constitute an assignment of dower, by agreement or specific act of the widow, it should be clearly manifest that such was the intention.

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B. died intestate in 1849, seized of certain lands, and leaving a widow and two children. In 1855, the widow joined with her children in a lease of the premises for five years. J., one of the children, who was plaintiff's husband, died in 1859; he collected the rent under the lease up to his death, and the plaintiff after that time. After the expiration of the lease, the surviving child executed leases in her own name up to her death in 1866. She left a will devising her real estate to trustees; these joined with the widow of B. and plaintiff in leases for terms not exceeding two years, by which three-ninths of the rent was made payable to the trustees, five-ninths to B.'s widow, and one-ninth to plaintiff. B.'s widow died in 1878. Action thereafter brought for the admeasurement of plaintiff's dower.

Construction:

The facts did not show an assignment of dower either to the widow of B. or to the plaintiff, and did not constitute a bar; and plaintiff was entitled to dower in one-half of the real estate. *Aikman* v. *Harsell*, 98 N. Y. 186, aff'g 31 Hun, 634.

A widow's dower right, although not admeasured, is an absolute right, which is assignable.

When she assigns such dower right, taking back a mortgage upon the land to secure the consideration, her equities are the same as if she had conveyed the land and taken back the mortgage for the purchase price.

The widow of an intestate, who died seized of certain premises, and leaving three children, his heirs at law, joined with one of the heirs in the conveyance of their interests to the other heirs, she taking a mortgage upon the premises to secure the sum agreed to be paid her.

Construction:

The mortgage was, to the extent of the value of the dower right, a lien prior to a former judgment against one of the grantees upon the one-third which said grantee took by descent subject to such dower right. *Pope* v. *Mead*, 99 N. Y. 201.

Where a widow was also executrix, and, as such, one of the partners of the contract sale, and was made a party defendant in her individual, as well as her representative, capacity, in an action for specific performance by joining in the contract of sale, without any reservation therein of her dower right, she consented, so far as her individual rights were concerned, to make a good title to the purchaser and to look to the purchase money as a substitute for the land for her dower right therein.

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Widow may dispose of her dower right before it is admeasured. *Bostwick* v. *Beach et al.*, 103 N. Y. 414.

A dower right, while unassigned, is not a legal estate in land, but it is a legal interest and constitutes property capable in equity of being sold, transferred and mortgaged. *Mutual Life Ins. Co.* v. *Shipman*, 119 N. Y. 324.

Where there is a sale of land subject to a right of dower, and also to a mortgage, which is assumed by the purchaser, payment of the mortgage by the purchaser may be compelled by the owner of the dower interest. *Munroe* v. *Crouse*, 59 Hun, 248.

Where a widow who has a right of dower in certain premises, which has not been assigned, joins with the heirs in a lease thereof for a term of years, she becomes vested, as against the tenant, with all the rights of a lessor, and her title to the premises and to the rents can not be disputed by him.

In making the lease the widow consents to the undisturbed possession of the premises by the tenant for the whole term, and must look to the rents reserved in the lease for the satisfaction of her right as doweress to one-third of the rents and profits of the land during the period of the lease.

The fact that all the other lessors, the owners of the fee of the premises, have joined in a deed conveying the premises, does not prevent the maintenance of an action, by herself, or, in case of her death, by her administrator, to apportion and recover her share of the rents.

In such case the owners of the fee, the plaintiff's co-lessors, who have conveyed their interest in the property, need not be made parties to the action.

While a doweress out of possession can not lease, she may release, or for an annual payment agree not to enforce her right of dower, and thereby estop herself during the term from instituting proceedings to establish her dower interest.

Where a widow is entitled, under such circumstances, to the rent of premises, the lease may be canceled and annulled by her acceptance of a parol promise upon the part of the grantee of the premises to pay her a certain sum monthly for her maintenance for life, and by the performance of the promise. *Holmquist* v. *Bavarian Star Brewing Co.*, 1 App. Div. 347.

Citing Ins. Co. v. Shipman, 119 N. Y. 324; 24 N. E. 177; Pope v. Mead, 99 N. Y. 201; 1 N. E. 671; Payne v. Becker, 87 N. Y. 153.

A widow, by joining in a conveyance or mortgage of land in which she has a dower right, without reservation of her dower right, becomes estopped from claiming dower in the premises. Freiot v. La Fountain, 16 Misc. 153.

Citing Payne v. Becker, 87 N. Y. 153; Bostwick v. Beach, 103 id. 414.

2. REQUISITES.

1. MARRIAGE

A marriage contracted in this state was, in the year 1822, dissolved by the decree of the court of chancery on account of adultery by the husband, and afterwards, in 1825, and again subsequent to the 1st of January, 1830, during the lifetime of his former wife, a marriage was solemnized in due form within this state between him and the plaintiff, with whom he cohabited as his wife until his death in 1847.

2. REQUISITES.

1. MARRIAGE.

Construction :

Each of these marriages with the plaintiff was void, and she was not entitled to dower in the lands of which he died seized. *Cropsey* v. *Ogden*, 11 N. Y. 228.

Where a marriage has been annulled by a judicial decree, upon the ground that when it was contracted the husband had a former wife living, who had absented herself for more than five successive years immediately preceding the second marriage, without being known by him to be living, although until it was annulled it was voidable only and not void (2 R. S. 139, sec. 6), and the cohabitation of the parties was not adulterous, and although both parties entered into the marriage in entire good faith, yet the wife is not entitled to dower in the real estate owned by the husband at the date of the decree. *Price* v. *Price*, 124 N. Y. 589; rev'g 33 Hun, 76; distinguishing Wait v. Wait, 4 N. Y. 95; Jones v. Zoller, 29 Hun, 551; 32 id. 280; 37 id. 228; 104 N. Y. 418; Brower v. Bowers, 1 Abb. Ct. App. Dec. 214; Griffin v. Banks, 37 N. Y. 621.

2. SEIZIN.

In ejectment for dower against a grantee of the husband by *quit claim deed*, or a person holding under such grantee, the defendant is not estopped from showing that the husband was not seized of such an estate in the premises as to entitle his widow to dower.

Sherwood v. Vandenburgh, 2 Hill, 303; Bowne v. Potter, 17 Wend. 164, and other similar cases in the Supreme Court, considered and in this respect overruled. *Sparrow* v. *Kingman*, 1 N. Y. 242.

In ejectment for dower, against a person claiming the premises under a deed in fee from the plaintiff's husband, with full covenants, the defendant is not estopped from showing that the husband had but a leasehold estate in the premises. *Fin* v. *Sleight*, 8 Barb. 401.

A widow is not dowable of land in which her husband has only a vested remainder, expectant upon estate for life.

This rule holds as well where the estate of the husband comes by devise as by inheritance.

The word "purchase," as used in Coke Litt. 31, in reference to this point is limited to a purchase by deed. *Durando* v. *Durando*, 23 N. Y. 331.

A wife has no dower in an estate in remainder inherited by a husband. *Clark* v. *Clark*, 84 Hun, 362.

NOTE.—See Eldridge v. Forrestal, 7 Mass. 253; and Beekman v. Hudson, 20 Wend. 53.

2. REQUISITES.

2. SEIZIN.

That husband must have been seized of a present freehold as well as of an estate of inheritance, and that seizin of a vested remainder is not sufficient, where husband dies or aliens his interest in the premises during the continuance of the particular estate, see, also, Dunham v. Osborn, 1 Paige, 634; Reynolds v. Reynolds, 5 id. 161; Matter of Cregier, 1 Barb. Ch. 598; Green v. Putnam, 1 Barb. S. C. 500; 4 Kent, 39, 40; Fearne on Rem., 5th ed., 35, 36; Park on Dower, 61, 73.

Where a husband is seized of a vested remainder expectant upon an estate for life, subject to be defeated by his own death prior to that of the tenant for life, and he purchases the life estate, this is such a seizin as gives the wife dower subject to be defeated, as above. The husband can not alienate or encumber the estate to the prejudice of the wife's dower, nor is the same affected by the sale of the life estate upon execution against the husband. *House* v. *Jackson*, 50 N. Y. 161.

See, also, Beardslee v. Beardslee, 5 Barb. 324.

Dower interest was lost through default in covenant to pay incumbrances. *Durnherr* v. *Rau*, 60 Hun, 358.

Inchoate right of dower under a conveyance upon conditions is defeated on the failure of the husband's title through non-performance of the conditions. *Greene* v. *Reynolds*, 72 Hun, 565.

Where, by a deed, the grantor reserved a power to create a future estate in the land conveyed, the power, unless coupled with a trust, is not imperative, but its execution depends entirely upon the will of the grantor.

It is only when a power is in trust that a court of equity will decree its execution.

T., who was a widower, conveyed certain real estate to his children, reserving to himself a right to devise by will a life estate in one-third thereof to "any hereafter-taken wife." The grantor thereafter married, and died without executing the power.

Construction :

The widow was not entitled to any interest in the land ; the reservation at most created a mere power, and so, to be executed or not, at the pleasure of the grantor.

As to whether the reservation can be treated as a power within the meaning of the Revised Statutes (1 R. S. 732, sec. 105), *quere*. *Towler* v. *Towler*, 142 N. Y. 371, aff'g 65 Hun, 457.

The position of a wife, in respect to her husband's property, is limited by the Revised Statutes, and save as brought within those limitations she is without the right to assert any claim to it.

To entitle a wife to dower, the husband must be seized either in fact or in law of a present freehold in the premises, as well as an estate of inheritance.

2. REQUISITES.

2. SEIZIN.

Such a seizin can not be predicated with respect to lands purchased with the moneys of the husband, but not conveyed or agreed to be conveyed to him.

Plaintiff's complaint alleged in substance that she was the wife of defendant, who, with intent to defraud her of her dower rights in his real estate, has purchased various pieces of land, the title to which he caused to be taken in the name of L., under a written agreement with the latter that defendant "should receive all the benefit of, and have control of said property;" that defendant did exercise full possession and control of the same, and when sold, L., pursuant to the agreement, executed conveyances to *bona fide* purchasers having no notice of plaintiff's interest, defendant receiving the purchase money; that all of the land so purchased, except one piece, had been thus sold and conveyed. Plaintiff asked for a judgment adjudging the proceeds of such sales to be "still real estate, and that this plaintiff has an inchoate right of dower in the same," and that the piece unconveyed be adjudged subject to her right of dower.

Construction:

The complaint did not set forth a cause of action; and so, the overruling of a demurrer thereto was error. *Phelps* v. *Phelps*, 143 N. Y. 197, rev'g 75 Hun, 577.

Widows are not dowable in the real estate of a copartnership while its affairs remain unsettled. *Riddell* v. *Riddell*, 85 Hun, 482.

There is no dower in lands held in joint tenancy though otherwise of co-tenancy. Jourdan v. Haran, 24 J. & S. 185; 117 N. Y. 628.

In absence of fraud there can be no claim of dower in property deeded away by the husband before marriage. *Oakley* v. *Oakley*, 69 Hun, 121, aff'd 144 N. Y. 637.

Where no adverse possession is shown, a title vested in husband will constitute such seizin as is required to entitle widow to dower. Actual possession by the husband need not be proved. *McIntyre* v. *Costello*, 47 Hun, 289.

A widow is not entitled to dower out of lands held under a contract of purchase, where the husband's interest has been aliened during coverture. *Hicks* v. *Stebbins*, 3 Lans. 39.

The court considered itself bound by the authority of Hawley v. James, 5 Paige, 318, 453; s. c., 16 Weod. 61, though disagreeing with opinion there expressed.

See Code Provisions, *post*, p. 202.

Dower can not be had in estates *pur autre vie* under 1 R. L. 365, sec. 4. *Gillis* v. *Brown*, 5 Cow. 389.

A wife's right of dower attaches on the real estate of her husband as soon as there is a concurrence of marriage and seizin.

Such right of dower will not be affected, or prejudiced, by any act of the husband subsequent to the marriage, or by any judgment afterward recovered against him. But it is liable to be defeated by every subsisting claim or incumbrance, in law or

2. REQUISITES.

2. SEIZIN.

equity existing before the inception of the title, and which would have defeated the husband's seizin. 1 R. S. 742, sec. 16.

Previous to assignment, the right of dower of a married woman is a right resting in action only. She can neither convey nor assign it; and has no estate in the land. *Scott* v. *Howard*, 3 Barb. 319. Citing 4 Kent's Com. 50, 2d ed; Green v. Putnam, 1 Barb. 506.

Instantaneous seizin not sufficient to entitle wife to dower. *Cunningham* v. *Knight*, 1 Barb. 399.

See, also, Stehlin v. Golding, 15 St. Rep. 814.

Five persons purchase real estate for joint benefit and sign an agreement that it shall be (which it is) taken in the name of one who is to hold and receive avails for joint account, until a sale and conversion into money. A bill is filed for partition sale and account; the court decided that the widow of one of the five was not a necessary party, she having no right of dower. The court also held, that the wife of the party in whose name the property had been taken in trust had no inchoate right of dower. *Coster* v. *Clarke*, 3 Edw. Ch. 429 (1840).

See, also, Cooper v. Whitney, 3 Hill, 95; Terrett v. Crombie, 6 Lans. 82.

3. DOWER IN LANDS EXCHANGED.

Real Prop. L., sec. 171 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "Dower in lands exchanged.—If a husband seized of an estate of inheritance in lands, exchange them for other lands, his widow shall not have dower of both, but 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."

1 R. S. 740, sec. 3, same, except "proceedings" instead of "action."

The word "exchange" as used in the Revised Statutes, 1 R. S. 740, sec. 3. is to receive the same interpretation which is applied to it when used at common law, in reference to that species of conveyance.

In order to deprive the wife of her dower, therefore, in lands conveyed by her husband, or to put her to an election, under the provision of the statute, there must be a mutual grant of equal interests in the respective parcels of land; the one in consideration of the other. A transfer of a mere equitable interest in seventy five acres of land, derived under a lease in perpetuity, for eleven acres of land and $700 in other property, will not constitute a legal exchange. *Wilcox* v. *Randall*, 7 Barb. 633.

The reviser's note on this section (3 R. S. 596) is relied on to indicate that the object of the framers of the statute was to enact the common law rule which is found in 1 Cruise, 148, sec. 3, and 1 Inst. 31b.

4. DOWER IN LANDS MORTGAGED.

1. IN LANDS MORTGAGED BEFORE MARRIAGE.

Real Prop. L., sec. 172 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "Dower in lands mortgaged before marriage.—Where a person

4. DOWER IN LANDS MORTGAGED.

1. IN LANDS MORTGAGED BEFORE MARRIAGE.

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."

1 R. S. 740, sec. 4, same.

A wife is dowable of the equity of redemption in lands of which her husband was seized at the time of the marriage. Van Duyne v. Thayer, 14 Wend. 233; s. c., 19 id. 162; Titus v. Neilson, 5 Johns. Ch. 452; Coles v. Coles, 15 Johns. 319; Bell v. New York, 10 Paige, 49.

But where the mortgage is made before marriage, the wife can not, after foreclosure or after release by the husband, recover her dower at law, though not made a party to the foreclosure proceedings; her remedy is in equity, to redeem. Smith v. Gardiner, 42 Barb. 356; Van Duyne v. Thayre, 19 Wend. 162; Cooper v. Whitney, 3 Hill, 95.

2. IN LANDS MORTGAGED AFTER MARRIAGE.

Where the wife of a mortgagor has not joined in the mortgage and has an inchoate right of dower in the mortgaged premises, the making of her a party to an action of foreclosure, without allegations in the complaint that the mortgage is prior, superior or hostile to her interest, does not affect that interest nor does the general clause in the judgment foreclosing defendants of all right in the premises.

Even with such allegations a judgment passing upon her rights is erroneous. A foreclosure action is not the proper mode to litigate rights claimed in priority or in hostility to the mortgage. *Merchants Bank* v. *Thomson*, 55 N. Y. 7.

Doweress made party defendant in foreclosure, but not notified of proceedings to distribute surplus, is not concluded by order, but may recover *her* share from one taking it though he took it as trustee and she is in default in an action brought by him to settle trust. *Mathews* v. *Duryee*, 3 Abb. Ct. App. Dec. 220.

Citing, Mills v. Van Voorhies, 20 N. Y. 412; also Hawley v. Bradford, 9 Paige, 200; Vartie v. Underwood, 18 Barb. 561.

Mortgagee in possession—dower interest of the wife of a mortgagor not made a party to the foreclosure—right of the wife of the mortgagor to redeem—time within which redemption must be made—must be claimed through the husband. *Campbell* v. *Ellwanger*, 81 Hun, 259.

A widow has the right by virtue of her dower interest, to redeem from a mortgage to the foreclosure of which she was not a party. *Sheldon* v. *Hoffnagle*, 51 Hun, 478.

The effect of a judgment in an action of foreclosure upon a defendant claiming a dower right prior to the lien of the mortgage—proper practice in such a case. See *Lanier* v. *Smith*, 37 Hun, 529.

A reconveyance to a husband of property which has been theretofore conveyed by a husband and wife by way of mortgage, restored the wife's right of dower as against a mortgage given back by the husband to the grantor. See *Taylor* v. *Post*, 30 Hun, 446.

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2. IN LANDS MORTGAGED AFTER MARRIAGE.

A grantee of the husband can not set up a mortgage which was a lien upon the premises at the time of the marriage against the widow's claim for dower. *Bartlett* v. *Musliner*, 28 Hun, 236.

A widow, being an infant at the time of joining in the conveyance, may recover dower from the grantee, though he has bought in a purchase money mortgage to which the premises were subject. *DeLisle* v. *Herbs*, 25 Hun, 485.

As to the computation of amount of mortgage from which the widow must redeem. See *Raynor* v. *Raynor*, 21 Hun, 36.

The widow of the grantor (mortgagor) must tender the amount due, before she can obtain her dower. *Westfall* v. *Westfall*, 16 Hun, 541.

The wife's inchoate right of dower in the husband's land follows the surplus moneys raised by a sale in virtue of the power of sale in a mortgage executed by her, with her husband, and will be protected against the claims of her husband's creditors, by directing one-third of the surplus moneys to be invested and the interest only to be paid to the creditors during the joint lives of husband and wife. *Vartie* v. *Underwood*, 18 Barb. 561.

Citing, Denton v. Nanny, 8 Barb. 618.

Plaintiff's husband, during coverture, conveyed lands to B., subject to mortgage thereon, executed by plaintiff's husband and wife, to G., the former owner, to secure the purchase money, $1,600. At the time of the conveyance, plaintiff's husband had paid $400 on the mortgage. B. subsequently paid $1,200, the balance due upon the mortgage, and the mortgage was satisfied of record. The defendant was in possession of the premises as a purchaser from a person deriving title from B.

Construction:

The plaintiff was entitled to dower in the premises, and she could recover the same in an action at law. *Runyand* v. *Stewart*, 12 Barb. 537.

The equity of redemption in mortgaged premises before entry or foreclosure, is equivalent to the estate in fee, descendible by inheritance, devisable by will, and alienable by deed.

A widow is entitled to dower in an equity of redemption, as well when the mortgage was executed before marriage as when it is executed afterwards, by the husband and wife during coverture.

The widow as against the mortgagee and those claiming under him, is entitled in equity to redeem, upon payment of the mortgage debt. *Denton* v. *Nanny*, 8 Barb. 618.

J. and McJ. were partners, and bought in a house to secure a debt due the firm, mortgaged it and failed in business. J. died intestate and McJ. assigned for benefit of creditors. The mortgages were foreclosed and a balance of the funds remained in court.

Construction:

The widow of J. was entitled to a right of dower; but having joined her husband in the mortgages, she now had an equitable right of dower in a moiety of the equity of redemption and balance in court. *Smith* v. *Jackson*, 2 Edw. Ch. 28 (1833).

3. IN LANDS MORTGAGED FOR PURCHASE MONEY.

Real Prop. L., sec. 173 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "Dower in lands mortgaged for purchase money. Where a

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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."

1 R. S. 740, sec. 5, same.

1 R. S. 740, sec. 4, is not applicable to case of a purchase money mortgage. *Cunningham* v. *Knight*, 1 Barb. 399.

The wife of a mortgagor of land for the purchase money, whether she has or has not joined in the mortgage, had an inchoate right of dower in the equity of redemption which is not affected by a foreclosure to which he is not a party.

The object of the statute (1 R. S. 741, sec. 5) was not to prescribe a different rule, but to prevent the claim of dower of a widow who did not unite in a purchase money mortgage from having preference to it. *Mills* v. *Van Voorhies*, 20 N. Y. 412.

See also Smith v. Gardner, 42 Barb. 356.

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, who was not a party to the mortgage.

Although she does not derive title from her husband, yet she claims under him within the intent of the provisions of the Revised Statutes regulating mortgage sales under powers. 2 R. S. 745, sec. 8, as amended by the act of 1840, sec. 12, ch. 342, L. 1840. It is only by virtue of his seizin that she can claim, and her inchoate right is subject to any claim to which the title he acquired was subject. It is subordinate to a purchase money mortgage, and subsequent to it in the order of priority; and where it ripens into an actual title, upon the death of her husband, it is subsequent in point of time. *Brackett* v. *Baum*, 50 N. Y. 8.

Real Prop. L., sec. 174 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "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

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nevertheless entitled to the interest or income of one-third part of the surplus for life, as her dower."

1 R. S. 741, sec. 6, same, "decree of court of equity," instead of "judgment in an action to foreclose."

4. IN LANDS OF A MORTGAGEE.

Real Prop. L., sec. 175 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "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."

1 R. S. 741, sec. 7, same.

5. DOWER IN LANDS ALIENATED.

Dower is to be based on the value of the land when alienated by the husband. *Raynor* v. *Raynor*, 21 Hun, 36.

The dower which a widow is entitled to in lands aliened by the husband during the marriage is one-third of the value at the time of alienation, and no more. *Walker* v. *Schuyler*, 10 Wend. 480.

Same under R. S. and R. L. and at common law.

Citing Humphrey v. Phinney, 2 Johns. 484; Dorchester v. Coventry, 11 id. 510; see also Hall v. James, 6 J. Ch. 258 (1822); Hazen v. Thurber, 4 id. 604 (1820).

6. INCIDENTS OF THE ESTATE.

Doweress is liable to contribute to payment of mortgage of husband in which she joined on land in which dower is assigned to her. *Graham* v. *Linden*, 50 N. Y. 547.

A grantee's covenant to pay mortgages existing on land conveyed does not bind him to pay mortgages to protect dower interest of wife, who had joined in mortgages, although her dower interest was reserved in the deed. *Durnherr* v. *Rau*, 135 N. Y. 219, aff'g 60 Hun, 358.

Dower has priority over annuity. *Clark* v. *Clark*, 147 N. Y. 639.

Action lies against tenant in dower committing waste. See Code Provisions, *post*, p. 200.

In a case of equitable dower in land contracted to be purchased, the purchaser's widow has a right to have the purchase money paid out of the personal estate. *Williams* v. *Kinney*, 43 Hun, 1, aff'd 118 N. Y. 679.

Taxes assessed and unpaid before the assignment of dower, is made, can not be charged upon the estate assigned, where there is personal estate sufficient to pay them. *Harrison* v. *Peck*, 56 Barb. 251.

Dower is due of iron or other mines wrought during coverture; but not of mines unopened at death of husband. If lands assigned for dower contain an open mine, tenant in dower may work it for her own benefit. *Coates* v. *Cheever*, 1 Cow. 460.

7. EXTINGUISHMENT.

1. BY RELEASE TO GRANTEE OF HUSBAND.

The marriage of a female mortgagee with the mortgagor, since the act for the protection of the rights of married women (ch. 200, of 1848), does not extinguish her right to action upon the mortgage.

Where such mortgagee unites with her husband in a junior mortgage of the same land, the act affects only her inchoate dower interest, but does not in the absence of words for that purpose impair her right to priority of lien. *Power* v. *Lester*, 23 N. Y. 527.

The release by a wife of her inchoate right of dower operates only against her by way of estoppel; it must accompany or be incident to a conveyance by another, and binds only in favor of those who are privy to and claim under the title created by that conveyance, and if the conveyance is void or ceases to operate, she is again clothed with the right which she has released. The case of the Manhattan Co. v. Evertson, 4 Paige, 457, distinguished, and that of Meyer v. Mohr, 1 Robt. 333, questioned. *Malloney* v. *Horan*, 49 N. Y. 111.

Dower can not be extinguished by the committee of a lunatic. *Matter of Dunn*, 64 Hun, 18.

Where a wife joins with her husband in a conveyance of his lands, which is properly executed by her, is effectual and operative against him, and is not superseded or set aside as against him or his grantee, her inchoate right of dower is thereby forever extinguished for all purposes and as to all persons.

Even if such a conveyance, at the time of its execution, only operates against her by way of estoppel, at the death of her husband her interest is released as effectually as if she had been a widow when the conveyance was executed, and she can not assert it, even as against a stranger, to the grantee.

Plaintiff joined with her husband in a deed of his lands upon which there were certain mortgages, which mortgages were foreclosed and the lands sold leaving surplus moneys, before the distribution of which the husband died.

Construction:

Plaintiff had no dower right in the surplus. *Elmendorf* v. *Lockwood*, 57 N. Y. 322.

By joining in deed in order to release her dower, wife is not estopped from questioning its validity. *Carpenter* v. *Osborn*, 102 N. Y. 552.

Defendants were tenants in common with W., whose interest, sold on judgment against him, was bought in by defendants and improved. Then plaintiffs, as subsequent judgment creditors of W., redeemed,

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brought an action for partition and the property was sold under judgment therein.

The wife of W., after the purchase by defendants and before the redemption, quit-claimed her inhcoate right of dower to the defendants.

Construction:

The said dower right remained in the plaintiffs' undivided half of the property, but was discharged as against the defendants' undivided half; and in distributing the proceeds of sale, the value of such remaining and undischarged dower right should be charged upon and paid for solely out of the share awarded to the plaintiffs. *Ford* v. *Knapp*, 102 N. Y. 135.

Where a deed or mortgage, in which the wife has joined, is defeated by a sale on execution under a prior judgment, the wife is restored to her original position, and may, after her husband's death, recover dower in the lands.

Hinchcliffee v. *Shea*, 103 N. Y. 153, rev'g 34 Hun, 365.

From opinion.—"The joinder by a married woman with her husband in a deed or mortgage of his lands, does not operate as to her by way of passing an estate, but inures simply as a release to the grantee of her husband of her future contingent right of dower in the granted or mortgaged premises, in aid of the title or interest conveyed by his deed or mortgage. Her release attends the title derived from the husband, and concludes her from afterward claiming dower in the premises as against the grantee or mortgagee, so long as there remains a subsisting title or interest, created by his conveyance. But it is the generally recognized doctrine that when the husband's deed is avoided, or ceases to operate, as when it is set aside at the instance of creditors, or is defeated by a sale on execution, under a prior judgment, the wife is restored to her original situation, and may, after the death of her husband, recover dower as though she had never joined in the conveyance. Robinson v. Bates, 3 Metc. 40; Malloney v. Horan, 49 N. Y. 111; Kitzmuller v. Van Rensselaer, 10 Ohio St. 63; Littlefield v. Croeker, 30 Me. 192."

Action for dower must be brought within twenty years. See Code Provisions, *post*, p. 198.

When foreclosure sale bars widow's dower, see Code Provisions, *post*, p. 201.

If a doweress takes no proceedings in her lifetime, the right of dower abates absolutely. *Howell* v. *Newman*, 59 Hun, 538.

Where the release of her inchoate right of dower has been fraudulently obtained from a married woman, and a certain sum has been paid her in consideration therefor, she has three remedies. She may sue for the deceit, or she may sue in equity to rescind, or she may bring an action at law for an admeasurement of dower. *Spannocchia* v. *Loew*, 87 Hun, 167.

Where a widow had retained the consideration, given for her release of dower to the committee of her lunatic husband, for seventeen years and had not during that time made any claim, her right to dower was barred. *Doremus* v. *Doremus*, 66 Hun. 111.

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When a covenant by a woman to release her right of dower may be enforced by a purchaser from the husband. See *Carpenter* v. *Carpenter*, 40 Hun, 263.

The promise of husband to pay his wife for release of dower will be sustained, but the rights of creditors will be protected beyond the value of the inchoate right of dower as ascertained by the rule in Jackson v. Edwards, 7 Paige, 408. *Doty* v. *Baker*, 11 Hun, 222.

To the same effect is Smart v. Harring, 14 Hun, 276.

What form of deed is sufficient to transfer inchoate right of dower. See *Gillilan* v. *Swift*, 14 Hun, 574.

Release of dower is sufficient consideration to support promise by husband to wife. *Foster* v. *Foster*, 5 Hun, 557.

Wife's release of dower to her husband, though pursuant to order of the court and acknowledged in due form, is a nullity, she being incompetent to execute an instrument to him except in single case authorized by statute, *i. e.*, sale of real property under judgment of partition, authorized by L. 1840, p. 128. *Crain* v. *Cavana*, 36 Barb. 410, aff'd 62 id. 109.

See Code Provisions, *post*, p. 198.

Where husband and wife execute a deed, and deposit it as an escrow, to be delivered on the execution of a bond and mortgage, the husband's consent to the delivery of the deed to the grantee, without a performance of the condition, will bind the wife. *Ackert* v. *Pultz*, 7 Barb. 386.

Though, by articles of separation, a wife agrees to release her dower in her husband's lands, they are not thereby discharged unless she ratifies it after his death; and though she accepts and uses a pecuniary provision for her maintenance given in such an agreement she is not on that account prevented from claiming dower.

A wife can not directly or indirectly release to her husband her dower right. *Guidet* v. *Brown*, 3 Abb. N. C. 295; s. c., 54 How. Pr. 409.

Citing for last proposition, Carson v. Murray, 3 Paige, 483.

a. By power of attorney.

Real Prop. L., sec. 187 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "Married women 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. "Any married woman of the age of twenty one years, or more, may execute, ackuowledge 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."

Release by married woman to her husband in partition, see Code Provisions, *post*, p. 198.

A married woman, under the act of 1878 (L. 1878, ch. 300), authorizing her "to execute, acknowledge and deliver her power of attorney with like force and effect and in the same manner as if she were a single woman," may by such a power appoint her husband her attorney in fact.

A married woman executed a power of attorney to her husband, em-

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a. By power of attorney.

powering him to sell and convey all lands belonging to her, and to execute in her name "all necessary or proper deeds, conveyances, releases, releases of dower and thirds, and rights of dower," for conveying any "right, title and interest, whether vested or contingent, choate or inchoate therein."

Construction:

The husband was authorized to sign the name of his wife to a deed conveying real estate owned by him, and, too, to release her inchoate right of dower in the land. *Wronkow* v. *Oakley*, 133 N. Y. 505.

2. BY RELEASE OF DIVORCED WOMAN TO HER FORMER HUSBAND.

Real Prop. L., sec. 186 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "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 (repealing L. 1890, ch. 502). "In all cases where 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."

L. 1890, ch. 502—same as L. 1892, ch. 616, except that it is retrospective only while the L. 1892, ch. 616, renders the provision prospective, as well by inserting the words "or may hereafter" after the words "has been heretofore" and the words "or may be" after the words "divorce has been."

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2. BY RELEASE OF DIVORCED WOMAN TO HER FORMER HUSBAND.

After an absolute divorce procured by a wife, she may release her dower rights to her husband. *Savage* v. *Crill*, 19 Hun, 4, aff'd 80 N. Y. 630.

3. BY FORFEITURE FOR MISCONDUCT.

Real Prop. L., sec. 176 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "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."

1 R. S. 741, sec. 8, same.

1 R. L. 58, sec. 7 (L. 1787, ch. 4, repealed L. 1828, second meeting, ch. 21, sec. 1, par. 8) reads:

"If a wife willingly leave her husband and go away and continue with her adulterer, and be thereof convicted, she shall be barred forever of action to demand her dower that she might have had of her husband's lands, unless her husband willingly be reconciled to her and permit her to dwell with him; in which case she shall be restored to her action of dower."

By same act (L. 1787, ch. 4—1 R. L. 58, sec. 7, repealed L. 1828, second meeting, ch. 21), it is provided that if a woman be ravished and consent to the ravisher, neither shall be entitled to any inheritance, dower or jointure, and those who would be entitled on their death may enter and hold.

1 R. L., ch. 102, sec. 8, repealed L. 1828, second meeting, ch. 21, sec. 1, par. 138, wife convicted of adultery not entitled to dower in complainant's real estate.

Plaintiff's inchoate right of dower not affected by judgment dissolving marriage
See Code Provisions, *post*, p. 201.

Defendant's dower right extinguished by judgment dissolving marriage.
See Code Provisions, *post*, p. 201.

A divorce dissolving the marriage contract on the ground of the adultery of the husband, does not deprive the wife of her dower in his real estate.

The effect of a divorce at common law and under our statutes is discussed. *Wait* v. *Wait*, 4 N. Y. 95.

A wife can only be barred of dower by a conviction of adultery, in an action for divorce, and by the judgment in such action. 1 R. S. 741, sec. 8; 2 R. S. 146, sec. 48.

An admission or proof of adultery or a verdict or judgment in any other action, will not work a forfeiture.

A cohabitation by the husband with the wife after the commission of adultery by her, with knowledge of the fact, condones the offense and is an absolute bar to an action for divorce, and an action can not be maintained merely to establish the fact that the offense, which has thus been blotted out, has been committed in order to attach the penalty of forfeiture of dower to the offending wife. *Pitts* v. *Pitts*, 52 N. Y. 593.

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3. BY FORFEITURE FOR MISCONDUCT.

In an action of divorce *a vinculo* brought by a husband against his wife, the referee found the wife guilty of the adultery charged, but also found the husband guilty of the same offense, and thereupon a judgment was entered dismissing the complaint.

Construction:

The wife had not lost her right of dower; this possibility of dower affected the title to lands deeded by the husband, she not having joined in the deed or in any manner relinquished her right; and a vendee who had contracted to purchase and pay for the premises upon delivery of a deed assuring to him the fee, clear of all incumbrances, was not required to accept such title. *Schiffer* v. *Pruden*, 64 N. Y. 47, aff'g 7 J. & S. 167.

A decree dissolving a marriage for a cause not regarded as adequate by the laws of this state, rendered in another state by a court having jurisdiction of the subject and the parties, in an action brought by the husband, will not deprive the wife of her then existing dower rights in lands in this state; at least, in the absence of evidence that, under the laws of the state where it was rendered, it has that effect.

As to whether, even with such evidence, it will have the same effect in this state, *quære*.

The word "misconduct," in the provision of the Revised Statutes (1 R. S. 740, sec. 1), declaring that "in case of divorce dissolving the marriage contract for the misconduct of the wife she shall not be endowed," refers, not to any act which may be termed misconduct or converted into a cause of action by the legislature of another state but only to that kind of misconduct which our laws recognize as sufficient to authorize a divorce—that is, adultery.

It seems, the provisions of the Code of Civil Procedure (secs. 1756, 1760), providing that where judgment is rendered, at the suit of the husband, dissolving the marriage, the wife shall not be entitled to dower, were substituted for the provisions of the Revised Statutes (2 R. S. 146, sec. 48) declaring that "a wife being a defendant in a suit for a divorce brought by her husband, and convicted of adultery, shall not be entitled to dower," and the repeal of the latter provision (sec. 1, subd. 4, chap. 245, L. 1880) left the law unchanged. *Van Cleaf* v. *Burns*, 118 N. Y. 549; rev'g 43 Hun, 461; see 133 N. Y. 540.

The "misconduct" which under the Revised Statute (1 R. S. 741, sec. 8) deprives a wife, divorced because thereof, of her right of dower, is only

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that kind of misconduct which under our laws is a ground for divorce, *i. e.*, adultery.

The effect which a judgment of divorce, granted in another state, has upon the lands of the husband in this state is to be determined, not by its laws, but by the laws of this state.

A husband obtained a divorce in another state on the ground of his wife's abandonment of him.

Construction:

The wife was not thereby deprived of her then existing dower rights in the lands of her husband in this state, although the effect of the decree under the statutes of the state where it was rendered, was to deprive her of dower. *Van Cleaf* v. *Burns*, 133 N. Y. 540, rev'g 62 Hun, 250, former appeal, 118 N. Y. 549.

a. Forfeiture of pecuniary provision in lieu of dower.

Real Prop. L., sec. 182 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "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, and 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."

1 R. S. 742, sec. 15, same.

4. BY EXERCISE OF THE RIGHT OF EMINENT DOMAIN.

Where, in pursuance of an act of the legislature, lands are taken by a municipal corporation for a public use, upon an appraisement and payment of their value to the holder of the fee, the corporation acquires an absolute title to them, divested of any inchoate right of dower existing in his wife.

The inchoate right of dower of a married woman exists not as a part of the marriage contract, but as a positive institution of law incident to the marriage relation. It is not an estate, but a mere contingent claim, not capable of sale on execution, nor the subject of grant or assignment.

The estate of a widow after the assignment of her dower is a continuation of the estate of her husband (Cruise Dower, T. 6, ch. 2, sec. 17), a part of the fee he held while living, and this is entirely divested by the proceedings to appropriate the land to public use.

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4. BY EXERCISE OF THE RIGHT OF EMINENT DOMAIN.

The land of the plaintiff's husband was, during her marriage, taken by the corporation of New York for a public market, under ch. 75 of the law of 1817. The proceedings to acquire it were regular.

Construction:

The corporation acquired the absolute fee, discharged of her claim of dower. *Moore* v. *The Mayor*, 8 N. Y. 110.

NOTE. Before assignment of dower, the widow has no estate, but a mere right in action, or claim which can not be sold upon execution. 2 Coms. 254; Greenleaf's Cruise Dig. Title Dower, ch. 3, sec. 1, note; Gooch v. Atkins, 14 Mass. 378. (p. 113.)

Where real property belonging to a married man is taken during coverture by the exercise of the right of eminent domain, an absolute title is acquired divested of any right of dower existing in his wife, but as between the wife and her husband the inchoate rights of the wife are not extinguished, but must be recognized and protected. *Matter of New York and Brooklyn Bridge*, 89 Hun, 219.

5. ACT OF HUSBAND.

Real Prop. L., sec. 183 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "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 the laws 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."

1 R. S. 742, sec. 16—same, except "estate of married women" used instead of "contingent right of dower of a married woman"; and the phrase "if otherwise entitled thereto" is added at the end of the sentence.

1 R. L. 57, 59, secs. 4, 10 (L. 1787, ch. 4), (repealed L. 1828, second meeting, ch. 21, sec. 1, par. 8). By sec. 4, it is provided that wife shall have dower in lands recovered against the husband by covin, or default. By sec. 10 it is provided that, the attainder of the husband shall be no bar to dower.

1 R. L. 60 (L. 1806, ch. 17) (this statute was not revised by R. S.) provides that no widow whose husband was convicted and attainted of adhering to the enemies of this state under L. 1779, ch. 25, sec. 3, shall be endowed of lands held at the time of conviction or before, with a provision that claims of widow whose husband died before passing of this (L. 1806, ch. 17) act shall not be affected.

8. BARRMENT.

1. BY JOINTURE.

Real Prop. L., sec. 177 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "When dower barred by jointure.—Where an estate in real property is conveyed to a person and his intended wife, or the intended wife alone, or to a person in trust for them or for the intended wife alone, for the

8. BARRMENT.

1. BY JOINTURE.

purpose of creating a jointure for her, and with her assent, the jointure bars her right of 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."

1 R. S. 741, secs. 9, 10, same.

1 R. L. 58, sec. 8 (L. 1787, ch. 4, repealed by L. 1828, second meeting, ch. 21, sec. 1, par. 8), provides that where a jointure is created for a wife, she shall not have dower of her husband's lands, but if lawfully evicted from her jointure she shall be endowed to the amount lost by the eviction.

A woman can only relinquish her dower by receiving a jointure as provided in sections 9–12 of 2 Revised Statutes (6th ed), 1121, 1122. *Ennis* v. *Ennis*, 48 Hun, 11.

An antenuptial agreement, not to claim dower will not be sustained unless founded on the consideration of some provision in lieu of dower; the marriage is not sufficient consideration. *Curry* v. *Curry*, 10 Hun, 366.

2. BY PECUNIARY PROVISION.

Real Prop. L., sec. 178 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "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."

1 R. S. 741, sec. 11, same.

9. ELECTION.

1. BETWEEN JOINTURE AND DOWER.

Real Prop. L., sec. 179 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "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."

1 R. S. 641, sec. 12, same.

1 R. L. 58, 59, secs. 8, 9 (L. 1787, ch. 4), (repealed L. 1828, second meeting, ch. 21, sec. 1, par. 8). The element of consent does not seem to enter. By sec. 8 a jointress is barred of dower unless lawfully evicted from her jointure. But by sec. 9 where the jointure is given after marriage she is allowed an election.

In an action to recover dower it appeared that plaintiff, during the lifetime of her husband, who had been declared a lunatic, and a committee of his estate appointed, entered into a contract with the committee and the children of her husband, and executed to them a deed, by

9. ELECTION.

1. BETWEEN JOINTURE AND DOWER.

which, in consideration of the receipt by her of about one-third of her husband's property, she released all interest in his estate, including "her inchoate right of dower (if any exists), of, in and to any and all real estate," and also covenanted at any future time, on demand, to execute all necessary deeds, releases or transfers, to carry out the intention of the parties, "namely, the full and perfect release" of her "inchoate and other rights in the property" of her husband, which she had or might have at the time of the death, and she also covenanted not to make any claim therefor on the death of her husband.

Construction:

Plaintiff was not entitled to dower; there was, under the agreement and within the meaning of the Revised Statutes (1 R. S. 741, secs. 12, 13, 14), a pecuniary provision made in lieu of dower; and, as plaintiff had retained that provision and never offered to return it, she must be deemed to have elected to keep it in lieu of dower.

Also, while the agreement and deed did not operate as a present release of her inchoate right of dower, as under the agreement she received a separate estate, it was obligatory upon her, and she was bound to release her dower; it was immaterial that defendants did not then own the land in which dower is claimed; they were competent to make a contract for the benefit of the land when their interest should come into existence. *Jones* v. *Fleming*, 104 N.Y. 418, rev'g 37 Hun, 227.

2. BETWEEN DEVISE AND DOWER.

Real Prop. L., sec. 180 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "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."

L. 1895, ch. 1022, sec. 1 (taking effect June 14, 1895, repealing L. 1895, ch. 171 and re-enacting 1 R. S. 741, sec. 13), same, except that the last sentence "but she is not entitled to both" is omitted.

L. 1895, ch. 171, sec. 1 (taking effect Jan. 1st, 1896, amending 1 R. S. 741, sec. 13), same, and also forces an election where lands are inherited from husband; also last sentence omitted. (Repealed by Real Prop. L., § 300.)

1 R. S. 741, sec. 13, same, except that the last sentence "but she is not entitled to both" is omitted.

Under the provisions of the Revised Statutes a widow's action of ejectment for dower must be brought against the *actual occupant* of the land

of which she is dowable, and not as in the former action of dower against the tenant of the freehold.

Where she is entitled to dower in a block of lots in a city, the action may be maintained against the occupant of a single floor of a store erected upon one of them who has hired it of the owner for a single year. But a judgment against him would not bind his landlord. (*Semble*, per Ruggles, Ch. J.)

The receipt by her for several years after the death of her husband in lieu of dower, of one-third of the rent of lands leased by him will not bar her action.

It is not necessary that she demand her dower before bringing her action. *Ellicott* v. *Mosier*, 7 N. Y. 201.

Where, by an antenuptial agreement, a provision is made that the husband shall provide by will for an annuity for his widow for her life, with an interest in a certain part of his real estate, in lieu of dower or any portion of his estate, and the husband by will gives her an annuity only during her widowhood, he has failed to perform upon his part, and his widow is not precluded from claiming the property which by the statutes is to be inventoried without appraisal and set apart for her use.

A provision in the will of a husband in favor of the wife, will never be construed by implication to be in lieu of dower or the interests the law may give her in the personal property not disposed of by him.

In such a case, the fact that she is in possession of the real estate and some personal property held by her before marriage, and secured to her by the agreement, claiming to hold them under it, will not prevent her from asserting her right. *Sheldon* v. *Bliss*, 8 N. Y. 31.

A widow has the right to elect whether she will accept a provision made for her in her husband's will or claim her dower; her election is not binding unless made with full knowledge of the nature and extent of the estate. *Hindley* v. *Hindley*, 29 Hun, 318.

The fact that a general legacy of bank stock is made to a widow in lieu of dower, will not give her the income which may have accrued upon such stock from the time of the testator's death until his transfer to her. *Tifft* v. *Porter*, 8 N. Y. 516.

A devise of the testator's whole estate to his widow for life, with remainders over, is not a provision in lieu of dower, unless such intention be implied from other terms of the will, and the widow may take one third of the estate as doweress and the residue as devisee.

A claim of dower in premises so devised is not barred by a fore-

closure and sale under a mortgage executed by the husband alone during coverture, although the widow was made a party to the foreclosure suit, and the bill, which was taken as confessed against her, alleged, in pursuance of the one hundred and thirty-second rule of the late court of chancery, that she claimed some interest in the premises "as subsequent purchaser or incumbrancer, *or otherwise*."

A decree against defendants, made parties under such general allegation, bars rights and interests in the equity of redemption, but not those which are paramount to the title of both mortgagor and mortgagee. *Lewis* v. *Smith*, 9 N. Y. 502; see 11 Barb. 152.

NOTE.—Where there is no direct expression of intention that the provision shall be in lieu of dower, the question always is, whether the will contains any provision inconsistent with the assertion of a right to demand a third of the lands, to be set out by metes and bounds. 1 Roper on Husband and Wife, 576. The devises in a will must be so repugnant to the claim of dower that they can not stand together. 4 Kent's Com. 58; Adsit v. Adsit, 2 Johns. Ch. R. 448; Wood v. Wood, 5 Paige, 596; Fuller v. Yates, 8 id. 325; Sanford v. Jackson, 10 id. 266; Bull v. Church, 5 Hill, 206; s. c., in error, 2 Denio, 430. (P. 511-512.)

A provision was construed inconsistent with a claim of dower in Dodge v. Dodge, 31 Barb. 413; Sullivan v. Mara, 43 id. 523; Starr v. Starr, 54 Hun, 301.

A provision was construed consistent with a claim of dower in Bond v. McNiff, 9 J. & S. 543; s. c., 6 id. 83; Bull v. Church, 5 Hill, 206; s. c., 2 Den. 130; Lasher v. Lasher, 13 Barb. 106.

The testator not having declared in express terms, that the provisions made by his will for his widow are given in lieu of dower, she is not put to her election, unless the devises of the will are so repugnant to the claim of dower that they can not stand together. Lewis v. Smith, 9 N. Y. 502; Bull v. Church, 2 Denio, 430; Jackson v. Churchill, 7 Cow. 287; Savage v. Burnham, 17 N. Y. 562.

Where the executors are clothed with full power and authority to rent, lease, repair and insure the estate during any period of time it shall remain unsold and undivided, they are vested with the legal title thereto.

The claim of dower is inconsistent with the provisions of a will which requires the executors to rent, lease, repair, etc., the estate out of which the money is to be raised to pay the bequest to the widow, and, therefore, the widow can not claim under the provisions of the will without relinquishing her right of dower in such premises. *Tobias* v. *Ketchum*, 32 N. Y. 319.

The acceptance of an annuity expressed to be in lieu of dower barred the claim of dower. *Hatch* v. *Bassett*, 52 N. Y. 359, digested p.

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2. BETWEEN DEVISE AND DOWER.

Power to sell real estate not devised to widow and to invest proceeds for her was inconsistent with her dower right therein, and her acceptance of the devise barred dower. *Vernon* v. *Vernon*, 53 N. Y. 351.

Devise construed to be in lieu of dower. *Le Fevre* v. *Toole*, 84 N. Y. 95.

The will gave wife one-third of the estate. It was not stated to be in lieu of dower or other claim. The residuary bequest was declared void. The testator died intestate as to such portion as was not validly disposed of, and the acceptance by wife of provision for her was not a waiver of her right to share in the distribution thereof under the statute of distribution. *Lefevre* v. *Lefevre*, 59 N. Y. 434.

Citing Vernon v. Vernon, 53 N. Y. 351, 362; Pickering v. Stamford, 3 Ves. 332; s. c., id. 492; Hoes v. Van Hoesen, 1 Barb. Ch. 379.

By an antenuptial agreement, the woman covenanted, that, if, after marriage, the man died first, she would accept $1,500 "in full satisfaction of her dower in his estate, and shall bar her from claiming the same, either in his real or personal estate." He covenanted to provide by will for the payment of that sum "in lieu of dower, or her rights as his widow in his estate."

The man died after marriage, having made provision by will, as covenanted.

Construction:

The agreement was valid and remained in full force after marriage (L. 1849, ch. 375, sec. 3); the woman took nothing as widow from her husband's estate, and there being no children of such marriage living, the widow was not entitled to the specific articles given by the statute (2 R. S. 83, sec. 9) to a widow; the surrogate, on application of the widow to compel the executor to set apart the said articles for her, had jurisdiction to determine the question. *Matter of the Estate of Young* v. *Hicks*, 92 N. Y. 235, aff'g 27 Hun, 54.

W., by will, gave to his widow "all of the household property in the dwelling-house and the use of the dwelling-house during her life." In the dwelling-house there was, at testator's death, a quantity of coal and wood, provided for family use, and a shot gun.

Construction:

These articles were properly allowed the widow.

The gift of household property did not preclude executors from set-

ting apart as exempt and for the use of the widow, a horse, phæton and harness, of the value of $150.

The will directed the executors to expend a sum not exceeding $2,000 "in repair" of a cemetery lot. This authorized a sarcophagus for testator's remains at the expense of $500, and the monument to be replaced, headstones erected, coping replaced, etc.

The residuary estate, including the homestead in which his wife was given a life estate, W., the testator, gave to his wife, H. and W. in equal proportions. The executors, at request of widow and H., expended $320 in repair of the premises and properly charged same to them.

The acceptance by widow of the provisions of the will did not preclude her from her dower right. *Matter of Accounting of Frazer*, 92 N. Y. 239.

From opinion.—"Finally, it is objected that the widow was not entitled to dower because the provisions for her benefit under the will were accepted by her, and dower was excluded by the manifest intention of the testator derived from the scope and tenor of the will. No trust estate was vested in the executors. They had simply a power of sale with no right to rent or lease, and no control over the rents and profits. No duty relating to the real estate was imposed upon them except to sell and convey. Dower, therefore, was not excluded by the creation of a trust estate inconsistent with it, vested in the executors. Savage v. Burnham, 17 N. Y. 561; Tobias v. Ketchum, 32 id. 327. The provision giving the rest, residue and remainder of his property to the widow and the McDonalds is not inconsistent with dower, for it relates to the division of his estate, and does not purport to dispose of hers. The two may stand together. The intention manifest in the will was not an equal division of all his property among the three, as in Chalmers v. Storil, 2 Ves. & Bea. 222, a case shaken by subsequent criticism. Gibson v. Gibson, 17 Eng. L. & Eq. 349. But the equal division aimed at is of a residue which may well be deemed the remainder of the property subject to the dower right. Havens v. Havens, 1 Sandf. Ch. 324; Mills v. Mills, 28 Barb. 456. The repugnancy, therefore, which drives the widow to an election must come, if at all, from the provision for the support of testator's brother, those directing a sale, and that devising a house and lot to Mrs. Carr. It is conceded that the support of the brother was simply charged upon the McDonald farm, which was not to be sold. The existence of such a charge does not necessarily exclude the widow's dower in the same land, especially since the executors are also directed to reserve in their hands sufficient of testator's property for the purpose of that support. The devise to Mrs. Carr and the direction to sell and convey a part of the real estate do not necessarily conflict with the right of dower in the present case. Jackson v. Churchill, 7 Cow. 387; Havens v. Havens, *supra;* Fuller v. Yates, 8 Paige, 325. Directions for a sale may be so expressed and the purpose to be answered of such peculiar character as to indicate an intention to exclude dower. Vernon v. Vernon, 53 N. Y. 362. But no unusual or peculiar state of facts exists in the present case to compel an inference that the property directed to be conveyed was to pass free and discharged from the widow's dower."

Z., by will, after directing payment of debts, funeral expenses, etc., gave to his wife during her life "the rents, income, interest, use and

occupancy" of all his estate, real and personal, upon condition that she keep the buildings and personal property insured, pay all taxes and assessments, and keep said estate in good repair.

Construction:

The provision was inconsistent with the assertion of a dower right, and so must be construed as in lieu of dower; the widow having accepted the provision so made, she could not thereafter claim dower. Lewis v. Smith, 9 N. Y. 502.

Widow is not of right entitled to a gross sum for value of her life estate in surplus on foreclosure, pursuant to rule 71; as, except in cases of dower (subd. 3, sec. 2793, Code of Civ. Pro.), the question rests in the discretion of the court.

Such rule simply provides for the manner of estimating the gross sum. *In the Matter of Zahrt*, 94 N. Y. 605.

Bequest in lieu of dower is not liable for debts. *Dunning* v. *Dunning*, 82 Hun, 462.

Equitable lien upon the property of the grantor of an annuity in lieu of dower, as against his creditors, the property upon which it is given must be described with certainty. *Mundy* v. *Munson*, 40 Hun, 304.

Legacy in lieu of dower abates, like other legacies, is not a charge upon the real estate, and has preference over other legacy. *Sanford* v. *Sanford*, 4 Hun, 753.

Provision in will for wife declared that it should be "accepted and received by her in lieu of and in bar of her dower. This acceptance precluded her from sharing in lapsed legacies. *Matter of Accounting of Benson*, 96 N. Y. 499, digested p. 1562.

Provisions in lieu of dower become inoperative on refusal of widow to accept the same. *Bailey* v. *Bailey*, 97 N. Y. 460, digested p. 447.

The will of S., who died leaving both real and personal estate, after providing for the payment of his debts and giving certain specific legacies, gave his residuary estate to his executors to sell and dispose of the same and divide the proceeds equally between his "wife and children, share and share alike."

Construction:

The widow was not put to her election, but was entitled to dower in addition to the provision made for her in the will; the devise to the executors was void as a trust, but valid as a power in trust, and the lands descended to the heirs, subject to the execution of the power, 1 R. S. 729, sec. 56; Cooke v. Platt, 98 N. Y. 35, and the execution of such power was not inconsistent with a dower interest, but a sale would be subject thereto.

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2. BETWEEN DEVISE AND DOWER.

Dower is never excluded by a provision for the wife, except by express words or necessary implication. Where there are no express words, there must be on the face of the will a demonstration of the intent of the testator that the widow shall not take both dower and the provision. Such demonstration is furnished only where there is a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to the benefit of the provision.

The intention to put the widow to an election between dower and the provision may not be inferred from the extent of the provision, or because she is devisee for life or in fee, or because it might seem to the court unjust as a family arrangement to permit her to claim both, or because it might be inferred that, had the attention of the testator been called to it, he would have expressly excluded dower.

Konvalinka v. *Schlegel*, 104 N. Y. 125, aff'g 39 Hun, 451, distinguishing Savage v. Burnham, 17 N. Y. 561; Tobias v. Ketcham, 32 id. 319.

From opinion.—"We repeat, the only sufficient and adequate demonstration which, in the absence of express words, will put the widow to her election, is a clear incompatibility, arising on the face of the will, between a claim of dower and a claim to the benefit given by the will. We cite a few of the cases in this state showing the general principle and the wide range of application. Adsit v. Adsit, 2 J. Ch. 449; Sanford v. Jackson, 10 Paige, 266; Church v. Bull, 2 Den. 430; Lewis v. Smith, 9 N. Y. 502; Fuller v. Yates, 8 Paige, 325; Havens v. Havens, 1 Sandf. Ch. 324, 331; Wood v. Wood, 5 Paige, 596. * * * It seems to be supposed that there is a necessary repugnancy between the existence of a trust in real property created by a will, and an outstanding dower interest of a widow in the trust property. We perceive no foundation for this contention. If the purpose of a trust, as declared, require that the entire title, free from the dower interest of the widow, should be vested in the trustees in order to effectuate the purposes of the testator in creating it, a clear case for an election is presented. Vernon v. Vernon, 53 N. Y. 351. But the mere creation of a trust for the sale of real property and its distribution is not inconsistent with the existence of a dower interest in the same property. There is no legal difficulty in the trustee executing the power of sale, but the sale will necessarily be subject to the widow's right of dower, as it would be subject to any outstanding interest in a third person, paramount to that of the trustee. In the cases of Savage v. Burnham, 17 N. Y. 561, and Tobias v. Ketcham, 32 id. 319, the widow was put to her election, not because the vesting of the title in trustees was *per se* inconsistent with a claim for dower, but for the reason that the will made a disposition of the income, and contained other provisions which would be in part defeated if dower was insisted upon. There is language in the latter case, which, disconnected with the context, may give color to the contention of the appellant. But it is the principle upon which adjudged cases proceed, which is mainly to be looked to, because a correct principle is sometimes misapplied. There is, however, no ground for misapprehension of the meaning of the learned judge in that case, interpreting his language with reference to facts then under consideration. It has frequently been declared that powers of, or in trust for sale, are not inconsistent with the widow's right of

dower. Gibson v. Gibson, 17 Eng. L. and Eq. 349; Bending v. Bending, 3 Kay & J. 257; Adsit v. Adsit, *supra;* In re Frazer, 92 N. Y. 239. And it was held in Wood v. Wood, 5 Paige, 596, that the widow was not put to her election where the testator devised all his property to trustees with a peremptory power of sale, and directed the payment to the widow of an annuity out of the converted fund. The same conclusion was reached under very similar circumstances in Fuller v. Yates, 8 Paige, 325, and In re Frazer, *supra*, the widow's dower was held not to be excluded by a provision in the will, although as to a portion of the realty the power of sale given to the executors was peremptory. The general doctrine is very clearly stated by the vice-chancellor in Ellis v. Lewis, 3 Hare, 310: 'I take the law to be clearly settled at this day, that a devise of lands *eo nomine* upon trusts for sale, or a devise of lands *eo nomine* to a devisee beneficially, does not *per se* express an intention to devise the lands otherwise than subject to its legal incidents, dower included.' This remark of the vice-chancellor also answers the claim that the testator, when he described as the subject of the dower, "all the rest, residue and remainder of my estate," meant the entire title, or the estates as enjoyed by him. A similar argument was answered by Lord Thurlow in Foster v. Cook, 3 Bro. Ch. C. 347. 'Because,' he said, 'the testator gives all his property to the trustees I am to gather from his having given all he has, that he has given that which he has not.'"

Provision for one-third of net income is in lieu of dower. *Starr* v. *Starr*, 54 Hun, 300.

Acceptance of a bequest expressed to be in lieu of dower bars widow's claim on realty. *Grout* v. *Cooper*, 9 Hun, 326.

The right of dower being in itself a clear legal right, an intent by the testator to exclude it, or that it should be relinquished, must be demonstrated by express words or by manifest implication. In order to exclude it the will itself should contain a provision inconsistent with the assertion of such legal right. *Leonard* v. *Steele*, 4 Barb. 20.

See, also, Lasher v. Lasher, 13 Barb. 106; Bond v. McNiff, 6 J. & S. 83.

The will of M. gave to his wife certain premises, together with certain personal property, to be received by her in lieu of dower. At the time of the testator's death there was a mortgage upon the premises, the amount of which was about the value of the premises. The widow accepted the provisions. Subsequently the mortgage was foreclosed, resulting in a deficiency.

Construction:

The widow was not entitled to be allowed the value of the real estate; under the statute, 1 R. S. 749, sec. 4, she simply took the equity of redemption and was required, as devisee, to pay and satisfy the mortgage.

Also, it was immaterial that the testator, in the first clause of his will, directed the payment of his debts as soon after his decease as conveniently could be done.

Same will:

After giving a legacy of $1,000, the will gave the testator's residuary estate to his executors, in trust, to be converted into money. At the

time of his decease the testator had $20,000 in a firm in which he was a partner. This he provided should remain in the business at interest, if his partner should assent, the interest to go to his wife as long as she remained unmarried, and if she did not marry again, until her death. The balance of his estate he directed his executors to invest in interest bearing securities, the interest to be paid to his wife as long as she remained unmarried. The fifth clause of the will then provided that, upon the death or marriage of his wife, his executors should convert all the residuary estate into money and divide the same into six parts, to be distributed as directed. In the sixth clause the testator directed his executors, as soon as convenient after his decease, to pay to the beneficiaries named in the fifth clause a certain proportion of the legacies bequeathed to them, amounting, in all, to $11,000. The clause concluded thus: "Such several payments to be on account of and to be deducted from any share or proportion of my estate which they shall be entitled to receive under the preceding paragraph." The debts of the testator, exclusive of the bond and mortgage and the funeral expenses, amounted to about $2,000. The testator, aside from the $20,000 in the firm, owned $10,000 of personalty. It was claimed by the legatees that the $11,000 provided for in the sixth clause should be paid from the personalty before the provision for the widow, and that she was only entitled to interest on the residue.

Construction:

Untenable; the intention of the testator was to give his wife, during widowhood, the use of all his property, after deducting the $1,000 legacy. *Meyer* v. *Cahen*, 111 N. Y. 270.

The will of A. devised and bequeathed all his real and personal property, after the payment of debts and funeral expenses, to his executors, in trust, to invest and keep invested the proceeds in certain specified interest bearing securities, to pay the income of a certain small part thereof to his mother during life, and the balance to his widow during life, including that bequeathed to the mother after her death, and after the death of the wife, the remainder over to the testator's surviving children, share and share alike. In an action for the construction of the will, it appeared that the widow and two children survived him, one of whom died thereafter and before the commencement of the action. The widow claimed the benefit of the provision made for her in the will, and also dower in the testator's real estate, and that upon the death of her child she, as next of kin, became entitled to one-half of

the remainder provided for each child, and to an absolute interest in possession of one-quarter of the estate by reason of a merger of her legal and equitable interest therein.

Construction:

Untenable; the creation of a trust for her life was inconsistent with an implied right on her part to manage and control any part of the estate; from the fact that the testator gave her the income of all his estate, it was to be implied that he did not expect her also to take dower and the will indicated the testator's intent that all his property should be converted into money; the widow's interest in the trust estate did not merge in that acquired on the death of her child; there could be no merger because of the existence of the trust estate.

Where there is a manifest incompatibility between the provision for a widow in a will and dower, the widow is put to an election between them. Vernon v. Vernon, 53 N. Y. 351; Konvalinka v. Schlegel, 104 id. 125; Matter of Zahrt, 94 id. 605.

In equity the union of legal and equitable estates in the same person does not effect a merger, unless such was the intention of the parties and justice and equity require it. Smith v. Roberts, 91 N. Y. 470; Champney v. Coope, 32 id. 543.

Merger is accomplished in law when two or more estates in the same property unite in the same person, and when these estates comprise the whole legal and equitable interest in such property, and so the holder becomes the absolute owner. Mickles v. Townsend, 18 N. Y. 575; Bouv. Inst., secs. 1993–1995; it can not take place where there is an intermediate estate.

The provisions of the Revised Statutes (1 R. S. 727, sec. 471), indicating the circumstances under which the union of legal and equitable estates extinguish the latter, are, in principle, equally applicable to trusts of personal property.

The widow, by the death of her child, acquired a future estate, dependent upon the precedent estate of the trustees, which may be devised, but can not be enjoyed in possession; it was the intent of the testator to put the corpus of the fund beyond the hazard of impairment and waste during the life of his widow, and this could not be defeated or affected by the acquisition by her of the estates in remainder.

The necessity of a conversion of realty into personalty, to accomplish the purposes expressed in a will, is equivalent to an imperative direction to convert, and effects an equitable conversion. Hobson v. Hale,

95 N. Y. 588; Chamberlain v. Taylor, 105 id. 185. *Asche* v. *Asche*, 113 id. 232, aff'g 47 Hun, 285.

NOTE.—Section 47 of chapter on Uses and Trusts, as was said by the chancellor in the Matter of De Kay, 4 Paige, 403, provides that every person who is entitled to the *actual possession of lands* and to the receipt of the rents and profits thereof in law or in equity, is deemed to have a legal estate therein, commensurate with his beneficial interest in the premises, except in those cases where the estate of the trustees is connected with *some power of actual disposition or management*. Here the widow is not only entitled to the possession of the trust fund, but there is also a valid trust imposing upon its trustees the duties of actual disposition and management which will continue as long as the fund exists and the widow lives.

Although a gift by express terms is not made in a will, a legacy by implication may be upheld where the words of the will leave no doubt of the testator's intent and can have no other reasonable interpretation.

V. died leaving a widow but no children. His will, after a provision made for his wife, contained this clause: "This provision to be accepted by my wife in lieu of her dower right *and distributive share in my estate*, she to make her election, whether she accepts this provision of my will, within sixty days from the time of proving the same." The widow within the time specified made her election, rejecting the provision. The residuary estate was given to a nephew of the testator.

Construction:

Aside from her dower right, the widow was entitled to such share of the personal estate as the law would have given her had the deceased died intestate. *Same will.*

The executor claimed that the widow had no right to raise the question of construction, upon probate of the will, as it involved both real and personal estate.

Construction:

Untenable; the widow simply put in issue a disposition of personal property, and such a disposition the Code of Civil Procedure (sec. 2624) permits a party to put in issue upon probate. *Matter of Vowers*, 113 N. Y. 569, rev'g 45 Hun, 418.

Widow, by election to take a provision in a will in lieu of dower consented to all the terms and conditions annexed, and yielded all inconsistent rights. *Lee* v. *Tower*, 124 N. Y. 370.

A person claiming dower by title paramount to a mortgage upon the real estate can not be brought into court in an action to foreclose the mortgage, and compelled to test the validity of her dower. Merchants' Bank v. Thomson, 55 N. Y. 7.

9. ELECTION.

2. BETWEEN DEVISE AND DOWER.

The will of N. gave to his wife the use and income of his real estate during life, the same to be, as stated, "enjoyed, accepted and received by her in lieu of dower, and in addition to what she would have as doweress if this devise was not so made to her."

Construction:

The devise was in lieu of dower; the devisee having accepted the provision made was not entitled to dower. Lewis v. Smith, 9 N. Y. 511; Konvalinka v. Schlegel, 104 id. 125.

Certain real estate of which N. died seized was subject to a mortgage executed by him, but in which his wife did not join. An action was brought after the death of N. to foreclose the mortgage; his widow was made a defendant and was served with summons and complaint, but did not appear. The complaint contained no allegation in reference to her dower right, except the general averment that defendants "have, or claim to have, some interest in or lien upon said mortgaged premises" accruing "subsequently to the lien of said mortgage." The judgment provided that the premises be sold "subject to the dower therein of the defendant," Mrs. N. The premises were purchased by the plaintiff in that action. Action brought by Mrs. N. to recover dower in said real estate.

Construction:

The proceedings in the foreclosure suit were ineffectual to determine the question as to plaintiff's right to dower, and defendant, who was the grantee of the purchaser at the sale, was not estopped by the judgment therein, or by the purchase under it, from questioning that right. *Nelson* v. *Brown*, 144 N. Y. 384, aff'g 66 Hun, 311.

In an action brought to make partition of certain premises it appeared that James M. Conner was, at the time of his death, the owner of an undivided interest in the premises; that he left him surviving his widow and also several children, and left a will by which he directed his executors to distribute and apportion to his widow and children his estate in such a manner and at such times as should in their judgment be for the best interests of his widow and children, and gave such executors full power to sell as much of his real and personal property as they should deem best, and to invest and distribute the proceeds of such sales as they deemed best for the interest of all.

The widow accepted the provisions for her benefit made in the will, and also claimed dower in the real estate sought to be partitioned.

Held, that the widow was not put to her election, but was entitled to her dower, in addition to the provisions made for her in the will.

That, subject to the widow's dower, the widow and children were each entitled under the will to an equal proportion of the property by virtue of the provisions of

the Revised Statutes (R. S. pt. 2, ch. 1, tit. 2, sec. 98) which enact that where a disposition under a power is directed to be made to 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 equal portions.

That the devise to the executors was void as a trust, but valid as a power in trust; that the lands descended to the heirs subject to the execution of the power, which was not inconsistent with the continued existence of the dower interest of the widow, and that any sale under the power would be subject to that interest. *Conner* v. *Watson*, 93 Hun, 54.

A provision in a will giving the entire estate to the widow so long as she remains such, and directing that in case she remarries she may retain one-third of the estate, the balance to be divided, share and share alike, between testator's children, is inconsistent with a claim of dower, and puts the widow to her election. *Jurgens* v. *Rogge*, 16 Misc. 100.

An action was brought to obtain a judicial construction of the will of William H. Gray, the third clause of which was as follows: "I give and devise to my beloved wife, Mary Jane Gray, in lieu of dower and thirds, and all right and interest in my estate (and in addition to the other and further provisions for her hereinafter made), the house and lot of land in which we now reside, and known by the present street number 130 West Eleventh street in the city of New York, to her aud her heirs absolutely forever;" by the same clause the testator also devised his jewelry, household furniture, books, pictures and ornaments to his wife, and directed that his executors should pay from his estate the mortgages upon the house devised to her.

After making the will, the testator sold the West Eleventh street house, and moved into another house owned by him on West Seventy-second street, in which he died.

By the fifth clause of his will the testator devised all the rest and residue of his estate to his executors in trust, to receive the rents, income aud profit thereof, and to apply one-sixth of them to the use of his wife during her life, and the remainder in other ways mentioned in his will.

Construction:

It was the intention of the testator to give his wife, in lieu of dower, only the house in West Eleventh street, and the expression "and in addition to the other and further provisions for her hereinafter made" must be disregarded in construing this clause;

It was not the intention of the testator that all the provisions in his will intended for her benefit were to be in lieu of dower;

As the sale of the house in West Eleventh street operated as a revocation of the devise, the widow could not thereafter be compelled to elect between the specific devise and her right of dower;

The widow was entitled to dower in all the real estate, in addition to the provision made for her by the fifth clause of the will under which she was to receive one-sixth of the rents, income and profit during her life;

The right of dower was favored and was never excluded by a provision for a wife except by express words or by necessary implication;

A widow could not be put to an election between a testamentary provision and her dower, unless it was clear to a demonstration that the testator intended that she should elect;

The creation by the will of a trust estate was not inconsistent with a right of dower in the wife in the subject of the trust;

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2. BETWEEN DEVISE AND DOWER.

The fact that the West Eleventh street house was devised in lieu of dower and thirds, and had been sold, did not create a bequest by implication to the widow of one-third of the personal property in addition to the bequest of one-sixth of the income given by the will;

In order to uphold a devise by implication the inference from the will of the testator's intention to give it must be such as to leave no hesitation in the mind of the court and permit of no other inference;

There was nothing in the will from which it could be inferred that it was the intention of the testator to substitute the house in West Seventy-second street for the house in West Eleventh street as a provision for the widow in lieu of dower. *Gray* v. *Gray*, 4 App. Div. 132.

A devise of the residue equally to the widow, son and daughter, "share and share alike," is inconsistent with the right of the widow to claim dower, and puts her to her election as to the residuary estate.

Closs v. *Eldert*, 16 Misc. 104.

From opinion.—"The widow does not depend upon her husband for dower. It is not his to give, but is hers by law. It follows that unless it appear from a husband's will that he did not intend that his widow should take both dower and the provision which he therein makes for her, she is not required to elect which she shall take. 1 Roper on Husb. & W. 582; Bull v. Church, 5 Hill, 206. To put her to such election, the taking of dower must be inconsistent with the provisions of the will. The test is whether the setting off of one-third of the real estate by metes and bounds to the widow for her dower would make the carrying out of the devise of the will impossible. 1 Roper on Husb. & W. 576; Matter of Zahrt, 94 N. Y. 609. The devise here is of all the residue to the widow and two children share and share alike. It would be impossible to thus partition it equally among them if one-third has first to be set off by metes and bounds to the widow: Any division of it except into thirds would disturb and disappoint the will. I see no conflict between my conclusion and the decision in Konvalinka v. Schlegel, 104 N. Y. 125. There was a peremptory power of sale of the land in the will construed in that case, with a direction to divide the proceeds among the widow and children share and share alike. This meant a sale subject to the widow's right of dower. That case did not present the practical impossibility of an equal partition of the lands by metes and bounds if one-third had first to be set off for the widow. Nor does the case of Lewis v. Smith, 9 N. Y. 502, control this case. There the devise by the husband was of his entire estate to his widow for life, and it was held that there was no conflict between her taking as doweress and also under the will, it being carefully pointed out that there was "no person who takes an interest under the will during her lifetime with which the claim of dower will conflict." In the Zahrt case, *supra*, there was the same devise to the widow, but upon the conditions that she should keep the estate in repair, pay the taxes, assessments and water rates, and keep the buildings insured. The court distinguished that case from Lewis v. Smith, because of the said conditions imposed by the will, and held that the widow was put to her election. I do not just now see how the requirements of the will concerning waste, and the payment of taxes, water rates and ordinary assessments, made a difference, for they would have existed the very same if the will had not mentioned them. The law has always imposed them upon the widow, the same as upon other life tenants. 2 Reeves' Hist. Eng. L., 173, 436, Finlason's ed.; Code Civ. Pro., § 1651; Thomas v. Evans, 105 N. Y. 612. If the inconsistency be based wholly upon the requirement for insurance,

it shows that a much smaller inconsistency than that presented by the present case may require the widow to elect."

3. WHEN ELECTION IS DEEMED TO HAVE BEEN MADE.

Real Prop. L., sec. 181 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "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 an action in the office of the clerk of each county wherein the real property or a portion thereof affected thereby is situated."

L. 1895, ch. 1022, sec. 1 (taking effect June 14, 1895, repealing L. 1895, ch. 171, and reenacting 1 R. S. 742, sec. 14 and L. 1890, ch. 61 amending same) is substantially the same except that there is no provision allowing court to direct manner of giving notice (see *supra*, at end of next to last sentence); "to be assigned" is used for "assigned" in the first sentence.

L. 1895, ch. 171, sec. 1 (taking effect Jan. 1, 1896, amending 1 R. S. 742, sec. 14, repealed by above), provides that the widow shall be deemed to have elected to take the jointure, inheritance, devise or pecuniary provision, unless she make an entry or bring an action within the year after her husband's decease. No provision is made for the extension of time for making election.

L. 1890, ch. 61 (amending 1 R. S. 742, sec. 14) is same as L. 1895, ch. 1022, sec. 1, *supra*.

1 R. S. 742, sec. 14 (repealed by Real Prop. L., sec. 300) same as at present (L. 1896, ch. 547, sec. 181, *supra*) except that there is no provision in regard to the extension of time for election. "To be assigned" used for "assigned."

B., by his will, gave to his widow in lieu of dower, one-third of his personalty absolutely, and the net income for life of one-third of his real estate, which was vested in a trustee for that purpose. About three years after B. died, the widow brought an action in which she asked that she might be permitted to make her election, renounce the

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3. WHEN ELECTION IS DEEMED TO HAVE BEEN MADE.

testamentary provision and have her dower assigned, on the ground that she was ignorant of the extent of her husband's estate until the executor filed his accounts, and was induced to omit to take steps necessary to claim dower by representations of the executor made in the presence of S., the principal beneficiary under the will, and by S., as to the value of her dower right.

Construction:

Plaintiff was not entitled to the relief sought.

The provision of the statute (1 R. S. 741, secs. 13, 14) requiring a widow to elect within one year between a provision made for her in her husband's will and the right to have her dower in his real estate admeasured, and declaring that she shall be deemed to have elected to take the testamentary provision, unless within that time she shall enter upon the lands to be assigned to her for dower, or commence proceedings for the assignment thereof, has the force of a statute of limitations, and she is at once on the death of the testator, charged with the duty of informing herself so as to make her election. *Akin* v. *Kellogg*, 119 N. Y. 441, aff'g 48 Hun, 459, citing, Hone v. Van Schaick, 7 Paige, 221–3.

Widow's election to accept testamentary provision in lieu of dower is determined by not claiming dower within the statutory year. *Duffy* v. *Duffy*, 70 Hun, 135.

See, also, *Palmer* v. *Voorhis*, 35 Barb. 479.

10. WIDOW'S QUARANTINE.

Real Prop. L., sec. 184 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "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."

1 R. S. 742, sec. 17 (repealed by Real Prop. L., sec. 300), same.

1 R. L. 56, sec. 1 (L. 1787, ch. 4,) (repealed L. 1828, second meeting, ch. 21, sec. 1, par. 8), provides that the widow shall tarry in the chief house of her husband forty days after the death of her husband, *or until her dower be assigned to her;* and in meantime have her reasonable sustenance out of his estate.

11. WIDOW MAY BEQUEATH A CROP.

Real Prop. L., sec. 185 (L. 1896, ch. 547, taking effect Oct. 1, 1896). "Widow may bequeath a crop. A woman may bequeath a crop in the ground of land held by her in dower.

1 R. S. 742, sec. 25 (repealed by Real Prop. L., sec. 300), same.

1 R. L. 368, ch. 23, sec. 17 (repealed L. 1828, second meeting, ch. 21, sec. 1, par. 95), same.

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Sec. 263—Regulating when an action for dower should be brought in superior city court, repealed by L. 1895, ch. 946, to take effect Jan. 1, 1896.

Sec. 340—County court has jurisdiction of actions for.

Sec. 616—Security required on staying proceedings after verdict in dower.

Sec. 791—Preferred on calendar.

Sec. 968—Triable by jury.

Sec. 982—To be tried where the subject of action is situated.

Sec. 1499, ch. 14, tit. 1, art. 1, regulating actions for recovery of real property—"Such an action can not be maintained in a case where an action for dower may be maintained, as prescribed in article third of this title."

Sec. 1538—When person having right of dower must be made defendant in partition.

Sec. 1539—How may be provided for in final judgment in partition. See Jordan v. Van Epps, 85 N. Y. 427, *post*, p. 202.

Sec. 1553—Right of, not admeasured, how may be treated in partition.

Secs. 1567–1570—Right in partition, court may direct sale of; sale, proceeds, etc.

Sec. 1571—Married woman may release to husband her inchoate right of, in property to be sold in partition. L. 1840, ch. 177, sec. 2.

Secs. 1583–1585—Investment of proceeds of sale in partition. See Higbie v. Westlake, 14 N. Y. 281, *post*, p. 202.

Sec. 1596—An action for dower must be commenced by a widow within twenty years after the death of her husband, but if she is at the time of his death either

1. Within the age of twenty-one years, or

2. Insane, or

3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life,

The time of such disability is not a part of the time limited by this section. *And if at any time before such claim of dower has become barred by the above lapse of twenty years, the owner or owners of the land subject to such dower, being in possession, shall have recognized such claim of dower by any statement contained in a writing under seal subscribed and acknowledged in the manner entitling a deed of real estate to be recorded, or if by any judgment* or decree of a court of record within the same time and concerning the lands in question, wherein such owner or owners were parties, such right of dower shall have been distinctly recognized as a subsisting claim against said lands, the time after the death of her husband and previous to such acknowledgment in writing, or such recognition by judgment or decree, is not a part of the time limited by this section.

Last sentence added by L. 1882, ch. 277.

1 R. S. 742, sec. 18, repealed by L. 1880, ch. 245, reads: "A widow shall demand her dower within twenty years after the death of her husband; but if, at the time of such death, she be under the age of twenty-one years, or insane, or imprisoned on a criminal charge, or conviction, the time during which such disability continues shall not form any part of the said term of twenty years.

1 R. L. 60, sec. 1 (L. 1806, ch. 168, sec. 1), (repealed by L. 1828, second meeting, ch. 21, sec. 1, par. 9), provides that "a widow shall and may be at liberty, at any time during her life, to make demand of her dower agreeably to the act hereby amended."

Sec. 1597—Against whom action for, may be brought. See Connolly v. Newton, 85 Hun, 552.

Secs. 1598–1599—Who may be made defendants in action for.

Sec. 1600—"Where a widow recovers, in an action therefor, dower in property in which her husband died seized, she may also recover in the same action damages for

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withholding her dower, to the amount of one-third of the annual value of the mesne profits of the property, with interest; to be computed where the action is against the heir, from her husband's death, or where it is against any other person, from the time when she demanded her dower from the defendant; and, in each case, to the time of the trial or application for judgment, as the case may be; but not exceeding six years in the whole. The damages shall not include anything for the use of permanent improvements, made after the death of the husband.'

1 R. S. 742, secs. 19, 20, 21 (repealed by L. 1880, ch. 245), same, except that there is no provision allowing interest, and damages are to be computed to recovery of judgment, instead of to "trial, or application for judgment," as in the Code.

1 R. L. 60, sec. 1 (L. 1806, ch. 168, sec. 1) (repealed L. 1828, second meeting, ch. 21, sec. 1, par. 9) contains a proviso "that, dower of any lands sold by the husband shall be according to the value of the lands, exclusive of the improvements made since the sale."

Sec. 1601—"Where a widow recovers dower, in a case not specified in the last section, she may also recover, in the same action, damages for withholding her dower, to be computed from the commencement of the action; but they shall not include anything for the use of permanent improvements, made since the property was aliened by the husband. In all other respects, the same must be computed as prescribed in the last section."

Sec. 1602—"The last two sections do not authorize the recovery, against a defendant who is joined with others, of damages for withholding dower, in any portion of the property not occupied or claimed by him." See Kyle v. Kyle, 67 N. Y. 400; *post*, p. 202.

Sec. 1603—"Where a widow recovers dower in real property aliened by the heir of her husband, she may recover, in a separate action against him, her damages for withholding her dower, from the time of the death of her husband to the time of the alienation, not exceeding six years in the whole. The sum recovered from him must be deducted from the sum which she would otherwise be entitled to recover from the grantee: and any sum recovered as damages from the grantee, must be deducted from the sum, which she would otherwise be entitled to recover from the heir."

1 R. S. 743, sec. 22 (repealed L. 1880, ch. 245) same. See Price v. Price, 54 Hun, 349.

Sec. 1604—"The acceptance by a widow, of an assignment of dower, in satisfaction of her claim upon the property in question, bars an action for dower, and may be pleaded by any defendant."

1 R. S. 743, sec. 23 (repealed by L. 1880, ch. 245) same, except that the plea in bar may be pleaded by the heir or his grantee, or grantee of husband, while in Code, it may be pleaded by "any defendant."

Sec. 1605—"Where a widow not having a right to dower, recovers dower against an infant, by the default or collusion of his guardian, the infant shall not be prejudiced thereby; but when he comes of full age, he may bring an action of ejectment against the widow, to recover the property so wrongfully awarded for dower, with damages from the time when she entered into possession, although that is more than six years before the commencement of the action."

1 R. S. 743, sec. 24 (repealed by L. 1880, ch. 45) same.

1 R. L. 57, secs. 5, 6 (L. 1787, ch. 4) (repealed by L. 1828, second meeting, ch. 21, sec. 1, par. 8), contain provisions allowing infant heir to recover against a woman endowed by default or collusion.

Sec. 1607—Complaint in action for, what to state.

Sec. 1607—Interlocutory judgment for admeasurement of; must be admeasured by referee or three commissioners.

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Secs. 1608–1613, inclusive, regulate the duties, etc., of commissioners to admeasure. See McIntyre v. Clark, 43 Hun, 352; Price v. Price, 41 id. 486.

Sec. 1614—Plaintiff may recover sum awarded as; court may modify judgment.

Sec. 1615—Junior incumbrances not affected by admeasurement of.

Sec. 1616—Appeal from judgment does not stay execution thereof unless the court so direct; when court can not direct a stay.

Sec. 1617—Plaintiff may consent to receive gross sum in lieu of. (L. 1870, ch. 717, sec. 1, first half amended by the above sec.) See Robinson v. Govers, 138 N. Y. 425; *post*, p. 203.

Sidway v. Sidway, 52 Hun, 222; McKeen v. Fish, 33 id. 28, aff'd 98 N. Y. 645; Schierloh v. Schierloh, 14 Hun, 572.

Sec. 1618—Defendant may obtain leave to pay such gross sum; proceedings thereon. See Kyle v. Kyle, 3 Hun, 458. See 67 N. Y. 400.

Sec. 1619—Interlocutory judgment for sale where plaintiff consents to accept gross sum.

(L. 1870, ch. 717, sec. 1, second half, remodeled by above sec.)

See O'Dougherty v. Remington Paper Co., 42 Hun, 192.

Secs. 1620–1625, inclusive, regulate proceedings in case of such sale; who bound by it, etc.

Sec. 1638—Claim for can not be made basis of action to determine claim to real property.

Sec. 1647—"A person claiming, as owuer, an estate in fee, for life, or for years, in real property, may maintain an action against a woman, who claims to have a right of dower in the whole or a part of the property, to compel the determination of her claim. *But such an action can not be commenced until after the expiration of four months after the death of defendant's husband. If the defendant is under any of the disabilities specified in the last section, the provisions of that section relating to new trials and to perpetuating proofs, shall apply to her case.*"

Last two sentences added by L. 1891, ch. 210.

2 R. S. 489, secs. 6, 7, 8 (repealed by L. 1880, ch. 245), provide that the owner of the land may, after forty days, give notice in writing to the widow to demand her dower within niuety days after service of notice, and if she fails to comply or if, even when no notice is given, she fails to make demand within one year from death of husband, then the owners may petition the supreme court or court of common pleas of the county, or surrogate of the county for the admeasurement of said dower.

A copy of the petition with notice of time and place of presentment to be served personally on the widow, twenty days previous to its presentation.

1 R. L. 60, secs. 2, 3 (L. 1806, ch. 168) (repealed by L. 1828, second meeting, ch. 21, sec. 1, par. 9), substantially the same provision; after the forty days may give thirty days' notice to demand dower within ninety days thereafter; application to be made to surrogate of the county. See Linden v. Doetsch, 40 Hun, 239.

Sec. 1648—Proceedings in such action where defendant's right is admitted.

Sec. 1649—Id.; when defendant's right denied.

Sec. 1651—"An action for waste lies against a tenant by the curtesy, in dower, for life, or for years, or the assignee of such a tenant, who, during his estate or term, commits waste upon the real property held by him, without a special and lawful written license so to do; or against such a tenant, who lets or grants his estate, and, still retaining possession thereof, commits waste without a license."

2 R. S. 334, secs. 1, 2 (repealed by L. 1880, ch. 245) substantially the same provision.

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1 R. L. 62, sec. 2 (L. 1787, ch. VI) (repealed by L. 1828, second meeting, ch. 21, sec. 1, par. 10), same, last sentence omitted.

Sec. 1676—When taxes, etc., must be paid on sale in action for.

Sec. 1685—Liability of one purchasing from defendant pending action for.

Secs. 1759, 1760—Right of, how affected by judgment of divorce.

Sec. 1759, subd. 4—"Where final judgment is rendered, dissolving the marriage, the plaintiff's inchoate right of dower, in any real property, of which defendant then is or was theretofore seized is not affected by the judgment."

This is declaratory of the previous rule, see Wait v. Wait, 4 N. Y. 95; Forest v. Forest, 6 Duer, 102; Kade v. Lamber, 16 Abb. N. S. 288.

Sec. 1760, subd. 3—"Where judgment is rendered dissolving the marriage, the defendant is not entitled to dower in any of plaintiff's real property, or to a distributive share in his personal property."

2 R. S. 146, sec. 48 (repealed by L. 1880, ch. 245) same provision differently expressed. See Schiffer v. Pruden, 64 N. Y. 47.

2 R. L. 102, sec. 8 (repealed by L. 1828, second meeting, ch. 21, sec. 1, par. 138), same as R. S.

Sec. 2362—When right of, may be included in sale of real estate of infant, lunatic, etc.

Sec. 2363—Id.; when belonging to infant, etc.

Sec. 2365—What controversies concerning, may be submitted to arbitration.

Sec. 2395—Right of, when barred by sale on foreclosure by advertisement.

Sec. 2395—"A sale, made and conducted as prescribed in this title, to a purchaser in good faith, is equivalent to a sale, pursuant to judgment in an action to foreclose a mortgage, so far only as to be an entire bar of all claim or equity of redemption, upon or with respect to the property sold, of each of the following persons:

* * * * * * * * * * * *

Subd. 5—The wife or widow of the mortgagor, or of a subsequent grantee, upon whom notice of the sale was served as prescribed in this title, where the lien of the mortgage was superior to her contingent vested right of dower, or her estate in dower."

Sec. 2778—How affected by sale of real property of deceased to pay debts.

Sec. 2778—"Except as prescribed in the last section, a conveyance of real property, executed upon a sale thereof, pursuant to this title, vests in the grantee all the estate, right and interest of the decedent in the real property so conveyed, at the time of his death, free from any claim of his widow for dower, which has not been assigned to her, but subject to all subsisting charges thereon by judgment, mortgage or otherwise, which existed at the time of his death, unless the said real property is decreed to be sold free and clear from the lien of any judgment or judgments established by the decree and ordered to be paid as far as possible from the proceeds of such sale, as provided for in sections twenty-seven hundred and ninety-one and twenty-seven hundred and ninety-three of this act, in which event such lien or liens shall be transferred by such sale from the land sold to the proceeds thereof. Where dower has been assigned to the widow, the grantee takes the part of the property to which the estate in dower attaches, subject thereto."

The clause beginning with "unless" and continuing down to the end of the sentence was inserted by L. 1894, ch. 735.

2 R. S. 105, sec. 31 (latter part), sec. 32 (repealed by L. 1880, ch. 245), practically the same provision as before amendment. *supra*. That dower assigned not affected by the sale, see Lawrence v. Miller, 2 N. Y. 245; Lawrence v. Brown, 5 id. 394; Mapes v. Howe, 3 Barb. Ch. 641.

12. PROVISIONS OF THE CODE OF CIVIL PROCEDURE.

Sec. 2794—"The claim of dower of the decedent's wife, in real property held by the decedent, under a contract for the purchase thereof, which must be satisfied, as prescribed in subdivision third of the last section, extends only to the annual interest, during her life, upon one-third of the balance remaining, after deducting from the money arising upon the sale, all sums due from the decedent, at the time of the sale, for the real property so contracted and sold."

2 R. S. 112, sec. 72 (repealed L. 1880, ch. 245), substantially the same provision.

That wife is entitled to dower in lands, of which the husband was possessed at the time *of his death*, under a contract for the purchase thereof, subject to the payment of sum due upon the contract, see Hawley v. James, 5 Paige, 318; Hicks v. Stebbins, 3 Lans. 39.

Sec. 2795—Fund set apart for dower; how invested, etc.

Sec. 3299—Fees of commissioners.

As to costs in an action of dower see Swift v. Swift, 88 Hun, 551; Witthaus v. Schaack, 38 id. 560; Aikman v. Harsell, 31 id. 634; Schierloh v. Schierloh, 14 id. 572.

On the sale of lands, by order of the surrogate, to pay debts, the portion of the purchase money to be set apart and invested pursuant to the statute, 2 R. S. 106, sec. 37, for the widow, in lieu of dower, is the one-third of the gross amount, and not of the amount less the charge and expense of the sale.

Where interest on the purchase price accrues after the sale, and before the distribution, the one-third of it belongs to the widow. *Higbie* v. *Westlake*, 14 N. Y. 281.

The provisions of the Revised Statutes giving a widow damages for withholding dower, 1 R. S. 742, sec. 19, *et seq.*, were intended to prescribe the sole rule to determine the amount thereof, and by and under the statute alone can she now recover, either at law or in equity.

As to whether an executor of an heir at law has the right to charge the estate of his testator, or expend the assets in his hands, for the payment of arrears of dower, where dower has not been assigned, *quære*. *Kyle* v. *Kyle*, 67 N. Y. 400, modifying 3 Hun, 458.

C., plaintiff's husband, conveyed certain premises to his brother G.; plaintiff did not join in the deed. After the death of G., C., as one of his heirs, brought an action for partition of the premises; plaintiff was made a party defendant. The complaint alleged that she claimed an inchoate right of dower in the premises because she had not signed said deed and that each undivided portion was subject thereto. The summons with notice of object of action was served upon her. She did not appear. The final judgment made no provision for her dower. Upon sale under said judgment, defendant became the purchaser. Action to recover dower.

Construction:

The judgment in the partition suit was a bar; it was the intent of the provisions of the Revised Statutes in reference to partition, 2 R. S. 318, sec. 5, *et seq.*, to cut off the inchoate right of dower of any party to a partition suit, as a general rule; if the position was tenable, the claim for dower, being an adverse one accruing before the title of the tenants in common, could not be determined in the partition suit, it should have been presented in some form in that action; and, having failed to do this, plaintiff could not claim in another action that she was unlawfully deprived of her dower right.

Badgley v. Halsey, 4 Paige, 98; Jenkins v. Van Schaack, 3 id. 242; Burhans v. Burhans, 2 Barb. Ch. 398; Hosford v. Merwin, 5 Barb. 51; Florence v. Hopkins, 46 N. Y. 182; O'Dougherty v. Aldrich, 5 Den. 385, distinguished.

Also the death of C. before the entry of the decree in the partition suit could not af-

12. PROVISIONS OF THE CODE OF CIVIL PROCEDURE.

fect the rights of the purchaser as far as this action was concerned, it could be only considered upon application to the court in the partition suit. *Jordan* v. *Van Epps*, 85 N. Y. 427, aff'g 19 Hun, 526.

The alleged fraudulent conveyances were of the debtor's real estate to his wife, and the judgment set them aside.

Construction:

An objection to such judgment, that it did not provide for the wife's right of dower could not be raised on appeal; the remedy, if any, was by motion.

It seems that such dower right is not affected by the judgment. *Wright* v. *Nostrand*, 94 N. Y. 31, revg 15 J. & S. 441.

After a verdict in an action under sec. 1617, Code of Civ. Pro., determining plaintiff to be entitled to dower, defendants moved for leave to pay the gross sum in lieu thereof, and reference was ordered to ascertain such sum; the referee made and filed his report, specifying the sum. On motion, the court decided to confirm it, its decision being expressed in the form of a written opinion, and the formal order embodying this decision was prepared and signed by the court and entered three days thereafter. Plaintiff died on the same day, about two hours before the order was so signed and entered. The court ordered that the action be continued in the name of plaintiff's executor, and that the sum stated be paid to him.

Construction:

No error; the plaintiff's right to demand and receive the sum fixed was established when the court made its decision. In equity, the entry of the order might be regarded as done at the time of the division. Fulton v. Fulton, 8 Abb. N. C. 210; McLaughlin v. McLaughlin, 22 N. J. Eq. 505–512; Mulford v. Hiers, 2 Beas. Ch., N. J., pp. 13, 15; Livermore v. Bainbridge, 49 N. Y. 128, 129; Mackay v. Rhinelanders, 3 Johns. Cas. 467. *Robinson* v. *Govers*, 138 N. Y. 425.

13. ASSIGNMENT AND ADMEASUREMENT.

At what time and in what manner dower must be determined.

See *O'Dougherty* v. *Remington Paper Co.*, 42 Hun, 192.

In order to authorize a sale of the property, it must be shown that a distinct parcel of the property can not be admeasured and set off to the plaintiff, as tenant in dower, "without material injury to the interests of the parties." It is not sufficient to show that one of the parties would be injured by an actual partition. *O'Dougherty* v. *Remington Paper Co.*, 42 Hun, 192.

A widow is not entitled to have her dower assigned to her in each separate and distinct parcel, when to do so would injuriously affect the equitable rights and interests of other parties. *Price* v. *Price*, 41 Hun, 486.

When her dower to be charged on lands in the inverse order of their alienation. See *Raynor* v. *Raynor*, 21 Hun, 36.

A widow is entitled to dower in lands whereof her husband died seized, notwithstanding that dower hath before been assigned in the same lands to the widow of the husband's father; the only effect of the previous assignment of dower is to reduce the extent of the recovery, as thus; if the estate originally consisted of nine acres, the widow of the father is endowed of three acres; and on the death of the widow of the father, the widow of the son becomes entitled to one-third of the three acres, originally assigned to the widow of the father. *Bear* v. *Snyder*, 11 Wend. 592.

See, also, Dunham v. Osborn, 1 Paige, 634; Reynolds v. Reynolds, 5 id. 161: Ex parte, 1 Barb. Ch. 598; Ellwood v. Klock, 13 Barb. 50.

V. TENANCY BY THE CURTESY.

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1. REQUISITES.

1. MARRIAGE.

There must be a lawful marriage. 1 Cruise Dig. 107; 1 Washb. on Real Prop. 5th ed. 172; Stuart on Husband and Wife, sec. 153.

Voidable marriage. If voidable, it must be avoided before her death. 1 Washb. 5th ed. 172. See 1 R. S. pt. 11, ch. 8, tit. 1, sec. 4. The marriage must exist at the time of her death.

Rights in case of divorce. A divorce *a vinculo* prevents curtesy, when judgment is obtained by the wife.

Whether, under the code, a decree for separation affects curtesy—is there any difference if brought by husband or wife? See *Van Duzer* v. *Van Duzer*, 6 Paige, 366.

Code Civ. Pro., ch. 15, tit. 1, sec. 1760. In actions for divorce, when the action is brought by the husband, the following regulations apply to the proceedings: * * * * *

2. A judgment dissolving the marriage does not impair, or otherwise affect the plaintiff's rights and interests in and to any real or personal property which the defendant owns or possesses when the judgment is rendered.

Earlier statute 2 R. S. 146, sec. 47, repealed by L. 1880, ch. 245, sec. 8; 2 R. L., p. 199, ch. 102, L. 1813.

Code Civ. Pro., ch. 15, tit. 1, sec. 1759. Where the action is brought by the wife, the following regulations apply to the proceedings:

3. "If, when final judgment is rendered, dissolving the marriage, the plaintiff is the owner of real property; or has, in her possession, or under her control, any personal property, or thing in action, which was left with her by the defendant, or acquired by her own industry, or

1. REQUISITES.

1. MARRIAGE.

given to her by bequest or otherwise; or if she is or may thereafter become entitled to any property, by the decease of any relatives intestate, the defendant shall not have any interest therein, absolute or contingent, before or after her death."

Earlier statutes, 2 R. S. 146, sec. 46, repealed by L. 1880, ch. 245, sec. 1; 2 R. L., p. 199, sec. 6, ch. 102, L. 1813, passed Apr. 13.

"The statute of this state (2 R. S. 146, sec. 46) gives to the wife, upon the dissolution of the marriage upon the ground of adultery of the husband, as a matter of right, * * * all the real estate of which the husband is then seized in the right of his wife, and of which she is the real owner; * * * * and the evident intent of the legislature was * * * * to give her such real estate discharged of the husband's life interest therein, as tenant by the curtesy initiate." Per Walworth Ch., p. 425. *Renwick* v. *Renwick*, 10 Paige Ch. 420.

2. NATURE OF WIFE'S TITLE—A FEE SIMPLE IN REAL PROPERTY.

As to the husband's rights as tenant by the curtesy in the wife's equitable estates, see 4 Am. and Eng. Enc. of Law, p. 965, notes and cases cited.

Right of curtesy did not exist in nominal fee in wife, which was subject to and defeated by execution of power of sale in executors. *Harvey* v. *Brisbin*, 143 N. Y. 151.

Where money stands as and for the property itself.

Real property contemplates money where a court of equity would treat it as land.

Right of tenancy by the curtesy, where a vested remainder exists in the trust fund. *Young* v. *Langbein*, 7 Hun, 151.

Money agreed to be set aside for purchase of land. *Coster* v. *Clarke*, 3 Edw. Ch. 428: *Matter of Dodge* v. *Stevenson Mfg. Co.*, 14 Barb. 440.

* * * "the husband takes an interest by the curtesy in money directed to be laid out in lands for the wife, he in all other respects being entitled as such." *Dictum* per Hand, J., in *Vrooman* v. *Shepherd*, 14 Hun, 440, rev'd 77 N. Y. 101.

Testator in his will, directed that after paying debts and legacies, the remainder of his estate should be at the disposition and control of the executors for the use of his wife, and children while minors; but that it should be divided equally between them after his youngest grandchild attained its majority. Each minor had an estate and interest in a share of the proceeds resulting from the conversion of the property, while he was such, which ceased with his minority and thereupon vested in those who were still minors, and the wife. X., a daughter of testator, was of age at the death of the testator and died before the youngest child became of age, consequently never having been seized during her life, and coverture of such an estate as could entitle her husband Y. to an estate by the curtesy, she never having had possession under the will because of her majority, nor being entitled to any until the youngest should become of age which did not happen during her lifetime. *Burke* v. *Valentine*, 52 Barb. 412, affirmed by Court of Appeals, see 6 Alb. L. J. 167.

1. REQUISITES.

2. NATURE OF WIFE'S TITLE—A FEE SIMPLE IN REAL PROPERTY.

A testator devised to a daughter, directing the executor to sell. Husband had curtesy in the interest of the proceeds in lieu of rents and profits. *Dunscomb* v. *Dunscomb*, 1 Johns. Ch. 508.

A testator devised realty in the shape of money, *i. e.*, proceeds of sale by exeeutors, under directions, which she had laid out in the purchase of a dwelling-house. *Held*, her husband was entitled to curtesy in the house purchased with such proceeds. *In Matter of Kirk* v. *Richardson*, 32 Hun, 434.

NOTE 1. Whether he took the estate as realty of which she was seized during coverture or as purchased with money of which she was seized and which itself represented realty, *quære*.

See, further, Graham v. Dickinson, 3 Barb. Ch. 169.

Partition proceedings under sec. 1560 of Code Civ. Pro.

In proceedings for partition of wife's property, where premises were sold by order of court, pursuant to statute, the wife, a tenant in common with two others (other requisites being proper), became entitled to curtesy initiate in her interest, and hence, when premises were sold under proceedings therefor, pursuant to 1 R. L. 510, sec. 5 (now sec. 1560 Code Civ. Pro.) "on application by R. G. (husband's creditor) * * * the court ordered one-third of the proceeds of the sale to be put at interest by the clerk, to be disposed of by the court * * * * * according to the rights of the parties at that time." *Schermerhorn* v. *Miller*, 2 Cow. 439.

"Where a judgment is recovered against the husband, during the pendency of a partition suit against him and his wife, for the partition of lands of which he holds an undivided share in right of his wife, a subsequent sale of the lands under the deeree in partition divests the legal lien of the judgment creditor upon the husband's legal estate iu the lands, and converts it into an equitable lien upon the husband's interest in the fund produced by the sale, to the same extent as the legal lien." *Ellsworth* v. *Cook*, 8 Paige, 643.

Under right of eminent domain.

Where a wife's land, in which the husband has a curtesy interest, is directed to be sold, the husband has the same right in the proceeds as he had in their representative, the land, *i. e.*, interest upon the same during his life.

A wife died intestate pending proceedings to condemn her lands for public improvements. The husband, who survived and received an award of the entire fee in the premises, had also been appointed guardian of the infant children of the marriage, and had given the statutory bond, receipting as guardian for such. *Held*, that the father was entitled to his interest as tenant by the curtesy during his life; also, that the fact of his giving a receipt as guardian for the fund, did not estop him from demanding his life interest. *Matter of Petition of Camp*, 126 N. Y. 377.

1. REQUISITES.

2. NATURE OF WIFE'S TITLE—A FEE SIMPLE IN REAL PROPERTY.

The property must be an inheritable freehold.

It must be an estate of inheritance, *Young* v. *Langbein*, 7 Hun, 151, and so it can not be a life estate, *Young* v. *Geisenheimer*, 7 Da. Reg. 373; and arises whether fee be absolute or determinable, 8 Coke, 67; Withers v. Jenkins, 14 S. C. 597; Thornton's Exrs. v. Krepps, 37 Pa. St. 391; see Matter of Kirk v. Richardson, 32 Hun, 434.

And continues after fee determined.

Under the will of the testatrix, defendant's wife took a fee determinable upon the happening of two specified events, viz.: the return of her son, and her death without a child surviving, the limitation over to plaintiff thereupon being good as an executory devise; both of which events happened, which determined her estate upon her death. *Held*, * * * * that defendant had an estate in the land as tenant by the curtesy, other requisites being equal, proper birth of issue, etc.

The common law rights of a husband as tenant by the curtesy are not affected by the acts of 1848 (L. 1848, ch. 200), and 1849 (L. 1849, ch. 375), for the more effectual protection of the property of married women, as to the real estate of the wife, undisposed of at her death. Where the wife takes by devise an estate in fee, limited by an executory devise which defeats or abridges the fee in case of the happening of a certain event, the seizin and estate which she has will give the husband curtesy. *Hatfield* v. *Sneden*, 54 N. Y. 280; 1 Washb. R. Prop. *135; McMasters v. Negley, 152 Pa. St. 303.

In the opinion of Johnson, C., p. 285, Lord Coke is quoted thus: "The husband's estate shall continue, for it is not derived merely out of the estate of the wife, but is created by law" "by the privilege and benefit of the law *tacite* annexed to the gift."

There must be an actual or constructive seizin.

"A testator having directed that the income of one-half of his estate should be paid to his widow during her life, and that upon her death the said one-half should be divided equally among his children, absolutely, in fee forever, and that the income of the other half should be divided equally among his children until the youngest child should be of age, and then that said half should be divided among his children, absolutely, in fee forever. *Held*, that the children took the fee on the death of the testator, subject to the restrictions contained in the will, and upon the death of a married daughter, having had issue, her husband would be entitled to his curtesy. *Young* v. *Langbein*, 7 Hun, 151.

From opinion.—(Per Brady, J.) The testator made no disposition of his estate in terms, or any part of it, until the event of the death of his wife, when one-half was to

be divided absolutely in fee among his children by his will, or until the youngest child arrived at age, when half of it was to be divided in like manner among them, in case his wife was living when that event occurred; otherwise, they then took the whole estate. * * * He meant to give his children his entire estate, burdened only by the right of his wife to the income of one-half." * * *

"The children, therefore, took the fee subject to the restrictions and burdens created by the will." * * *

"The testator evidently intended to hold the property together, not to prevent the vesting of the fee, but the division of the corpus of the estate until the happening of the events named."

" * * * It was the division of the estate that he designed to defer." * * *

"It must be said further, that with regard to one-half of the estate the children were in possession, because they were entitled to the rents, issues and profits, without limit other than the payment of the expenses attending its possession."

(Per Daniels, J.) * * * "His real estate consequently descended to his children in fee, and the plaintiff, as the husband of one of them, may be tenant by the curtesy, as to his wife's share."

Wife must be seized in fact to give husband rights as a tenant by curtesy. *Gibbs* v. *Esty*, 22 Hun, 266.

Seizin in fact by the wife necessary to create a tenancy by the curtesy. See *Graham* v. *Luddington*, 19 Hun, 246.

Possession of lessee no bar to sufficient seizin.

* * "It has been held that the possession of a lessee, under a lease reserving rent, is an actual seizin of the husband so long as to entitle him to a life estate in the land as tenant by the curtesy; although he neither received nor demanded rent during the life of the wife. 3 Atk. 469." *Dictum* per Walworth Ch.; *Ellsworth* v. *Cook*, 8 Paige, 646.

An equitable estate for life no bar to sufficient seizin. (See *post*, p. 212.)

Seizin of wild and uncultivated lands sufficient seizin.

"Where a *feme covert* is owner of wild * * unoccupied * * and uncultivated lands * * (not held adversely to her) she is considered in law, as in fact, possessed, so as to enable her husband to become a tenant by the curtesy." *Jackson* v. *Sellick*, 8 Johns. 262; Jackson v. Johnson, 5 Cow. 98.

Seizin of husband in right of his wife sufficient seizin.

"The seizin of one tenant in common is the seizin of the others. Accordingly, where a person, in right of his wife, became a partner with others as the owners of a cotton factory and other mills, and in the management of the business thereof, and received a proportionate share of the profits from the time his wife became interested in the property until after her death; *held*, that this was sufficient seizin of the wife to

consummate the estate by the curtesy in the husband." *Buckley* v. *Buckley*, 11 Barb. 43.

Possession of vendee is no bar to sufficient seizin.

K., ancestor; Mrs. B., heir; Mr. B., her husband; T. and J., vendees of K. P., heir of Mrs. B., having a quit claim deed of the curtesy interest from Mr. B., brings ejectment; issue becomes, whether the vendees were holding adversely to the heir (Mrs. B.) of the vendor so as to prevent her seizin, and whether the statute of limitations had barred P., incidentally raising the question whether Mr. B. was tenant by the curtesy of lands coming to Mrs. B., if so the quit claim deed was good, and during his possession as tenant by the curtesy the statute did not run against the heir; if not, the conveyance was void and the statute had been running in the meantime.

Whether B. was tenant by the curtesy involved the question whether possession by the vendee of an ancestor or heir was such as would make seizin in fact of the wife to sustain curtesy. *Vrooman* v. *Sheperd*, 14 Barb. 441. (See Code of Civ. Pro. sec. 374.)

Note from opinion.—"The defendant further insists that if * * * (T. and J.) * * * had entered upon and occupied the land under a contract to purchase made with * * * (K.) * * * and payments were made, there was no such seizin in fact as would constitute * * * (Mr. B.) * * * a tenant by the curtesy, and consequently the statute had run against the plaintiff. This proposition is distinct from that in relation to a presumption of a deed in pursuance of the contract, from lapse of time. The question is, whether the possession of a vendee of the ancestor is the possession of the heir. * * * But I do not see how a mere possession under the contract to convey could be a disseizin of the vendor or his heir. In England the vendee is considered a tenant at will; the lowest kind of estate, and which may be determined by demand or entry. * * * Possession of a tenant for a term of years is a sufficient seizin to support a tenancy by the curtesy. * * * The after taken wife or husband of vendor, it is said, and the heirs, devisees and grantees, with notice, etc., may be compelled to convey. * * * In this case, if, there was a valid contract to convey * * * Mr. B. * * * and his wife could have been compelled to perform, to the extent of their interest, the vendee being in no default. Till then the legal title remains * * *. One in possession of land, under an executory contract, may hold adversely as against strangers. * * * But the possession of the vendee is not adverse to the vendor. * * * After performance by the vendee, it seems, it may become so. * * * But actual payment was not proved in this case."

Recovery in ejectment by the husband jure mariti is sufficient entry and seizin.

"A recovery in ejectment by the husband and wife, of lands belonging to the wife, gives to the husband such a constructive seizin of the

lands as to entitle him to a life estate therein as tenant by the curtesy initiate."

"So a decree in partition, settling the right of the husband and wife to an undivided portion of the land in possession of and claimed by the complainant in the partition suit, and directing a sale of the whole premises for the purpose of making partition of the fund produced by the sale, is a sufficient constructive seizin to entitle the husband to claim an interest as tenant by the curtesy." *Ellsworth* v. *Cook*, 8 Paige, 643.

NOTE.—Now she recovers in her own right. See sec. 450, Code Civ. Pro.—*Married Women.*

When wife takes under deed with no adverse possession, entry unnecessary and her seizin is sufficient seizin in fact.

Where a wife takes under a deed and there is no adverse holding, no actual entry is necessary for the seizin requisite for husband's title to curtesy. *Jackson* v. *Johnson*, 5 Cow. 74.

The doctrine that, to enable the husband to take as tenant by the curtesy, there must be an actual seizin in the wife during coverture, applies only to cases where her title is not complete before entry—as, where she takes by descent or devise—and not where her title is acquired in virtue of a conveyance which, under the statute of uses, passes the legal title and seizin without the necessity of an entry or other act to perfect the estate in the grantee. *Adair* v. *Lott*, 3 Hill, 182.

But not when there is adverse possession.

An estate by the curtesy is not acquired during an adverse possession. *Baker* v. *Oakwood*, 49 Hun, 416.

Rule since 1848–49 *relating to married women.*

The estate of tenancy by the curtesy survives to the husband on the decease of his wife, in all her real property, to which it would have attached at common law, and over which she has not exercised the power of disposition given by the married woman's act of 1848 and 1849. *Matter of Winne*, 2 Lans. 21.

Where there is an intervening life estate which does not terminate during coverture, there is no possession or sufficient seizin in fact to support curtesy.

The testator devised his real estate to his two illegitimate children, George and Maria, "in fee to be equally divided between them, share and share alike" "with a limitation over on the death of either without issue to the survivor."

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After the death of the testator these children went into possession as tenants in common. By proceedings under the statutes concerning nonresident and absconding debtors, which was good as against the daughter, the son's undivided one-half of the premises passed to S. G. and subsequently he and the daughter while yet unmarried partitioned until either George or Maria should die without lawful issue. They exchanged deeds which were valid and binding to pass the estates therein named and the respective parties took exclusive possession of the part thereby conveyed. Thereafter Maria married the plaintiff and died leaving issue, and subsequently George died without issue. The plaintiff's wife (said daughter) was not seized in fact at any time during her coverture of the undivided portion of the premises partitioned conveyed to S. G. and consequently plaintiff, her husband, was not entitled to curtesy therein though "the wife died leaving (lawful) issue (the defendant), and subsequently the brother died without issue." * * *

"Where there is an outstanding estate for life, the husband can not be the tenant by the curtesy of the wife's estate in reversion or remainder, unless the particular estate terminate during coverture. *Ferguson* v. *Tweedy*, 43 N. Y. 543.

Tenant by curtesy—vested remainder. See *Young* v. *Langbein*, 7 Hun, 151.

A. died leaving a widow and children. The widow continued in possession of the premises, of which he died seized, for three years, when the heirs and persons interested set off and assigned to her as her dower the homestead in "exclusive possession" until her death in 1870. In 1857 one of the heirs conveyed his interest to the wife of one of the children. Such wife died in 1866. In 1875 the father of these latter children purported to convey his curtesy interest to defendants. In an action to recover the same, *held*, that the setting off with the consent of all the parties interested, and her actual possession thereunder, operated as an assignment of her dower, and that she was in possession of the seizin of her husband from the first, and hence the seizin in such estate for the life of such widow was thereby defeated and hence the heirs of A. had no seizin in fact of vested estate in such property of A. set aside for dower of A.'s wife, and consequently the conveyance from one of them to the wife of one of A.'s children, gave only his interest in remainder; after that life estate she never became seized in fact of the premises and therefore her husband was not entitled as tenant by the curtesy, and his deed purporting to convey the same to defendants passed nothing. *Gibbs* v. *Esty*, 22 Hun, 266.

The husband of a woman owning an estate in remainder vesting in possession during coverture, is entitled to an estate by the curtesy. *Trolan* v. *Rogers*, 79 Hun, 507.

Where there is a merger of the intervening life estate and the remainder seizin in possession is complete.

Testator by his will devised to his daughter, J. M., wife of Mr. T.,

and such of her children as at her decease be living and shall attain the age of twenty-one years; *held*, that the words relating to her children, being words of purchase and not of limitation, Mrs. T. took a life estate for her life, with (but for the statute against perpetuities) remainder to the children specified. But the estate to the children was contrary to the statute against perpetuities and hence void, to the legal consequence that this part of the devise "descended to Mrs. T. as the heir at law of the testator, and united with her life estate."

"Where a life estate, and the immediate reversion, meet in the same person, the particular estate is merged in the greater estate. And if the two estates unite in a *feme covert*, her husband is entitled to a life estate as tenant by the curtesy." *Taylor* v. *Gould*, 10 Barb. 388.

An intervening equitable estate for life no such hindrance.

After questioning whether the seizin of the estate of a wife, in remainder in fee was sufficient to support curtesy, *held*, "if, however, the estate for life be a mere equitable interest, the husband's right *at law*, as tenant by the curtesy, is clear." * * * "as husband, during her life, became seized of her share as tenant by the curtesy." * * * *Adair* v. *Lott*, 3 Hill, 182.

3. NATURE OF HUSBAND'S TITLE.

It is an interest and not a charge.

"The interest of a tenant by the curtesy is a legal estate in the land, not a mere charge or incumbrance." *Adair* v. *Lott*, 3 Hill, 182.

4. BIRTH OF ISSUE.

It must be of the marriage, born alive and before mother's death.

"The issue must be born alive and during the marriage and capable of inheriting as heir to the mother; and the issue must be born during the life of the mother, for if the mother dies * * * the husband in this case shall not be the tenant by the curtesy, because the instant of the mother's death he was clearly not entitled, as having had no issue born." *Dictum* per Lamont, J. *In the Matter of Winne*, 1 Lans. 513, rev'd 2 Lans. 21, citing Marsellis v. Thalhimer, 2 Paige, 42.

"In the * * * case of a tenancy by the curtesy, it is well settled that the child must be born alive in the lifetime of the mother, to entitle the father to the estate." *Dictum* per Walworth, Ch., in Marsellis v. Thalhimer, 2 Paige, 42.

Dictum to like effect of Southerland J., in Jackson v. Johnson, 5 Cow. 95, par. 2, sent. 1.

1. REQUISITES.

4. BIRTH OF ISSUE.

But it is immaterial how long thereafter it lives.

As long as born as above, it is immaterial how long it lives. "'So if he hath issue which dieth before the descent.'" *Dictum* per Southerland, J., in Jackson v. Johnson, 5 Cow. 95, quoting Lord Coke.

See, also, *Beamish* v. *Hoyt*, 2 Rob. 307; Mack v. Roche, 13 Daly, 103, in general.

It is immaterial whether the issue be born before or after seizin.

"A., in 1787, was vested by act of the legislature, with certain lands in fee, in trust for B., a female infant, and others, he having power to sell, etc. On the 12th May, 1790, he contracted by his attorney, to sell a farm to R., on his (R.'s) paying, etc.; and R. took possession under the contract, and began to improve the land; but soon assigned his contract to J., who, in 1790, succeeded him in the possession. B., the female *cestui que trust*, being still an infant, intermarried with C., April 7th, 1792; and on the 5th November, of the same year, A. conveyed all the trust property (including the land contracted for by R.) to the *cestuis que trust*. Afterwards, December 13th, 1793, A., the trustee, by his attorney, conveyed the fee to J. During the same year, but what time in the year it did not appear, B. had issue, a son, born alive, by her husband C.; and afterwards, September 30th, 1795, a daughter. B. died in July, 1797, having attained the age of twenty-one, C., her husband, surviving. The son died intestate and unmarried in 1816, and his father, the husband of B., died in 1817, the daughter surviving."

C. was tenant by the curtesy, whether the adverse possession or disseizin took place before or after issue of the marriage.

"Four things are necessary to constitute a tenancy by the curtesy; marriage, seizin of the wife, issue, and death of the wife. But it is not necessary that seizin and issue should concur together at one time; and, therefore, if the wife become seized of lands during coverture, and then be disseized, and then have issue, the husband shall be tenant by the curtesy of these lands; and on his wife's death, may enter as such; and, during her life, he is called tenant by the curtesy initiate. So if the wife become seized after issue, though the issue die before her seizin.

"As to what shall amount to a seizin; it is enough that the wife have a tenant in possession, who holds at will, or who entered under a contract to purchase her estate.

"And it seems, that the rule which requires actual seizin applies only to cases where it is not complete till entry; as where the estate comes to the wife by descent or devise; not where it comes by purchase, and is transferred into possession by the statute of uses.

1. REQUISITES.

4. BIRTH OF ISSUE.

"The lessor of the plaintiff sworn as a witness, at the circuit, without objection, in order to prove the loss of a deed."

Jackson v. *Johnson*, 5 Cow. 74.

From opinion.—(Per Sutherland, J., p. 95.) "It is clear that the birth of a child at any time during coverture, whether before or after the commencement of the defendant's possession, would constitute Cooper (husband) tenant by the curtesy of all the lands of his wife, of which, during coverture, she was so seized as to support such an estate. Lord Coke says ' * * * if a man taketh a woman, seized of lands in fee, and is disseized, and then have issue, and the wife die, he shall enter and hold by the curtesy. So if he have issue which dieth before the descent.' "

It must be capable of inheriting such estate.

Co. Litt. 29a. Rice on Real Prop. 219.

2. INCIDENTS.

1. CURTESY—HOW BARRED.

Curtesy initiate is barred by his death before wife's.

Also by antenuptial (or postnuptial after 1892) contract; by statute of limitations—consummate. Thompson v. Green, 4 Ohio St. 216; Carter v. Cantrell, 16 Ark. 154; Shortall v. Hinckley, 31 Ill. 219; Kibbie v. Williams, 58 id. 30; Weisinger v. Murphy, 2 Head, Tenn., 674.

Also by conditions in the deed or will of the property to the wife. See cases, note 1, par. 4, Am. & Eng. Enc. of Law, p. 966.

Also by divorce *a vinculo*. See Statutes, p. 204.

Also by execution sale for her debts. Stewart v. Ross, 50 Miss. 776. If husband is not made a party to such sale. Jackson v. Ennis, 25 N. J. Eq. 402.

Also by conveyance or devise by her after 1848. See effect of statute.

Also if he joins in conveying her realty. Jackson v. Hodges, 2 Tenn. Ch. 276; Stewart v. Ross, 50 Miss. 776.

As to husband's right being subject to lien made by his wife. See *Forbes* v. *Sweesy*, 8 Neb. 520.

2. HUSBAND ENTITLED TO EXCLUSIVE POSSESSION.

The right of a husband to an estate as tenant by the curtesy still exists—when the widow of one of the heirs of the wife is not entitled to dower during the continuance of the said estate. *Leach* v. *Leach*, 21 Hun, 381.

A., wife of B., died seized of realty, leaving husband and three children her surviving who all died intestate and without issue. Plaintiff is a widow of one of these

2. INCIDENTS.

2. HUSBAND ENTITLED TO EXCLUSIVE POSSESSION.

children praying for dower in such land. *Held*, that on A.'s death her husband took life estate in such realty as tenant by the curtesy and hence his possession and enjoyment of such estate could not be interfered with by the heirs, and hence they not having any estate or interest vested in possession, the life estate not having terminated during his life in them during their lives, their death defeated her right to dower. *Leach* v. *Leach*, 21 Hun, 381.

"One claiming lands as heir of his mother can not recover in ejectmennt against an occupant who entered under the father, while there is an outstanding estate for life in the latter as tenant by the curtesy." *Grout* v. *Townsend*, 2 Hill, 554.

Husband's title to exclusive possession during his life, when once vested.

Where the wife died during the pendency for the condemnation of her lands for public purposes and the husband was appointed guardian of the infant children of the marriage, and the circumstances were such as to entitle the husband to an interest in the fund paid for the property taken; *held*, in an action by one of the children upon his becoming of age, for an accounting as to his share, that the petitioner had no immediate right to demand payment thereof when he became of age and consequently a surrogate had no power, until the husband's life estate was terminated, to compel the guardian to account to the ward for his share, nor to decree payment thereof without the former's consent. *Matter of petition of Camp*, 126 N. Y. 377.

Conveyance of a fee by a tenant by the curtesy—what passes.
Jackson v. *Mancius*, 2 Wend. 357.
Conveyance of a fee by a tenant by the curtesy—rights of heirs.
See Estates for Life, *House* v. *House*, 10 Paige, 158, digested p. 141.

3. HUSBAND ENTITLED TO USE OF FIXTURES.

Fixtures are a part of the realty and so far his exclusive use as tenant by the curtesy.

Plaintiff claims as grantee or vendee of Phineas Buckley the husband of Phœbe Buckley. "If this property was real estate, and Phineas was tenant by the curtesy, he had the same right to the fixtures annexed to the land of his wife, as an ordinary tenant for life. * * * And, of course, as to erections placed upon the premises by the Buckleys for the purpose of trade, the question is substantially between a tenant for life and a remainderman." Per Hand, J., in *Buckley* v. *Buckley*, 11 Barb. 64.

4. HUSBAND'S ESTATE VESTS BY OPERATION OF LAW.

"Curtesy is considered, in many respects, as a continuance of the wife's estate, and the husband takes it after her death with all the incum-

brances which would affect it in her possession if she were living. Crabb's L. of Real Prop. § 1110. I agree with Brother Lamont, that the husband does not take by descent from his wife. His estate is simply that which the common law made it. I do, however, insist that there could be no such thing as a tenant by the curtesy, or an estate by the curtesy, until the death of the wife. That the husband, upon the birth of issue, had some rights, and that some feudal duties were imposed upon him, is true." Per Marvin, P. J., *Matter of Winne*, 2 Lans. 23.

3. ACTIONS BY OR AGAINST TENANT BY THE CURTESY.

Tenant by the curtesy must be made a party to an action for partition. Code Civ. Pro., sec. 1538. When he may be made a party. Sec. 1539.

"Where a party has an estate by the curtesy for life or for years in an undivided share of the property;" how partition is made. Same, sec. 1553.

A tenant by the curtesy in an undivided share of real property may maintain an action for partition. Code of Civil Procedure, secs. 1532–1538. *Tilton* v. *Vail*, 53 Hun, 324.

An action for partition can not be brought by a tenant by the curtesy—Code of Civil Procedure, secs. 1538, 1557 and 1577—all the parties, including the infants, are, however, bound conclusively by the entry of a final judgment confirming a sale made in such an action—the only remedy of the infant defendant is an action against their guardian *ad litem* and his sureties—the failure to give a separate bond to each infant is only an irregularity. See *Reed* v. *Reed*, 46 Hun, 212, aff'd 107 N. Y. 545.

On curtesy generally, see Vandeveer v. Vandeveer, 17 St. Rep. 648; *Spaulding* v. *Cleghorn*, 28 id. 897.

Action of waste lies against tenant by the curtesy. Same, sec. 1651.

Amount of damages in same. Same, sec. 1655.

"A tenant by the curtesy was always liable for waste. 2 Saund. 252. Though tenants for life were not punishable at common law, but were by statute." *Dictum* per Hand, J., in Buckley v. Buckley, 11 Barb. 64.

4. CREDITORS.

Generally.

"Wife seized, has issue of the marriage born alive and dies without disposing. Husband has curtesy, which will pass to a receiver of his property." *Beamish* v. *Hoyt*, 2 Rob. 307.

4. CREDITORS.

Creditor bringing his bill before interest by curtesy vests and on different grounds or cause of action.

Husband, when not in debt, pays purchase price for land which he has conveyed to wife, and so plaintiff, a creditor of husband, can not attack the conveyance on ground of being in fraud of creditors, and being since 1848, he acquired no interest which creditors could take (see 8 Paige, etc.) during his wife's life, though after her death he became tenant by the curtesy.

The husband's wife having died *pendente lite*, thereby vesting in him an interest by the curtesy, the creditor, plaintiff, could not recover that. *Curtis* v. *Fox*, 47 N. Y. 299.

NOTE.—This case is often cited for proposition that husband's interest by the curtesy is liable for his debts and that he can not release it in fraud of creditors. But an extract from the opinion (per Grover, J.) will show this was not decided.

"Here, at the commencement of the action, Fox had no legal interest in the land, and he did not acquire any until long after putting in his answer. The complaint did not allege any, but sought relief upon the ground only that the title of the wife was fraudulent as against the plaintiff. This was not litigated. Fox (the husband and defendant) had no opportunity to raise the objection that an execution was the proper remedy for the plaintiff, so far as the interest acquired upon the death of his wife was concerned. He therefore, by his silence, did not waive it."

Husband's creditors except such as have obtained their rights bona fide and without notice of the wife's equities, are barred with him in divorce proceedings.

"Where the husband has violated marriage contract, or has been guilty of an act which entitled the wife to a decree for a divorce, or a separation, and for alimony, she is in equity entitled to a restoration of the property which the husband holds by virtue of his marital rights. And the court of chancery, upon the bill of the wife filed for the purpose of obtaining a divorce or separation, will not only protect her right to such property as against her husband himself, but also as against judgment creditors and others who do not stand in the situation of *bona fide* purchasers without notice of her equitable rights and of her intention to enforce them by a suit for a divorce or separation."

"So where the husband has married a ward in chancery without the consent of the court or of her legal guardian, the court, upon the ground of the husband's contempt, has jurisdiction to interfere, upon the application of the friends of the infant wife even without her consent, to restrain the husband and his creditors from intermeddling with her estate until a proper settlement is made for the support of the wife and of the issue of the marriage."

4. CREDITORS.

"The court of chancery will protect the wife's equity in the property which the husband acquires by the marriage, whenever the husband comes into that court as a party for the purpose of enforcing his claim to such property." *Van Duzer* v. *Van Duzer*, 6 Paige, 366.

In partition proceedings under section 1560, a creditor's rights are transferred from the property to the proceeds arising therefrom.

"Where a judgment is recovered against the husband during the pendency of a partition suit against him and his wife, for the partition of lands of which he holds an undivided share in right of his wife, a subsequent sale of the lands under the decree in partition divests the legal lien of the judgment creditor upon the husband's legal estate in the lands, and converts it into an equitable lien upon the husband's interest in the fund produced by the sale to the same extent as the legal lien.

"Where the real estate of the wife, in which the husband has a life estate as tenant by the curtesy initiate, is sold under a decree in partition, the creditors of the husband may, by a creditor's bill, reach his interest in the fund produced by the sale, to the extent of his legal interest in the estate sold. But they can not reach the wife's reversionary interest in the fund after the termination of the husband's life interest therein; where it has not been paid over to the husband, but has been invested for the separate use of the wife and her children under the order of the court." *Ellsworth* v. *Cook*, 8 Paige, 642.

A., B. and C. were tenants in common. By marriage and the proper birth of issue, D., the husband of C., became entitled as tenant by the curtesy initiate. E. became D.'s creditor, and D.'s interest was sold to him on execution. A., B. and C. partitioned, and, accordiug to 1 R. L. 510, sec. 5, premises were sold and were purchased by E. "On application by (E.) * * * the court ordered one-third of the proceeds of the sale to be put at interest by the clerk, to be disposed of by the court * * * according to the rights of the parties * * * *Schermerhorn* v. *Miller*, 2 Cow. 439.

A release of the curtesy, where not solvent, is in fraud of creditors.

A husband, having become embarrassed, settled upon the wife all of the property which had come to her from an uncle; as to personalty, to the extent which equity would have protected her, this was good against his creditor, but as to the excess it was void.

Wickes v. *Clarke*, 8 Paige, 161.

From opinion.—(Per Walworth, Ch. p. 171-2.) " * * * so far as relates to the husband's interest as tenant by the curtesy initiate in his wife's real estate" (he overrules vice-chan.) "In the case of Van Duzer v. Van Duzer, 6 Paige's Rep. 366, upon a review of all the cases on the subject, I arrived at the conclusion that the legal estate of the husband in his wife's real property as tenant by the curtesy initiate, could not be protected in equity from the claims of his creditors who had a right to sell the same upon their executions at law. As the debt in the present

4. CREDITORS.

case existed at the time of this settlement in 1829, and as there is nothing in the case to show that the husband retained to himself sufficient property of his own to satisfy all existing debts or claims for which he was then liable, the assignment of his life estate in his wife's lands can not be sustained as against these prior creditors. * * * The decree declared the husband's life estate in his wife's real property * * * to be inoperative and void as against the complainants' judgment. * * * The conveyance of the real estate * * * is valid, except as against the previous creditor of the husband," and therefore so much of the realty as is necessary to be sold to satisfy the debts of the complainant.

When the wife has not an equitable right to restrain husband's creditors from execution against the curtesy estates of the husband.

"Where the husband has been guilty neither of contempt in acquiring the legal title to his wife's property (nor of 'collusion, or a conspiracy between her husband and mere nominal creditors to deprive her and her children of an equitable right to a provision for support out of her property'), nor of such misconduct as entitled her to a divorce or a decree for a separation from bed and board, the court of chancery can not, upon the application of the wife, interfere with the husband's legal title as tenant by the curtesy initiate in his wife's property, so as to place it beyond his reach or the reach of his creditors and secure it for the support of the wife and her children."

"The bill was filed against the husband of the complainant and two of his judgment creditors, to restrain the latter from selling the husband's interest, as tenant by the curtesy initiate, in the real estate of the wife which belonged to her before her marriage; the husband being insolvent and worthless, and neglecting to provide for her children. * * * The only question to be decided * * * upon the present application is, whether this court has any power to reach this life interest so as to preserve it for her support; and thus to protect her and her helpless children against a vicious and improvident husband and his creditors." *Van Duzer* v. *Van Duzer*, 6 Paige, 366.

NOTE. The above is a case in equity. She has no legal right to interfere on any ground of that nature.

Curtesy is subject to the debts of the wife.

Tenancy by the curtesy, subject to debts of wife. *Arrowsmith* v. *Arrowsmith*, 8 Hun, 606.

5. ACTS RELATING TO MARRIED WOMEN.

L. 1848, *ch.* 200, *and L.* 1849, *ch.* 375, *relating to married women.*

The acts of 1848 and 1849, to protect the rights of married women, are not liable to objection, as imparing the obligation of a contract, be-

cause they defeat the expectation which the father of a living child had, previous to those acts, of being tenant in curtesy in lands acquired by his wife during coverture, and subsequent to these acts.

Mrs. T. married in 1833, issue born, whereupon Mr. T., prior to the acts of 1848–9, would have been entitled thereafter to all her estates of inheritance of which she was seized in fact at any time thereafter; *i. e.*, during the rest of her coverture. The land in question, in which a life estate by the husband is sought, came to Mrs. T. in 1853, long after the acts of 1848–9. Mr. T., supposing he had the right to the property *in mariti* and was tenant by the curtesy initiate, leased the same to defendants. Mrs. T. thereupon sues the latter to recover possession. Defendant contended, in the mayor's court, that Mr. T., by his marriage and birth of issue, acquired an estate by the curtesy in the land of his wife, which could not be defeated by the legislature. Defendant excepted. But verdict for plaintiff, which was reversed by the supreme court, which latter was reversed by court of appeals reinstating judgment of mayor's court. *Thurber & Stevenson* v. *Townsend & Wilbur*, 22 N. Y. 517.

Burke v. *Valentine*, 52 Barb. 412, affirmed in 1872 by court of appeals. See 6 Alb. L. J. 167.

By the court, per Ingraham, P. J. "Neither of these statutes (1848 or 1849) in words relate to the property or the rights of any one in the property of the wife after her death, in cases where she has not conveyed the same during coverture, or devised the same to others after her death. In such cases it is very clear the husband could have no estate by curtesy, because it would interfere with the right conferred upon her of conveying or devising the same, or any interest therein. If then this estate of tenancy by the curtesy is taken away, it is because it is inconsistent with the provisions of these statutes, and the intent of the legislature in passing them."

After summarizing the following cases, *Hurd* v. *Cass*, 9 Barb. 366; *Blood* v. *Humphrey*, 17 id. 660; *Shumway* v. *Cooper*, 16 id. 556; *Clark* v. *Clark*, 24 id. 581; *Lansing* v. *Gulick*, 26 How. Pr. 250; *Jaycox* v. *Collins*, id. 497; *Vallance* v. *Bausch*, 28 Barb. 633; and distinguishing *Colvin* v. *Currier*, 22 id. 371, and overruling *Billings* v. *Baker*, 28 id. 843, he concludes: "* * * the acts of 1848 and 1849 have not interfered with or taken away the right of the husband to the personal estate or the estate by the curtesy in the real property of the wife after her death, if not disposed of by her either during life or by will to take effect at her death."

"The common law rights of a husband as tenant by the curtesy are not affected by the acts of 1848 (L. 1848, ch. 200), and 1849 (L. 1849, ch. 375), for the more effectual protection of the property of married women, as to real estate of the wife undisposed of at her death." *Hatfield* v. *Sneden*, 54 N. Y. 280.

"The estate of tenancy by the curtesy survives to the husband on the decease of his wife, in all her real property, to which it would have attached at common law, and over which she has not exercised the power of disposition given by the married woman's act of 1848 and 1849.

5. ACTS RELATING TO MARRRIED WOMEN.

So *held*, reversing the decision at special term in this case," *i. e.*, 1 Lans. 508; ***In the matter of Winne***, 2 id. 21.

"The right to the tenancy by the curtesy was not taken away by the laws of 1848 and 1849, as to property of married women, or the amendments thereof. There has been considerable conflict in the decisions upon this question, but we think the weight of authority is clearly in favor of the view just expressed" (per Hardin, J.). Citing cases, see below. *Leach* v. *Leach*, 21 Hun, 382.

A husband and wife were married prior to the passage of the married women's acts (L. 1848, ch. 200, as amended by L. 1849, ch. 375), and in 1856, through a third person, the husband conveyed certain real estate to his wife.

Held, that the property acquired by the wife subsequent to the marriage was subject to any change, as to its disposition on her death, which the legislature might direct.

That the husband was entitled to the personal property of the wife acquired before the passage of the married women's acts. *Matter of Mitchell* v. *Curtis*, 61 Hun, 372.

Curtesy initiate since statutes of 1848–9 is not an interest in lands. *Dictum*, per Bradley, J., in *Matter of Clark*, 40 Hun, 237.

A husband and wife were married and had issue prior to the passage of the married women's acts (L. 1848, ch. 200, as amended by L. 1849, ch. 375), and in 1856, through a third person, the husband conveyed certain real estate to his wife.

Held, that the husband did not, by reason of the marriage and the birth of issue prior to 1848, acquire a vested right to a tenancy by the curtesy in such lands which the wife could not defeat by a subsequent testamentary disposition thereof. *Matter of Mitchell* v. *Curtis*, 61 Hun, 372.

For cases on the same subject in the inferior courts, see Clark v. Clark, 5 Barb. 474; Hurd v. Cass, 9 id. 366; White v. White, 24 id. 581; Rider v. Hulse, 33 id. 264; Jaycox v. Collins, 26 How. Pr. 496; Zimmerman v. Schoenfeldt, 6 T. & C. 142.

L. 1860, ch. 90, secs. 10, 11.

L. 1860, ch. 90, sec. 10, passed March 20.

At the decease of husband or wife, leaving no minor child or children, the survivor shall hold, possess or enjoy a life estate in one-third of all the real estate of which the husband or wife died seized

Repealed by L. 1862, ch. 172, sec. 2.

Sec. 11. At the decease of the husband or wife intestate, leaving minor child or children, the survivor shall hold, possess and enjoy all the real estate of which the husband or wife died seized and all the rents, issues and profits thereof during the minority of the youngest child, and one-third thereof during his or her natural life.

Repealed by L. 1862, ch. 172, sec. 2.

It has been questioned (see Gerard's Titles, 159,) whether this statute did not abolish, while in existence, curtesy for certain purposes.

NOTE.—As to the constitutionality of these acts of 1848 and 1849.

"The act of 1848, 'for the more effectual protection of the property of married women,' so far as it affects the husband's existing rights under a marriage contracted before the act, has been declared unconstitutional, as taking away the husband's property, in violation of article 1, sections 1, 6 of the Constitution. This would apply to lands acquired before the act. Under that act, and the act of 1849, *ante*, p. 75, the husband continues to take as tenant by the curtesy even of lands acquired subsequent to

5. ACTS RELATING TO MARRIED WOMEN.

them, where the wife dies seized of the estate, without having transferred it. The object of those statutes was simply to protect the wife during coverture, and to empower her to convey by deed or devise." Gerard's Titles, 158.

6. CURTESY NOT AFFECTED BY LAWS OF DESCENT.

L. 1896, ch. 547, art. 2. The descent of real property. Sec. 280. "This article does not affect * * * a tenancy by the curtesy. * * *"

1 R. S. 754, ch. 2 (passed Dec. 4, 1827, took effect Jan. 1, 1830), of title to real property by descent. Sec. 20. "The estate of a husband as tenant by the curtesy * * * shall not be affected by any of the provisions of this chapter: * * *."

Cases cited upon this statute: Billings v. Baker, 15 How. Pr. 525; Smith v. Schanck, 28 Barb. 344; Graham v. Luddington, 19 Hun, 246; Leach v. Leach, 21 id. 381; Gibbs v. Esty, 22 id. 266.

See 1 R. L., p. 54, ch. 12, L. 1786, passed Feb. 23, 1786.

VI. PRESUMPTION OF DEATH OF LIFE TENANT.

*Code Civil Procedure, sec. 841 (in effect, Sept. 1, 1877).

"Presumption of death in certain cases." "A person upon whose life an estate in real property depends, who remains without the United States, or absents himself in the state or elsewhere for seven years together, is presumed to be dead in an action or special proceeding concerning the property in which his death comes in question, unless it is affirmatively proved that he was alive within that time. And where in any action of partition in this state any portion of the proceeds of the sale of real property is or has been paid into court, or paid to the treasurer of any county for any unknown heirs, and has remained unclaimed for twenty-five years, after such payment by any person entitled thereto, the lapse of twenty-five years after such payment raises the presumption of the death of such unknown heirs at the time of the sale of such real property, and before such payment, and after the lapse of twenty-five years after such payment it shall be presumed that there were no such unknown heirs living at the time of such sale or payment, and in any action or proceeding taken for the purpose of distributing and paying over such proceeds, all such unknown heirs are presumed and they shall be presumed to have been dead at the time of such sale and before such payment into court, or to the treasurer of any county."

1 R. S. 749, sec. 6, repealed by L. 1880, ch. 245, sec. 1, in effect Sept. 1.

1 R. L. 103, sec. 1, in effect Feb. 6th, 1788, repealed by L. 1828, second meeting, ch. 21, sec. 1, par. 21, in effect Jan. 1, 1830. Same as R. S.

*Sec. 841 was amended by L. 1891, ch. 463.

VII. LEASES BY LIFE TENANT.

L. 1896, ch. 547 (Gen'l L., ch. 46, in effect Oct. 1, 1896), sec. 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."

1 R. S. 733, secs. 88, 89, repealed by L. 1896, ch. 547, sec. 300.

L. 1896, ch. 547 (Gen'l L., ch. 46, in effect October 1, 1896), sec. 123. A special and beneficial power may be granted,

1. * * * * * *

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."

1 R. S. 733, sec. 87, in effect Jan. 1, 1830, repealed by L. 1896, ch. 547, sec. 300.

Root v. Stuyvesant, 18 Wend. 257–270; Hone's Ex'rs v. Van Schaick, 20 id. 564.

For leases of property held in trust upon notice to the beneficiary, see Real Prop. L., secs. 86, 87.

VIII. RESTRICTIONS ON CREATION OF LIFE ESTATES.

The statute, in several instances, places restrictions upon the creation of life estates.

Sec. 33 of the Real Prop. L. (L. 1896, ch. 547, taking effect Oct. 1st, 1896) prohibits the limitation of more than two successive life estates, and then only to persons in being at the creation thereof; and avoids all life estates subsequent to those of the two persons first entitled, and vests any remainder, if it be vested, upon the expiration of such first two estates. See this section considered, *post*, p. 365.

Sec. 34 of the Real Prop. L. (L. 1896, ch. 547, taking effect Oct. 1st, 1896) provides that remainders created on an estate for the life of any other person than the grantee or devisee thereof shall not be less than a fee, and that the remainder created upon such life estate in a term of years shall be for the residue of such term. But by section 40 of the Real Property Law, an estate for life may be created on a term of years and remainder limited thereon, subject to the provisions of article two. See these sections considered, *post*, p. 365.

Sec. 35 of the Real Prop. L. (L. 1896, ch. 547, taking effect Oct. 1st,

1896) provides that where a remainder is created on an estate for the life of any other person than the grantee or devisee, and more than two persons are named as the persons during whose lives the life estates shall continue, the remainder shall take effect upon the death of the two persons first named. See section considered, *post*, p. 367.

Sec. 37 of the Real Prop. L. (L. 1896, ch. 547, taking effect Oct. 1st, 1896) provides that 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. See section considered, *post*, p. 240.

Sec. 40 of the Real Prop. L. (L. 1896, ch. 547, taking effect Oct. 1st, 1896) permits a fee or an estate less than a fee to be "limited upon a fee on a contingency, which, if it shall occur, must happen within the period prescribed in this article." See section considered, *post*, p. 241.

VII. CHATTELS REAL.

I. ESTATES FOR YEARS.

Sec. 23 of the Real Prop. L. (L. 1896, ch. 547, taking effect Oct. 1st, 1896) classifies estates for years as chattels real. See *ante*, p. 86.

Although the subject is beyond the purposes of the present work, the following statutes relating to estates for years are given at length.*

Sec. 190 of the Real Prop. L. (L. 1896 ch. 547, took effect Oct. 1st, 1896). 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."

1 R. S. 748, sec. 26, repealed.

Sec. 191 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896). 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."

1 R. S. 747, secs. 19, 20, repealed; L. 1846, ch. 274.

Sec. 192 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896). 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."

1 R. S. 747, sec. 22, repealed.

Sec. 193 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896). 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

*Annotations under these sections may be conveniently found in Logan's Real Property Law.

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."

1 R. S. 747, sec. 23, 24, repealed.

Sec. 194 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896). 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."

1 R. S. 744, sec. 3, repealed.

Sec. 195 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896). 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."

1 R. S. 748, sec. 27, repealed.

Sec. 196 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896). Effect of renewal on sub-lease. "The surrender of an underlease 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."

1 R. S. 744, sec. 2, repealed; L. 1846, ch. 274.

Sec. 197 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896). 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 had 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."

L. 1860, ch. 345, repealed.

Sec. 198 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896). 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."

1 R. S. 745, secs. 7, 8, 9, repealed.

Sec. 199 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896). 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."

1 R. S. 745, sec. 10, repealed.

Sec. 200 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896). 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."

1 R. S. 745, sec. 11, repealed.

Sec. 201 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st,

1896). 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."

Sec. 202 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896). 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."

1 R. S. 744, sec. 1, repealed.

Sec. 207 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896), includes leases for a term exceeding one year, in the provision for written conveyances.

Sec. 212 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896). Conveyance by a 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."

1 R. S. 739, sec. 145, repealed.

Sec. 213 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896). 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."

1 R. S. 739, sec. 146, repealed.

Sec. 224 of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896). 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."

2 R. S. 135, secs. 8, 9, repealed.

Sec. 240 of the Real Prop. L. (L. 1896, ch. 547, taking effect Oct. 1st, 1896), relating to the recording of instruments, provides that the term "real property," as used in article eighth, includes lands * * and chattels real, except a lease for a term not exceeding three years; and that the term "conveyance" includes every written instrument by which an estate or interest in real property is granted * * ; except * * * a lease for a term not exceeding three years.

The provisions respecting leases in the Code of Civil Procedure are found at the following sections: 1505, 1506–1510, 1508, 2253, 2256–2259, 2358, 2675, 2760, 2800.

II. ESTATES FOR LIFE OF THIRD PERSON.

Sec. 24 of the Real Prop. L. (L. 1896, ch. 547, taking effect Oct. 1st, 1896), so terms the remnant of an estate for the life of a third person after the death of the life tenant. See *ante*, p. 86.

The Real Property Law also provides as follows: Sec. 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." See section considered, *post*, p. 498.

VIII. CHATTEL INTERESTS.

Sec. 23 of the Real Prop. L. (L. 1896, ch. 547, taking effect Oct. 1st, 1896), provides that estates at will or by sufferance shall continue to be chattel interests, but not liable as such to sale on execution.

Sec. 198 of the Real Prop. L. (L. 1896, ch. 547, taking effect Oct. 1st, 1896), provides for the termination of tenancies at will or by sufferance by notice.

See statutes relating to estates for years as above given.

IX. ESTATES IN POSSESSION AND EXPECTANCY.

Real Prop. L., sec. 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."

1 R. S. 722, sec. 7, Banks's 9th ed., p. 1789, repealed by Real Prop. L. "Estates as respects the time of their enjoyment are divided into estates in possession and estates in expectancy."

1 R. S. 723, sec. 8, Banks's 9th ed., p. 1789, repealed by Real Prop. L. "An estate in possession is where the owner has an immediate right to the possession of land. An estate in expectancy is where the right to the possession is postponed to a future period."

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* *Estates in possession.*

Here the right to enjoy is not only certain, but the right is one of immediate enjoyment. The tenant is entitled actually to receive the profits of the land. The actual receipt may be withheld wrongfully from him; another may be in truth in possession of the land, or receiving the profits without his consent. This is immaterial, for, by right, if he should receive the profits as the owner of the estate, he is legally the tenant of an estate in possession. Estates in possession are such as usually follow conveyances of land by the delivery of a deed thereof, devises of estates taking effect in enjoyment on the death of the testator; interests in land created by lease *in præsenti*-

X. ESTATES IN EXPECTANCY.

Real Prop. L., sec. 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."

1 R. S. 723, sec. 9, Banks's 9th ed., p. 1789, repealed by Real Prop. L. Estates in expectancy are divided into:

1. Estates commencing at a future day, *denominated future estates;* and,
2. Reversions."

1 R. S. 726, sec. 42, Banks's 9th ed., p. 1794, repealed by Real Prop. L. "All expectant estates, except such as are enumerated and defined in this article, are abolished."

I. REVERSIONS.

Real Prop. L., sec. 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."[1]

Same as 1 R. S. 723, sec. 12, Banks's 9th ed., p. 1790, repealed by Real Prop. L.

EXPLANATORY NOTE.—If A., owning land, grant to B. for life, then to C., in fee, C. takes by remainder; if A. simply grant to B. for life, then the estate of inheritance is undisposed of; hence the fee continues in A. and his estate is a reversion. Yet neither A. nor C. can enjoy in possession until B. shall have died.

The following are characteristics of a reversion:

1. It arises by operation of law, and not by deed or will.
2. It is a vested[2] interest or estate. Kent's Com. vol. 4, *354.
3. It is not within the statutes against perpetuities, p. 410.

On the rights of reversioners and remaindermen respecting property sold for taxes or assessments, see N. Y. Gen. L. 1848, ch. 341; N. Y. Gen. L. 1842, chs. 154, 393; N. Y. Gen. L. 1855, ch. 327.

As to taxable transfers, see N. Y. Gen. L. 1896, vol. 1, p. 868; N. Y. Gen. L. 1892, ch. 399.

"[1]The idea of a reversion is founded on the principle that, when a person has not parted with his whole estate and interest in a piece of land, all that which he has not given away remains in him; and the possession of it reverts or returns to him, upon the determination of the preceding estate." Greenleaf's Cruise on Real Prop., vol. 1, p. 340.

[2]As to contingent reversions, see Floyd v. Carow, 88 N. Y. 560; also see Chaplin on the suspension of the Power of Alienation, p. 79.

Respecting actions for waste, see Code Civ. Pro., secs. 1651, 1652, 1665.

II. FUTURE ESTATES.

Real Prop. L., sec. 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.

1 R. S. 723, sec. 10, Banks's 9th ed., p. 1790, repealed by Real Prop. L. the same.

Real Prop. L., sec. 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."

1 R. S. 723, sec. 11, Banks's 9th ed., p. 1790, repealed by Real Prop. L., the same.

EXPLANATORY NOTE TO SECS. 25–29.—Sections twenty to twenty-five inclusive treat of the quantity or duration of the tenant's interest, irrespective of the period when he has a *right* to enjoy the same.

The foregoing sections, twenty-five to twenty-nine, treat exclusively of the *time* when the tenant may by *right* begin the actual enjoyment of an estate. These last enumerated sections classify estates, as respect such time of enjoyment, as follows:

Future Estates.	Reversions.
Created by act of parties.*	Created by act of law.*
Remainders—other future estates.	
Vested estates—contingent estates.	

It will be observed that by the Real Property Law, Estates in Expectancy are divided into Future Estates, and Reversions, and that by section 28 a future estate, when limited on a precedent estate, is called a "remainder". But the common law division of expectant estates was confined to Remainders and Reversions. Greenleaf's Cruise on Real Prop. 225; Kent's Com. *198. Why then do the statutes contemplate future estates other than "Remainders"? The reason is this; the common law rule refers only to legal estates created in conveyances and does not include certain interests in land created contrary to the rules of limitation of such estates (Kent's Com. vol. 4, *264); such were Executory Devises, Shifting or Secondary Uses, Springing Uses, Future or Contingent Uses and Conditional Limitations. Our statutes classify all such estates, as well as remainders, under the common head of Future Estates. Executory Devises and conditional limitations were created by will, and conditional limitations and the other estates men-

*Kent's Com. vol. 4, *197-8.

tioned were created by conveyances, but these, save remainders, were conveyances to uses.

It is now proposed to point out the characteristics and distinguishing features of these various future estates.

1. REMAINDERS.

Sec. 28, defines a remainder as an estate limited to begin in enjoyment upon the natural termination of a precedent estate, created at the same time.*

The precedent estate.

A particular or precedent estate was necessary at common law to support a vested remainder amounting to a freehold estate, because a freehold could not be created to commence in the future, without an estate *vested in possession* to support it intervening the time of the creation of the remainder and the time when it should be enjoyed in possession. This rested on the feudal theory that there must be a delivery of the possession of a freehold estate to continue until the actual enjoyment of the remainder.†

Where there was a precedent estate the remainderman was regarded as seized of his remainder at the same time that the tenant of the particular estate became possessed of his estate, and hence a delivery of the possession of the precedent estate was necessary, when a freehold vested remainder was limited upon it in order to sustain the latter estate, and then the delivery of possession to the particular tenant inured to the benefit of the remainderman, as the particular estate and remainder constituted the entire estate. Kent's Com. vol. 4, *234. As a result, if the precedent estate were void at its creation, or became so or was defeated thereafter, before its natural expiration, the freehold dependent upon it failed also. Kent's Com. *235–6.

This, also, was the same with contingent remainders, but between vested and contingent remainders there was this difference, that while a vested remainder of freehold might be limited on a precedent estate, less than a freehold, as on an estate for years, not created to begin in the

*"A remainder is a remnant of an estate in land, depending upon a particular prior estate created at the same time, and by the same instrument, and limited to arise immediately on the determination of that estate, and not an abridgment of it." Kent's Com. vol. 4, *198.

It is "an estate limited to take effect and be enjoyed after another is determined." Greenl. Cruise on Real Prop. vol. 1, p. 225.

†"The reason of this rule was that, under the feudal law, the freehold should not be in abeyance since there must always be a visible tenant of the freehold, who might be made a tenant to the *præcipe* and answer for the services required." Kent's Com. vol. 4, *236–7.

1. REMAINDERS.

future (Kent's Com. vol. 4, *235–6), yet, in the case of contingent remainders, the precedent estate must be a *vested freehold estate*. "Thus, in the case of a devise to B. for fifty years, if he should so long live, remainder to the heirs of his body, the remainder (being contingent) was held void for the want of a freehold to support it. But if the remainder had been to trustees during the life of B., remainder to the heirs of his body, in that case the contingent remainder had been good, because preceded by a vested freehold remainder to trustees." Kent's Com. vol. 4, *236–7.

Hence, at common law, to insure the creation and continuance of a valid remainder, the following were essentials noticeable in this connection:

(1) A valid precedent estate created at the same time as the remainder.

(2) If the remainder were a freehold, the precedent estate must be vested (Kent's Com., 234); if the remainder were limited on a contingency and amounted to a freehold, the precedent estate must be a vested freehold. Kent's Com. 237, *post*, p. 241.

(3) The expiration of such precedent estate naturally and not by abridgment, defeasance or destruction, *post*, pp. 247–251.

(4) The remainder must take effect at the expiration of the precedent estate, *post*, pp. 246, 247–251.

(5) If the precedent estate for any cause failed before its natural termination, the remainder failed; hence the event on the happening of which a contingent remainder should vest could not be such a contingency as should abridge or defeat the precedent estates, *post*, p. 244.

(6) A remainder could not be created to take effect upon the failure of an estate in fee created with it. See *post*, p. 241–2.

For further consideration of Remainders, see p. 238, *et seq.*

2. FUTURE ESTATES OTHER THAN REMAINDERS.

Later the statutes embodying the present law governing future estates and materially changing the common law rules above given will be given pp.

Meanwhile, the characteristics of other future estates may be stated.

Executory devise.

An executory devise is a contingent future estate *created by will.*

"The reason of the institution of executory devises was to support the will of the testator; for when it was evident that he intended a contingent remainder, and when it could not operate as such by the rules of law,

2. FUTURE ESTATES OTHER THAN REMAINDERS.

the limitation was then, out of indulgence to wills, held to be good as an executory devise." Kent's Com. vol. 4, *264.

"An executory devise differs from a remainder in three very material points, (1) [1]it needs not any particular estate to precede and support it, as in the case of a devise in fee to A. upon his marriage. Here is a freehold limited to commence *in futuro*, which may be done by devise, because the freehold passes without livery of seizin; and until the contingency happens, the fee passes, in the usual course of descent, to the heirs at law. (2) [2]A fee may be limited after a fee, as in the case of a devise of land to B. in fee, and if he die without issue, or before the age of twenty-one, then to C. in fee; (3) [3]a term of years may be limited over, after a life estate created in the same. At law, the grant of the term to a man for life, would have been a total disposition of the whole term." Kent's Com. vol. 4, *270.

NOTE 1. A devise to B. and his family if he should have a family. Flowmery v. Johnson, 7 B. Mon., Ky. 693; Mitchell v. Long, 80 Pa. St. 516. Devise to testator's nephews that may first come to America within an allowable time, otherwise to heirs. Chambers v. Wilson, 2 Watts, Pa. 495.

NOTE 2. Vedder v. Evertson, 3 Paige, 281; Matter of Sanders, 4 id. 292; Norris v. Beyea, 13 N. Y. 273. These cases are very numerous, see pp. 274–280.

"When the whole fee is first limited, as in a devise to a man and his heirs, and there is a devise over upon a contingency, this is an executory devise; but if the first devise was of an estate for life or years, a subsequent limitation to take effect immediately upon the determination of such first estate would be a remainder. Norris v. Beyea, 13 N. Y. 273.

NOTE 3. A., owning an estate for fifty years in land, devises it to B. for life, and after B.'s death the remainder to C. At common law, a valid conveyance of this nature could not be made as the estate for life was deemed to merge in it the entire term for years; but the rule was otherwise when precisely the same thing was done by will. See p. 242.

Shifting or secondary, springing, future or contingent and resulting uses.

"A use is where the legal estate of lands is in A., in trust, that B. shall take the profits, and that A. will make and execute estates according to the direction of B." Kent's Com. vol. 4, *290.

(See history and explanation of Uses and Trusts *post*, p. 561.)

The Revised Statutes, section 72, converted every estate formerly held as a use into a legal estate, and every person entitled to the actual possession of lands and the receipt of the rents and profits thereof, in law or in equity, is given a legal estate therein, equal in quality and duration to his beneficial interest. Hence, what was formerly a use became a legal estate in land.*

*The language of Chancellor Kent respecting the effect of 27 Henry VIII is applicable to the revision of the New York Statutes.

2. FUTURE ESTATES OTHER THAN REMAINDERS.

A use always arose by *grant or agreement*, and never by will. This manner of creation established the principal distinction between the doctrine of uses and executory devises, which they closely resembled, although in one respect analogous to contingent remainders. "Uses and contingent devises become parallel doctrines, and what, in the one case, was a future use, was, in the other, an executory devise." Kent's Com. vol. 4, *295. But uses differ from executory devises in this respect; that there must be a person seized to the uses when the contingency happens or they can not be executed by the statute (statute of uses). If the estate of the feoffee to such uses be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed forever; whereas, by an executory devise, the freehold is transferred to the future devisee. Contingent uses are so far similar to contingent remainders, that they require a preceding estate to support them, and take effect, if at all, when the preceding estate determines." Kent's Com. vol. 4, *295-296.

"*Shifting or secondary uses* take effect in derogation of some other estate, and are either limited by the deed creating them, or authorized to be created by some person named in it. Thus, if an estate be limited to A. and his heirs, with a proviso, that if B. pay to A. $100, by a given time, the use of A. shall cease, and the estate go to B. in fee, the estate is vested in A. subject to a shifting or secondary use in fee in B. So, if the proviso be that C. may revoke the use to A. and limit it to B., then A. is seized in fee, with a power in C. of revocation and limitation of a new use." Kent's Com. vol. 4, *296-7.

"*Springing uses* are limited to arise on a future event, where no preceding estate is limited, and they do not take effect in derogation of any preceding interest. If a grant be to A. in fee, to the use of B. in fee, after the first day of January next, this is an instance of a springing use and no use arises until the limited period. The use, in the meantime, results to the grantor, who has a determinable fee * * By means of powers, a use, with its accompanying estate, may *spring up* at the will of any given person. Land may be conveyed to A. and his heirs, to such uses as B. shall by deed or will appoint, and in default of and until such appointment to the use of C. and his heirs. Here a vested es-

" The *qualities* which had attended uses in equity were not separated from them when they changed their nature and became an estate in the land itself. If they were contingent in their fiduciary state, they became contingent in the land itself. They were still liable to be overreached by the exercise of powers and to be shifted and to cease, by clauses in cesser in deeds of settlement. The statute transferred the use with its accompanying conditions and limitations into the land." Kent's Com. vol. 4, *294-5.

tate is in C. subject to be divested or destroyed at any time by B. exercising his power of appointment, and B., though not the owner of the property, has such power, but it extends only to the *use* of the land, and the fee simple is vested in the appointee, under the operation of the statute of uses, which instantly annexes the legal estate to the use. * * A good springing use must be limited at once, independently of any preceding estate, and not by way of remainder, for it then becomes a contingent and not a springing use." Kent's Com. vol. 4, *298.

"*Future or contingent uses* are limited to take effect as remainders. If lands be granted to A. in fee, to the use of B. on his return from Rome, it is a future contingent use, because it is uncertain whether B. will ever return." Kent's Com. vol. 4, *298.

Conditional limitations.

Where an estate is granted on a condition subsequent, if there be a breach of such condition, the grantor or his heirs, and they only, may reenter for the non-performance of the condition. "If the condition subsequent be followed by a limitation over to a third person, in case the condition be not fulfilled, or there be a breach of it, that is termed a conditional limitation." Kent's Com. vol. 4, *126.

"At common law, a remainder could not take effect on an event which should defeat before its natural termination the precedent estate. Thus, if an attempt were made to *grant* an estate to B. for life, and if C. should return from Rome, then that B.'s estate should cease and a remainder vest at once in D., both the life estate and remainder would be void. This arose from the doctrine that a remainder could not take effect on an event which goes to defeat, or abridge or work the destruction of the precedent estate. Moreover, as the discontinuance of B.'s estate depended upon a condition, viz., the return of C. from Rome, no one but the grantor or his heirs could take advantage of the breach and make entry therefor, and hence the remainderman could not.

This rule applied only to common law conveyance. Kent's Com. vol. 4, *249. But if this same provision were made in conveyances to uses or in wills, it would be good as a *conditional limitation*, or future or shifting use, or executory devise. Kent's Com. vol. 4, *250, 251. And upon C.'s return from Rome B.'s estate would *ipso facto* cease and the remainderman (so called) could enter.

Hence, a *conditional limitation* was a contingent estate that should arise upon the premature destruction, by some act or event, of a precedent estate created at the same time, and was created either by will or by conveyance to uses. Kent's Com. vol. 4, *128.

2. FUTURE ESTATES OTHER THAN REMAINDERS.

But the Revised Statutes, Real Prop. L. (sec. 43, *post*, p. 244), now expressly provide that "a remainder may be limited on a contingency, which, if it happen, will operate to abridge or determine the precedent estate; and every such remainder shall be a conditional limitation." See *post*, pp. 244–5. See Conditions, p. 1063.

Distinction between remainders and other future estates no longer exists.

"The New York statute has, in effect, destroyed all distinction between contingent remainders and executory devises. They are equally future or expectant estates, subject to the same provisions, and may be equally created by grant or will. The statute allows a freehold estate, as well as a chattel real, to be created, to commence at a future day;[1] and an estate for life to be created in a term for years,[2] and a remainder limited thereon;[2] and a remainder of a freehold or chattel real, either contingent or vested, to be created expectant on the determination of a term of years;[1] and a fee to be limited on a fee, upon a contingency.[3] There does not appear, therefore, to be any real distinction left subsisting between contingent remainders and executory devises.[4] They are so perfectly assimilated, that the latter may be considered as reduced substantially to the same class; and they both come under the general denomination of expectant estates. Every species of future limitations is brought within the same definition and control. Uses being also abolished by the same Code (see sec. 71, *post*, p. 571), all expectant estates, in the shape of springing, shifting or secondary uses, created by conveyances to uses, are, in effect, become contingent remainders, and subject precisely to the same rules." Kent's Com. vol. 4, *294–6.

The original note of the revisers respecting these sections is as follows:

(Sec. 10, present sec. 27.) "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,'[5] 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.

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[1] Real Prop. L., sec. 40, *post*, p. 241.

[2] Real Prop. L., sec. 34, 40, *post*, pp. 241, 365.

[3] Real Prop. L., secs. 32, 40, *post*, pp. 241, 382.

[4] But see as to Remote Vesting, p. 389.

[5] Real Prop. L., sec. 27, *ante*, p. 232.

2. FUTURE ESTATES OTHER THAN REMAINDERS.

"At common law, owing to the necessity of an immediate livery of seizin, a freehold estate could not be created to commence in possession at a future day, unless as a remainder. 2 Black. Com. 166.

"In modern times, however, the 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.[1] The reasons upon which the original rule was founded, being no longer applicable, it is proposed to abolish it altogether. As future estates can not, under the following sections of this article,[2] create a suspension of ownership, for a longer period than remainders, no rules of public policy are violated by their permission. In fact they are in effect, though not by verbal definition, remainders, commencing in possession on the determination of the *intermediate* estate not granted or devised."

Revised Statutes, vol. 3, 2d ed., 571.

Statutes relating to future estates.

The statutes effecting the changes above discussed, as well as other statutes relating to future estates, will now be given.

3. CONTINGENT REMAINDER ON TERM OF YEARS.

Real Prop. L., sec. 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."

1 R. S. 724, sec. 20, Banks's 9th ed., 1791, repealed by Real Prop. L., same.
Butler v. Butler, 3 Barb. Ch. 304. Hawley v. James, 5 Paige, 463. See p. 389.

EXPLANATORY NOTE TO SEC. 36.—The common law prohibited the creation by *conveyances* of a contingent remainder amounting to freehold on a term of years, as a term for years not being a freehold estate, could not support a contingent remainder.[3] But section 40, subject to *preceding restrictions*, permits a freehold estate to be created to commence at a future day, and a contingent remainder to be limited on a term of years. One of the restrictions intended in section 40 is that contained in section 36 (former section 20), viz., that the remainder shall vest, if at all, within or at the termination of two lives in being at the creation of the estate. But as there is no restriction upon a vested estate limited on a term of years, an estate to A. for 500 years, remainder to B., is good.

[1] Real Prop. L., sec. 40, *post*, p. 241.
[2] Real Prop. L., sec. 32, *post*, p. 382.
[3] See *ante*, p. 233.

3. CONTINGENT REMAINDER ON TERM OF YEARS.

Such an estate is not objectionable within the statutes against suspension of the power of alienation, as the owners of the term and remainder may unite and convey. See p. 388.

4. ESTATE FOR LIFE AS REMAINDER ON TERM OF YEARS.

Real Prop. L., sec. 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."

1 R. S. 724, sec. 21, Banks's 9th ed., 1791, repealed by Real Prop. L., the same.

EXPLANATORY NOTE TO SEC. 37.—Thus, a term to A. for ten years years, remainder for life to first unborn son of B., is bad; but if the remainder were to B., a person in being, it would be good. As said under section 36, at common law, a term of years would not support a remainder, amounting to a freehold, if contingent. Section 40 permits this, subject to preceding restrictions, but section 37 declares that such permission does not extend to an estate for life limited to a person not in being, as a remainder on a term of years. Moreover, section 37 is an exception to section 36. Under the latter section a remainder in fee dependent on a contingency that must happen within two lives could be limited on a term of years, but under section 37 such a remainder, if an estate for life, can not be created in favor of a person not in being.

5. MEANING OF HEIRS AND ISSUE IN CERTAIN REMAINDERS.

Real Prop. L., sec. 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.

1 R. S. 724, sec. 22, Banks's 9th ed., 1791, repealed by Real Prop. L., the same. For cases relating to this section, see pp. 346, 378, 403.

EXPLANATORY NOTE TO SEC. 38.—[1]In the case of a remainder limited to take effect on the death of any person without heirs, etc., this section declares that a definite, rather than an indefinite failure of issue is intended, by limiting the provision to the time of the testator's death. Thus, devise to A. in fee, and if he should die without issue (or using any of the terms expressed in the section), then to B. But if the intention of the testator unquestionably refers to some other time than the death of the testator, his intention and not the statute governs.

See Kent's Com. vol. 4, *281; Champlins' Susp., p. 280 *et seq.*

[1] See note on this subject under section 32, *post*, p. 403.

6. CREATION OF FUTURE AND CONTINGENT ESTATES.

Real Prop. L, sec. 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 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."

1 R. S. 724, sec. 24, Banks's 9th ed., 1791, repealed by Real Prop. L.

"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."

For cases relating to this section, see pp. 309–346.

EXPLANATORY NOTE TO SEC. 40.—This section is intended to harmonize the manner of creating estates, whether created by grant or will.

"It allows, "subject to the provisions of this article,"

(1) A freehold estate[1] or a term of years to be created to commence at a future day (see restrictions on this, secs. 36 and 37 and notes);

(2) [2]An estate for life to be created in a term of years, and a remainder to be limited thereon (see restrictions, sec. 34 and notes);

(3) A vested or contingent[1] remainder of a freehold or chattel real to begin after a term of years (see restrictions, secs. 36 and 37 and notes);

(4) A fee or other less estate (words "other less estate" added by recent revision) to be limited on a fee,[3] on a contingency which, if at all, must occur within the period prescribed by the rule against perpetuities. By section 32 a contingent remainder in fee may be limited on a prior remainder in fee upon a contingency that must happen during two lives *and the minority of the first taker.* This rule does not apply to a fee limited on a fee, where the period of two lives in being is the limit within which the contingency must happen that shall vest the second fee.

This statute is intended to apply to remainders the same rule that was at common law applicable to executory devises and secondary uses. Thus the original revisers explain the reasons for the change.

[1]This was not allowed in conveyances at common law, *ante*, pp. 233, 239.

[2]This was not allowed in conveyances at common law, p. 242.

[3]This was not allowed in conveyances at common law, p. 242.

6. CREATION OF FUTURE AND CONTINGENT ESTATES.

"This section (present section 40) 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.

"None, indeed, of the restrictions that 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, 170, 173, 174; Fearne on Remainder, 423." 3 R. S. 573, 2d ed.

7. FUTURE ESTATES IN THE ALTERNATIVE.

Real Prop. L., sec. 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."

1 R. S. 724, sec. 25, Banks's 9th ed., 1792, repealed by Real Prop. L., substantially the same.

For cases relating to this section, see pp. 336, 377.

EXPLANATORY NOTE TO SEC. 41.—"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

7. FUTURE ESTATES IN THE ALTERNATIVE.

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." Reviser's notes, 3 R. S. 573, 2d ed.

"If the prior fee be contingent, a remainder may be created, to vest in the event of the first estate never taking effect, though it would not be good as a remainder, if it was to *succeed*, instead of being collateral to the contingent fee. Thus, a limitation to A. for life, remainder to his issue in fee, and in default of such issue remainder to B., the remainder to B. is good, as being *collateral* to the contingent fee in the issue. It is not a fee mounted upon a fee, but it is a contingent remainder with a double aspect, or, as Mr. Douglas says, with less quaintness, on a double contingency. But if the remainder over to B. had been merely in the event of such dying before twenty-one, it would have been good only as a shifting use or executory devise, for it would have vested on an event which rescinds a prior vested fee. There is likewise a double contingency when estates are limited over in the alternative, or in succession. If the previous estate takes effect, the subsequent limitation awaits its determination, and then vests. But if the first estate never vests by the happening of the contingency, then the subsequent limitation vests at the time when the first ought to have vested. Kent's Com. vol. 4, *200, 201.

8. FUTURE ESTATES VALID, THOUGH CONTINGENCY IMPROBABLE.

Real Prop. L., sec. 42. Future estates 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."

1 R. S. 724, sec. 26, Banks's 9th ed., 1792, repealed by Real Prop. L., substantially the same.

EXPLANATORY NOTE TO SEC. 42.—"It is a maxim (of the common law) 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 ques-

8. FUTURE ESTATES VALID, THOUGH CONTINGENCY IMPROBABLE.

tion, 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. 51b; Cruise's Dig. tit. 16, ch. 2, secs. 4 to 8." Reviser's notes, 3 R. S. 574, 2d ed.

9. CONDITIONAL LIMITATIONS.

Real Prop. L., sec. 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."

1 R. S. 725, sec. 27, Banks's 9th ed., 1792, repealed by Real Prop. L. "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 limitation would have by law." See p. 237.

The cases relating to Conditional Limitations will be found collected under Conditions, p. 1063 *et seq.*

EXPLANATORY NOTE TO SEC. 43.—This was always the rule applied to conveyances to uses, or to devises, but it is intended to abolish the severe and strict rule applicable to common law conveyances. Kent's Com. vol. 4, *250, *252.

"A remainder, properly so called, can not be limited (before the statutes) on a contingency, which, should it happen, will defeat the prior estate, before the period of its natural termination; in fewer words, it can not 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 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

9. CONDITIONAL LIMITATIONS.

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 a 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 cases 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. 3, 363, 391 to 393, 409, 410, and cases there cited. 2 Black. Com. 155, 156." Reviser's notes, 3 R. S. p. 574.

10. WHEN HEIRS OF LIFE TENANT TAKE AS PURCHASERS.

Real. Prop. L., sec. 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

10. WHEN HEIRS OF LIFE TENANT TAKE AS PURCHASERS.

of the body, of such tenant for life, shall take as purchasers, by virtue of the remainder so limited to them."

1 R. S. 725, sec. 28, Banks's 9th ed., 1792, repealed by Real Prop. L., substantially the same.

For discussion of this section and cases relating thereto, see pp. 87–92.

11. WHEN REMAINDER NOT LIMITED ON CONTINGENCY DEFEATING PRECEDENT ESTATE, TAKES EFFECT.

Real Prop. L., sec. 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."

1 R. S. 725, sec. 29, Banks's 9th ed., 1792, repealed by Real Prop. L., substantially the same. Acceleration of Remainders, see pp. 318, 343, 346, 390.

EXPLANATORY NOTE TO SEC. 45. — This intends that the enjoyment of a remainder limited on a term of years or estate for life shall not be accelerated by any destruction of the precedent estate, unless such was the intention. The remainder being limited on an estate for the life of B. shall vest in enjoyment when B. dies, whatever happens to his estate; if the remainder be limited on a term of years it shall take effect after the expiration of the years. It may be that the precedent estate will be defeated by the terms of the instrument creating it, or by operation of law, as by merger. But if it is apparent that the intention is that the remainder shall vest in enjoyment upon the failure of the precedent estate, this of course will result.

12. POSTHUMOUS CHILDREN.

Real Prop. L., sec. 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."

1 R. S. 725, secs. 30, 31, Banks's 9th ed., 1792, repealed by Real Prop. L., substantially the same.

For cases relating to this section, see pp. 282, 325, 326, 1090, 1428.

EXPLANATORY NOTE TO SEC. 46.—"The case of posthumous children is provided for in the statute of descents; but the statute of 10 and 11 William 3, ch. 16 (Evans's collec. of statutes, vol. 1, p. 230),

12. POSTHUMOUS CHILDREN.

entitling posthumous children to take by remainder, by a singular omission, has not been re-enacted in this state. Before the passing 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 Johns. Ch. 18."

"This section may be thought superfluous as expressing only the necessary consequence of a fair interpretation of the provisions of this article, considered in connection with the chapter of descents; but it is deemed expedient to guard against possible misconstruction, by declaring explicitly the effect of the birth of a posthumous child in the case supposed."

3 R. S., p. 576, 2d ed. Reviser's notes to secs. 30, and 31, R. S. 725.

See suspension of the power of alienation, p. 403.

13. WHEN EXPECTANT ESTATES ARE DEFEATED.

Real Prop. L., sec. 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."

1 R. S. 725, sec. 32, Banks's 9th ed., 1792, repealed by Real Prop. L. "No expectant estate can be defeated or barred by any alienation, or other act of the owner of the immediate or precedent estate, nor by any destruction of such precedent estate by disseizin, forfeiture, surrender, merger or otherwise."

1 R. S. 725, sec. 33, Banks's 9th ed., 1793, repealed by Real Prop. L. "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."

For cases relating to this section, see pp. 93–129, 308, 309, 318.

EXPLANATORY NOTE TO SEC. 47.—"The object of this section (sec. 32, present sec. 47) 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 can not be barred or prevented from taking 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

13. WHEN EXPECTANT ESTATES ARE DEFEATED.

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 precedent 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, in fee, before the birth of any 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 person 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 parties, and are not required by any consideration 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."

Reviser's note, 3 R. S. 576, 577, 2d ed.

(Sec. 33 R. S., present sec. 47.) "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 can not 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 fulfills the intent of the testator."

Reviser's notes, 3 R. S. 577, 2d ed.

"At common law the destruction of the precedent estate by disseizin, forfeiture, surrender, merger, etc., might, save in exceptional cases, destroy the same, and thereupon the remainder failed. This might be obviated by the creation of trustees to preserve the contingent remainder during 'the life of the tenant for life,' notwithstanding any determination of the particular estate prematurely, by forfeiture or otherwise. This precaution is still used in settlements on marriage, or by will, where there are contingent remainders to be protected. The legal estate limited to trustees during the tenant's life, is a vested re-

13. WHEN EXPECTANT ESTATES ARE DEFEATED.

mainder in trust, existing between the beneficial freehold and the contingent remainder, and the limitation in trust is not executed by the statute of uses, and the legal estate in such cases remain in the trustees. The tenant for life has a legal estate, and the remainder of the same character and for the same period is vested in the trustees; and if the particular estate determines otherwise than by the death of the tenant, the estate of the trustees *eo instanti*, takes effect, and as a particular estate in possession, it supports the remainder depending on the contingency." Kent's Com. vol. 4, *256.

14. EFFECT ON VALID REMAINDERS OF DETERMINATION OF PRECEDENT ESTATE BEFORE CONTINGENCY.

Real Prop. L., sec. 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 afterward 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 R. S. 725, sec. 34, Banks's 9th ed., 1793, repealed by Real Prop. L., substantially the same.

For cases relating to this section, see pp. 317, 318, 343.

EXPLANATORY NOTE TO SEC. 48.—This section is to meet the rule of the common law that the remainder must vest during the continuance of the particular estate, or at the very instant that it determines.

"The rule was founded on feudal principles, and was intended to avoid the inconvenience of an interval when there should be no tenant of the freehold to do the services of the lord, or answer to the suit of a stranger, or preserve an uninterrupted connection between the particular estate and the remainder. If therefore, A. makes a lease to B. for life, with remainder over, the day after his death; or if an estate be limited to A. for life, the remainder to the eldest son of B., and A. dies before B. has a son, the remainder, in either case, is void, because the first estate was determined before the appointment of the remainder. There must be no interval or 'mean time', as Lord Coke expresses it, between the particular estate and the remainder supported by it. If the particular estate terminates before the remainder can vest, the remainder is gone forever, for a freehold can not, according to the common law, commence *in futuro*. This rule, upon a strict construction, was held by the courts of law to exclude a posthumous son from taking a contingent remainder, when the particular estate determines before he was born, and the person who succeeded took by purchase. But the deci-

14. EFFECT ON VALID REMAINDERS OF DETERMINATION OF PRECEDENT ESTATE BEFORE CONTINGENCY.

sion of the K. B. upon that point was reserved by the House of Lords; and it is now the settled law in England and in this country, that an infant *en ventre sa mere*, is deemed to be *in esse*, for the purpose of taking a remainder, or any other estate or interest which is for his benefit, whether by descent, by devise, or under the statute of distribution." Kent's Com. vol. 4, *248-9.

(Sec. 34 R. S., present sec. 48.) "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." Reviser's notes, 3 R. S. 577-8, 2d ed.

15. QUALITIES OF EXPECTANT ESTATES.

Real Prop. L., sec. 49. Qualities of expectant estates.—"An expectant estate is descendible, devisable, and alienable, in the same manner as an estate in possession."

1 R. S. 725, sec. 35, Banks's 9th ed., 1793, repealed by Real Prop. L., substantially the same.

For cases relating to this section, see pp. 341–343.

EXPLANATORY NOTE TO SEC. 49.—At common law a vested remainder passed by deed without livery of seizin, but a contingent remainder

15. QUALITIES OF EXPECTANT ESTATES.

was a mere right, could not be transferred before the contingency vesting the estate happened, except by way of estoppel. Kent's Com. vol. 4, *260.

"All contingent and executory interests are assignable in equity, and will be enforced, if made for a valuable consideration; and it is settled, that all contingent estates of inheritance, as well as springing and executory uses and possibilities, coupled with an interest, where the person to take is certain, are transmissible by descent, and are devisable and assignable. If the person be not ascertained, they are not then possibilities coupled with an interest, and they can not be either devised or descended, at the common law. Contingent and executory, as well as vested interests, pass to the real and personal representatives, according to the nature of the interest, and entitle the representatives to them when the contingency happens." Kent's Com. vol. 4, *261–2.

16. VESTED AND CONTINGENT ESTATES.

Real Prop. L., sec. 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."

1 R. S. 723, sec. 13, Banks's 9th ed., 1790, repealed by Real Prop. L. "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."

For cases relating to Vested Estates, see p. 258; for cases relating to Contingent Estates, see p. 309 *et seq.*

Real Prop. L., sec. 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." pp. 307, 340, 892, 901.

EXPLANATORY NOTE TO SEC. 30.

Vested remainders.

"An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment. It gives a legal or equitable seizin. The definition of a vested remainder in the New York Revised Statutes, appears to be accurately and fully expressed. It is 'when there is a person in being, who would have an immediate right to the possession of the lands, upon the ceas-

ing of the intermediate or precedent estate.' A grant of an estate to A. for life, with the remainder in fee to B., or to A. for life, and after his death to B. in fee, is a grant of a fixed right of immediate enjoyment in A., and a fixed right of future enjoyment in B. So, if the grant was only to A. for life, or years, the right under it would be vested in A. for the term, with the vested reversion in the grantor. Reversions, and all such future uses and executory devises as do not depend upon any uncertain event or period, are vested interests. A vested remainder is a fixed interest, to take effect in possession after a particular estate is spent. If it be uncertain whether a use or estate limited *in futuro* shall ever vest, that use or estate is said to be in contingency. But though it may be uncertain whether a remainder will ever take effect *in possession*, it will nevertheless be a vested remainder if the interest be fixed. The law favors vested estates, and no remainder will be construed to be contingent, which may, consistently with the intention, be deemed vested. A grant to A. for life, remainder to B., and the heirs of his body, is a vested remainder; and yet it is uncertain whether B. may not die without heirs of his body, before the death of A., and so the remainder never take effect in possession. Every remainderman may die, and without issue, before the death of the tenant for life. It is the present *capacity* of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder. When the event on which the preceding estate is limited must happen, and when it *may* also happen before the expiration of the estate limited in remainder, that remainder is vested; as in the case of a lease to A. for life, remainder to B. during the life of A., the preceding estate determines on an event which must happen; and it may determine by forfeiture or surrender before the expiration of A.'s life, and the remainder is, therefore, vested. A remainder limited upon an estate tail, is held to be vested, though it must be uncertain whether it will ever take place." Kent's Com. vol. 4, *202-204.

Contingent remainders.

"A contingent remainder is limited so as to depend on an event or condition which is dubious and uncertain, and may never happen or be performed, or not until after the determination of the particular estate. It is not the uncertainty of enjoyment in future, but the uncertainty to the right to that enjoyment, which marks the difference between a vested and contingent interest." Kent's Com. vol. 4, *206.

16. VESTED AND CONTINGENT ESTATES.

Sir William Blackstone states that contingent remainders are of two kinds, viz.: remainders limited to take effect either to a dubious or uncertain *person*, or upon a dubious and uncertain event. Lord Ch. J. Willes, in Parkhurst v. Smith (Willes, 327), held that contingent remainders were of two kinds: (1) where the person to whom the remainder was limited was not *in esse;* (2) where the commencement of the remainder depended on some matter collateral to the determination of the particular estate, as in the case of a limitation to A. for life, remainder to B., after the death of C., or when D. returns from Rome. Note (a) Kent's Com. vol. 4, *208.

Vested and contingent estates distinguished.

Although the statute in New York is said to express the definition of a vested and contingent remainder at common law,* certain decisions of this state have not so construed it.

A vested estate differs from an estate in possession only in this, that the latter estate entitles the owner of it to a present enjoyment of the property, while the former estate entitles him to a future enjoyment of it, if his estate continues until the expiration of the precedent estate. The title is as fixed and invariable in one case as in the other.

An estate vested *in possession* may terminate, if it be a life estate, by the death of the life tenant; if it be a base or determinable fee, by some event that divests the owner of his enjoyment. If the estate be vested *in interest, but not in possession*, the same events might happen and terminate the estate before the precedent estate expired, but the possibility of these events happening would have no more effect on the owner's title in one case than another. The happening of the event simply prevents any enjoyment on the one hand, and cuts short an actual enjoyment on the other.

An estate can only be vested when it is limited on a precedent estate determinable on an event *sure* to happen, and on an event that *may* happen before the expiration of the estate in remainder.†

In the case of a vested estate, there is no doubt but that an estate in remainder is in existence ready to be enjoyed, if the precedent estate were out of the way; nor is there any doubt but that the person who would have a right to take possession of the property and enjoy it is in existence.

But with contingent remainders it is different. A future estate is given, but it is uncertain *who will take it;* or a future estate is given

*Kent's Com. vol. 4, *202, quoted, *supra*, p. 252. But see Coster v. Lorillard, 14 Wend. 302.

†Kent's Com. vol. 4, *202–204, *supra*, p. 253.

to *take effect on an event that may never happen.* Here is an uncertainty as to the existence of the person entitled to take, or as to the happening of the event; or there may be an uncertainty both as to the person and event. If such a gift be properly limited upon a precedent estate, it is a contingent remainder.

A life estate is given to A., and, in case B. sooner returns from Rome, a remainder is given to only such of A.'s children as shall be living at his death. Here it is doubtful what, if any, children A. will leave surviving him, and even if there will be any estate to be enjoyed. The remainder is contingent under both aspects of the rule. Assume, however, that after the life estate the remainder be given to C., in case B., before A.'s death, return from Rome. The remainder is still contingent, as B. may not return from Rome before A.'s death, although C., who is to take the estate, is ascertained.

Assume, now, that an estate be given to A. for life, and remainder after his death to A.'s heirs, and that A. has living children. Here is a remainder to take, vested as to the event, and it is vested as to the person, if the living children may be deemed the persons entitled to take. If this remainder were to designated living persons, it would be vested. Does the fact that it is given to A.'s heirs, who can not be known until A.'s death, make the remainder contingent?

In Moore v. Littel, 41 N. Y. 66, such a case was presented*.

The court held, that during the life of A. a remainder vested in such living persons as answered to the description of his heirs. The court admitted that the remainder would be contingent at common law "because, during A.'s life, no person could answer the description of heirs of A., nor could it be averred by any person that he would be the heir of A. at the time when the life estate determined." The opinion arrives at the result that the remainder was vested, by the following rule, which, it declared, was justified by the words of the statute:† "If you can point to a human being and say as to him, that man or that woman by virtue of a grant of a remainder would have an immediate right to the possession of certain lands, if the precedent estate of another therein should now cease, then the statute says, he or she has a vested remainder." Aside from the fact that three members of the

* Lawrence v. Bayard, 7 Paige, 70; Sheridan v. House, 4 Abb. Ct. App. Dec. 218; House v. Jackson, 50 N. Y. 161, 165; Jackson v. Sheridan, id. 660, are of similar import. See discussion of these and other cases and of this subject in Chaplin's Suspension, secs. 32 to 52, and cases cited by him p. 24, note 2.

†As seen above, Chancellor Kent says that the Revised Statutes embody the common law definition.

court dissenting, held that the remainder was contingent, the case has been much critcized.

In Hennessy v. Patterson, 85 N. Y. 91,* where F. was entitled to a remainder in case the testator's daughter died without leaving issue, if the rule laid down in Moore v. Littel were literally applied, F. would take a vested remainder; and yet the court held that F.'s estate was contingent. The cases however differ in this, that while in Moore v. Littel the persons were uncertain, according to the common law doctrine, who should take the remainder; in Hennessy v. Patterson, the person was ascertained, but the remainder was limited on an event that might never happen, viz.: the death of the daughter *without issue.* Nevertheless, the rule stated in Moore v. Littel would apply, if intended as a general test for determining whether a remainder was vested or contingent. But the court, in Hennessy v. Patterson, have at least decided that such rule is not of general application, for it refused to apply it in that case, and it seems clear that it was entirely inapplicable.

It would seem that in determining whether a remainder is vested or contingent, it would be necessary to test the case by the definitions of both a vested and contingent estate. A remainder can not be vested under the definition of a vested estate and contingent under the definition of a contingent estate. Hence it would appear that both definitions should be read and applied together and both be satisfied.†

It should be observed, however, that the court of appeals refers to the case of Moore v. Littel, *supra*, as authority for the proposition that, where a remainder vested as to the event on which it is to take effect, is given to the "heirs" of a living person, those of the class in existence or coming into existence, have a vested remainder, even in the life of the ancestor, although they may die before the termination of the precedent estate and thereby be divested of their interest, or others may be born into the class and thereby diminish the shares of the earlier takers. The persons in existence are regarded as presumptively the "heirs." Campbell v. Stokes, 142 N. Y. 23, 30; Montignani v. Blade, 145 id. 111, 122; Beardsley v. Hotchkiss, 96 id. 213. The court in this class of cases, probably considered that the word "heirs" should be construed to mean "children" or "issue." Smith v. Scholtz, 68

*See discussion of this in Chaplin's Suspension of the Power of Alienation, sec. 49, *et. seq.*

†The decisions are seldom more definite in describing remainders than to give the statute definitions. Beardsley v. Hotchkiss, 96 N. Y. 213; Coster v. Lorillard, 14 Wend. 302; Dana v. Murray, 122 N. Y. 616; Griffin v. Shepard, 124 N. Y. 75, 76.

N. Y. 41; Hard v. Ashley, 117 id. 606; Heath v. Hewitt, 127 id. 166; Heard v. Horton, 1 Denio, 165; Montignani v. Blade, 145 N. Y. 111, 122.* See cases of this class collected pp. 282, 283.

This seems the more probable as it continues to be held that the rule construing the word "heirs" used in a will in respect to a living person as merely *designatio personarum*, is inapplicable to the devise of a future estate, and that in such case the word has its strict legal meaning, *unless a different intention appears clearly from the context.* Campbell v. Rawdon, 18 N. Y. 412; Cushman v. Horton, 59 id. 149; Thurber v. Chambers, 66 id. 42; see dissenting opinion in Moore v. Littel, 41 id. 87; Heath v. Hewitt, 127 id. 166, 171.

Some of the decisions of this class involved present grants to the heirs of living persons, and it was held that the word "heirs" would have its strict legal meaning unless a contrary intention was manifested. Heath v. Hewitt, 127 N. Y. 166, 171. A survey of the decisions, however, indicate that if the terms of the instrument fairly show an intention in giving a remainder to "heirs," to use the word in the sense of children, the courts are quite ready so to construe it. As will be later seen, remainders given to the "children" or "heirs" (construed as "children") of a living person vest in those living at the death of the testator, and those born during the continuance of the precedent estate, subject to the extinction of his estate thus vested, by the death of any of the members of the class during the continuance of the precedent estates and subject to a *pro tanto* determination of the interest taken by each member of the class by the birth of persons into the class. Campbell v. Stokes, 142 N. Y. 23; Smith v. Scholtz, 68 id. 1;

* "It is true that the testator in providing for the ultimate vesting gave the stock to the 'heirs' of his son John, and since John is living and strictly can have no heirs until his death, it is argued that the vesting is postponed for the further life of John. But where the bequest is of personal property the word heirs is taken to mean those in the line of distribution, or the next of kin; and where the will shows on its face that the person whose heirs are referred to is, to the knowledge of the testator, at that time living, it is obvious that it is not used in its strict technical sense, but means in the case of land, heirs apparent, or those who would be the heirs were the living ancestor deceased, Heard v. Horton, 1 Den. 168, and, in the case of personal property, next of kin, who would be such were the ancestor deceased. Cushman v. Horton, 59 N. Y. 151. In this will the son John is twice spoken of as living, and once in a connection which implies his active interference, and, since the intent to vest the remainder absolutely is manifest, we must take the word 'heirs,' as used by this unskilled testator drawing his own will, to mean those who, if John were dead, would be his heirs or next of kin. There is thus no difficulty in holding that the absolute ownership was not postponed beyond the required two lives." From opinion, p. 122.

16. VESTED AND CONTINGENT ESTATES.

Dubois v. Ray, 35 id. 162. Of course, the testator's intention may change this. See rules stated and decisions collected at pp. 282–83.

The decisions falling under "Vested Estates," or "Contingent Estates" are given in their chronological order, but classified under the indices at pages 258, 308, 282–83.

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17. VESTED ESTATES—CASES.

1. THE LAW FAVORS THE VESTING OF ESTATES.

The law favors the vesting of estates as soon as possible after the testator's death, and a will, in doubtful cases, is construed accordingly; but the question is one of intent.

Stokes v. *Weston*, 142 N. Y. 433; Scott v. Guernsey, 48 id. 106; Low v. Harmony, 72 id. 408; Smith v. Edwards, 88 id. 92, 109; Byrnes v. Stillwell, 103 id. 453; Bowditch v. Ayrault, 138 id. 222; Moore v. Lyons, 25 Wend. 119, 145.

See Delafield v. Shipman, 18 Abb. N. C. 297; Pike v. Stephenson, 99 Mass. 188. Knowlton v. Sanderson, 141 id. 323; Harris v. Carpenter, 109 Ind. 540; Neilson v. Bishop, 45 N. J. Eq. 473.

2. DISTINCTION BETWEEN ESTATES VESTED IN POSSESSION AND IN INTEREST, AND BETWEEN VESTED AND CONTINGENT ESTATES. See, *ante*, p. 254.

1. An estate is *vested* when there is an immediate fixed right of present or future enjoyment.

2. An estate is vested in *possession*, when there exists a right of present enjoyment.

3. An estate is vested in *interest* when there is a present fixed right of future enjoyment.

4. An estate is *contingent* when a right of enjoyment is to accrue on an event which is dubious and uncertain. Greenl. Cruise on Real Prop. 227n†. See, *ante*, p. 253.

A person may have a fixed and absolute right to a future estate and yet such estate may be contingent. Distinction is stated between the vesting of a right to a future estate and the vesting of a freehold estate in interest, and the vesting of the same in possession. Hennessy v. Patterson, 85 N. Y. 91; Hawley v. James, 5 Paige, 466–7.

3. INFERENCE AS TO VESTING ARISING FROM THE DISPOSITION OF THE INCOME.

The fact that the whole income, or an equivalent sum, from the death of the testator, to the time of payment of the principal, is bequeathed to the remainderman, has great weight as denoting intention to vest the remainder from the time at which the income begins to accrue.[1]

Vanderpoel v. Loew, 112 N. Y. 167, 181; Warner v. Durant, 76 id. 133; Smith v. Edwards, 88 id. 103; Robert v. Corning, 89 id. 225, 240, 241; Bushnell v. Carpenter, 92 id. 270; Van Brunt v. Van Brunt, 111 id. 178; Patterson v. Ellis, 11 Wend. 259, 268, 271.

See Farnam v. Farnam, 53 Conn. 261.

(a) If no part of the income is directed to be paid to the remainderman, it has been stated that the remainder would not vest.[2] But a

[1] When gift is postponed, but, meanwhile, interest is given to legatee, generally, legacy vests at testator's death. When gift of interest is distinct, and direction is to pay or transfer principal sum at specified age, upon the condition named, legacy is contingent. Pleasonton's Appeal, 99 Pa. St. 362.

[2] Warner v. Durant, 76 N. Y. 138.

17. VESTED ESTATES—CASES.

3. INFERENCE AS TO VESTING ARISING FROM THE DISPOSITION OF THE INCOME.

direction to pay the income to the remainderman is but an aid to interpretation. The absence of such direction merely leaves the question of vesting to be determined by other considerations.[1]

Yet, where a portion of the income is to be paid to the remainderman, but some portion is also diverted to the general purposes of the estate, this condition, it has been considered, does not import an intention to vest the remainder, but leaves the question to be determined by the other provisions of the will.

Smith v. Edwards, 88 N. Y. 92, 106.

See Kelly v. Dike, 8 R. I, 436, 451; Cooper v. Payne, 92 Pa. St. 254.

(b) An authorization to the executors to advance the principal or some part thereof before the time fixed for the payment may be sufficient to require the construction that the estate vested on the death of the testator.

Everitt v. Everitt, 29 N. Y. 39, 49; Tucker v. Bishop, 16 id. 405; Patterson v. Ellis, 11 Wend. 259, 268, 271; Torrey v. Shaw, 3 Edw. Ch. 376.

See Holden v. Blarney, 119 Mass. 421.

(c) The failure to make disposition of the income intermediate, the death of the first taker and the actual division of the principal tends to show an intention to vest the estate in enjoyment at the death of the first taker, and not at the time of division.

Lovett v. Gillender, 35 N. Y. 617, 621; Du Bois v. Ray, id. 162, 170; Manice v. Manice, 43 id. 303, 365–6.

4. WHEN ESTATE VESTS WITH THE TIME OF PAYMENT OR POSSESSION POSTPONED.

Where the terms of the bequest import a present gift and also a direction to pay or give possession at a subsequent time, or upon sale and division of the proceeds, a legacy or devise vests at the death of the testator in absence of contrary intention.

Sweet v. Chase, 2 N. Y. 73; Traver v. Schell, 20 id. 89; Tucker v. Bishop, 16 id. 402, 404; Gilman v. Reddington, 24 id. 9; Everitt v. Everitt, 29 id. 39; Oxley v. Lane, 35 id. 340; Lovett v. Gillender, 35 id. 617; Manice v. Manice, 43 id. 305; Stevenson v. Lesley, 70 id. 512; Loder v. Hatfield, 71 id. 92; Warner v. Durant, 76 id. 133; Smith v. Edwards, 88 id. 92, 103; Bliven v. Seymour, id. 469, 478; Bushnell v. Carpenter, 92 id. 270; Matter of Mahan, 98 id. 372; Robert v. Corning, 89 id. 225; Van Brunt v. Van Brunt, 111 id. 178, 187; Goebel v. Wolf, 113 id. 405; Miller v. Gilbert, 144 id. 68; Matter of Murphy, id. 557; Patterson v. Ellis, 11 Wend. 260; Hone's Exrs. v. Van Schaick, 20 id. 563; Moore v. Lyons, 25 id. 144; Birdsall v. Hewlett, 1 Paige, 32; Hoxie v. Hoxie, 7 id. 187; Hoes v. Van Hoesen, 1 Barb. Ch. 379; Marsh v. Wheeler, 2 Edw. Ch. 155.

[1] Matter of Mahan, 98 N. Y. 372; De Costa v. Bass, 48 Hun, 31.

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4. WHEN ESTATE VESTS WITH THE TIME OF PAYMENT OR POSSESSION POSTPONED.

(a) The above rule may apply, although the estate, until the time of payment, be given to trustees.

Tucker v. Bishop, 16 N. Y. 402; Warner v. Durant, 76 id. 133; Wood v. Cone, 7 Paige, 471; see Van Axte v. Fisher, 117 N. Y. 401; Embury v. Sheldon, 68 id. 227, 233; Goebel v. Wolf, 113 id. 413; Genet v. Hunt, id. 169; Moore v. Appleby, 36 Hun, 368, aff'd 108 N. Y. 237; U. S. Trust Co. v. Roche, 116 id. 120; Townshend v. Frommer, 125 id. 446. See Manice v. Manice, 43 N. Y. 305, 367, 368; Torrey v. Shaw, 3 Edw. Ch. 376; Hetzel v. Barber, 69 N. Y. 1; Hoeffner v. Sevestre, 30 N. Y. S. R. 296; Linton v. Laycock, 33 Ohio St. 128; McElwee v. Wheeler, 10 S. C. 392; Matter of Brooks, 30 N. Y. S. R. 941; Vorrill v. Weymouth, 68 Me. 318; Teele v. Hathaway, 129 Mass. 164.

(b) But when there is no gift but direction to executors to pay or divide at a future time, the remainder does not vest until the time named.

See Delafield v. Shipman, 103 N. Y. 463. See Contingent Remainders, p. 330.

But, nevertheless, the remainder vests when the will so intends. See cases, *supra*. Borden v. Jenks, 140 Mass. 562, 565.

Devise to B., wife, of real estate during her life and bequest of legacy to her to be realized by a sale of the same real estate after B.'s death, are not repugnant provisions. The legacy vested in B., at the testator's death, but the payment was postponed to the time of sale after her death, as she already had the income of it.

Where a legacy charged upon real estate is given to the legatee to be paid to B. at the age of twenty-one years, it fails unless B. live to the time of payment, as the payment is deferred with reference to the legatee; but when it is deferred with reference to the convenience of estate it does not fail. *Sweet* v. *Chase*, 2 N. Y. 73.

Tucker v. Bishop, 16 N. Y. 402, 404.

Devise and bequest by will, taking effect before R. S., to sons, subject to the payment of pecuniary legacies to daughters, to be "paid by the sons to them, or, in case of the death of any of them, to the children of the deceased within ten years" after testator's death, without interest. Daughter surviving testator died before the ten years.

Construction:

(1) The "death" mentioned, in absence of other intention, referred to death before the testator. Gibson v. Walker, 20 N. Y. 476. But see Tyson v. Blake, 22 id. 558.

(2) The daughter that died had, at her death, a vested estate in the amount of the legacy, with time of payment postponed.

(3) When the terms of the bequest import a gift, and also a direction

to pay at a subsequent time, a legacy of personalty will not lapse on the death of the legatee before that time. *Traver* v. *Schell*, 20 N. Y. 89.

The time of enjoyment of estate was deferred to the death of the two younger children, or at the expiration of thirty years. *Gilman* v. *Reddington*, 24 N. Y. 9, digested p. 297.

When futurity is annexed to the time of payment and not to the substance of the gift. *Everitt* v. *Everitt*, 29 N. Y. 39, digested p. 419.

When the primary disposition of the estate is lawful, ulterior unlawful limitations may not affect such primary disposition.

Bequest to B. and C., daughters, of money, the use of same to begin one year after testator's death, and be paid the legatees yearly, and principal payable twenty-five years after testator's death.

Bequest to D. and C., minor daughters, of money, payment of principal as above, and use to begin when they respectively become twenty-five years of age.

Bequest to E. and F., grandchildren, principal payable as above, use to begin when E. should be of age, and if either should die without issue, before the payment of principal, as directed, the survivor should have the share of deceased.

Construction:

(1) Legacies vested at testator's death, although payment was postponed.

(2) All legacies vested absolutely, save those to E. and F., which were subject to be divested upon the contingency that legatee should die without issue during period of twenty-five years after the death of the testator. *Oxley* v. *Lane*, 35 N. Y. 340.

Devise to four sons of remainder of real and personal property to be divided equally between them, share and share alike, but the whole to be kept to accumulate until the youngest survivor of them should become of age, then the use to be paid to them and principal at the expiration of twenty-five years from testator's death; the real estate to be entered on and used by them equally after the youngest son or survivor should become of age, but not to be divided, sold, aliened or conveyed until expiration of the said twenty-five years. If any of the legatees or devisees should die without issue before final distribution, at end of twenty-five years, the share of the one dying should be shared equally among children, but subject to restrictions as originally applied.

At time of testator's death the sons were adults.

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Construction:

(1) Direction for accumulation was inoperative.

(2) Devise of real estate was in fee, as restriction as to sale, etc., were not in the operative terms of the devise.

(3) The restriction on the power of alienation was for more than two lives and was void.

(4) As to the personal property, the restriction related to the time of payment and was valid.

(5) The limitation of the share of real estate of one dying to children was good and did not suspend the power of alienation, as it would operate when the first taker died. See *post*, p. 280.

(6) Such share so passing under the executory gift would be subject to no further limitation; even if share so going over were subject to further limitation, such *further* limitation only would be void. *Oxley* v. *Lane*, 35 N. Y. 340.

See Lovett v. Gillender, 35 N. Y. 617.

NOTE.—A perpetual and total restriction upon the power of alienation of an estate in fee is void, and its failure does not affect the devise. (Citing, Litt. sec. 360; Co. Litt. 223 a; 4 Kent, 131; 2 Cai. 345; 4 Sim. 141; 1 Denio, 448; 2 Seld. 467, 462.)

But partial or limited restriction on the power of alienation has been upheld, but this doctrine has been criticised.

See cases *supra*, and Roosevelt v. Thurman, 7 Johns. Ch. 220.

A testator gave to his two daughters, M. and A., twelve thousand dollars each, as an annuity during their natural lives. He gave to his granddaughter, H., one-fourth part of all his real and personal estate; and to his remaining granddaughters, nine in number, the remaining three-fourths. He directed that, in case of the death of either of his daughters, M. or A., her annuity should be paid to her child or children until a division of the estate between them should be made; but that no division should be made until after the death of his said daughters. *Held:* That the daughters took no estate in the testator's property beyond the annuities given, except so far as the will contained a special devise and bequest to his daughter A., etc.

That the restrictions upon the division of the property among the grandchildren, being repugnant to the absolute and unqualified gift of the estate to them, was inoperative and void, so that the estate vested in the devisees and legatees, at the death of the testator, subject to the payment of the annuities, etc.

That the annuities given to each of the daughters would cease at the time of their respective deaths.

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That the shares taken by the grandchildren were vested estates, taking effect immediately on the death of the testator.

That all restrictions, postponements, or prohibitions upon the right to sell, or divide the estate, were inoperative and void. *Lovett* v. *Gillender*, 35 N. Y. 617, aff'g 44 Hun, 560.

Where, by a will, shares of interest in real or personal estate, to be ascertained by a division, are given, or where the real estate is directed to be sold and the proceeds divided, the estate or interest of the devisee or legatee in the property to be divided or converted, is a vested interest before the conversion or division, and limitations over to take effect in case of the death of those first designated prior to the division or sale, must be held to refer to the time appointed for the division or sale and not to the period of their completion, unless the language of the will clearly and unequivocally expresses an intention that the vesting shall be postponed until such completion. If the intention is unequivocally expressed, effect must be given to it:[1] but such intention will not be imputed to the testator if it can be avoided.[2] *Manice* v. *Manice*, 43 N. Y. 305, 368.

After a direct and absolute gift of a legacy a subsequent and independent direction for payment on the happening of an event named does not defer the vesting of the legacy, but only the payment thereof, and the representatives of a legatee, dying before the happening of the event, are entitled to the legacy. In re Bartholomew, 1 McN. & Gordon, 345; Leiter v. Bradley, 1 Haire, 1213; Andrew v. N. Y. Bible, etc., Soc., 4 Sandf. 156, 173; Patterson v. Ellis, 11 Wend. 259.

Where a direction for the payment of a legacy at a future day is for the convenience of the estate, or to let in some other interest, the vesting thereof is not prevented. Packham v. Gregory, 4 Haire, 398. *Loder* v. *Hatfield*, 71 N. Y. 92, aff'g 4 Hun, 36.

After various devises and bequests, testator gave to his executors a certain amount of money, then invested, in trust, to hold and keep invested, and among other things to pay annually to B. seven per cent. interest on $15,000, and at the end of five years after testator's decease, to pay principal to B. B. died before the expiration of five years.

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[1] Elwin v. Elwin, 8 Ves. 547.

[2] (Roper on Legacies 561, 8th ed; Pearson v. Lane, 17 Vesey, 101; Collin v. Collin, 1 Barb. Ch. 630; Clason v. Clason, 6 Paige, 541; s. c, 18 Wend. 369; Hayden v. Rose, L. R., 10 Eq. Cases. 224.)

See Stevenson v. Lesley, 70 N. Y. 512.

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Construction:

Legacy vested in B. upon testator's death, and passed to his representatives.

This was not affected by the fact that the principal might not yield interest at the rate named, as all the interest that was derived therefrom was to be paid, and both the legacy and interest thereon were connected as gifts to the legatee. *Warner* v. *Durant*, 76 N. Y. 133, aff'g 15 Hun, 450.

NOTE.—A legacy may vest in a legatee in his lifetime, though he die before the time fixed for payment.

See matter of Seaman, 147 N. Y. 69, 74.

"By the ninth clause of his will the testator gave to each and every grandchild born within twenty years after his death and before the final settlement of his estate the sum of one thousand dollars, to be paid to each on reaching full age, or if granddaughters upon their earlier marriage. The bequest was accompanied by a request that his children consent to and acquiesce in the provision. The general term held these legacies to be present gifts of separate and distinct portions of the testator's property, and that all must necessarily take effect completely within the period of one life in being at the death of the testator. We concur in the conclusion. The legacy vested in each grandchild immediately upon its birth, payment only being postponed until majority or marriage. The child of a daughter must necessarily take during the life of its mother, and that of a son, if born after his decease, is still regarded as living at the death of its father for the purpose of the vesting of the legacy." *Smith* v. *Edwards*, 88 N. Y. 92, 109, 110.

Gift *in præsenti* with time of payment postponed. *Bliven* v. *Seymour*, 88 N. Y. 469, 478, digested p. 543.

C., by will gave to two grandchildren "the sum of $1,000 each, to be paid to them respectively as they arrive at the age of twenty-five years." To five children he gave $1,000 each payable one legacy each year for five years after his decease. After certain devises and bequests, he gave his residuary estate to the defendant, his son, subject to the payment of his debts and legacies.

One of the grandchildren died before reaching the age of twenty-five. Her administrator, after the time, when, if living, she would have been twenty-five, brought the suit for legacy.

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Construction:

The legacy was vested at the grandchild's death; the time of payment simply was postponed.

Bushnell v. *Carpenter*, 92 N. Y. 270, aff'g 28 Hun, 19.

Citing, Manice v. Manice, 43 N. Y. 303; Livingston v. Greene, 52 id. 118; Smith v. Edwards, 88 id. 92; Loder v. Hatfield, 71 id. 98; Patterson v. Ellis, 11 Wend. 260; Everitt v. Everitt, 29 N. Y. 39; Warner v. Durant, 76 id. 133.

The will of E. devised two lots of land to her executor, with power to sell in his discretion, in trust, to collect the income or the proceeds in case of sale, and to pay therefrom to her mother annually a sum specified during life, and sums necessary for the support and education of her son T. during his minority, the balance to be divided equally among her three other children. Upon the death of the mother of the testatrix and upon the arrival of J. of age, the will gave one of the lots, or the avails in case of sale, to J., "his heirs, executors, administrators, or assigns." The residue of her property she gave to her three other children, "the survivor or survivors of them." Shortly after J. became of age, the mother of the testatrix died. At that time but one of the three children named in the residuary clause was living.

Construction:

The words of survivorship referred to the death of the testatrix, and the limitation of the residuary estate took effect as a valid remainder at that time, and therefore, the representatives of the two deceased children were entitled to their respective shares of the residuary estate.

Matter of Accounts of Mahan, 98 N. Y. 372, aff'g 32 Hun, 73.

From opinion.—"We think the provisions of the will bring the case within the principle, well settled in this state, that if there be a direct gift to legatees, a direction for payment at the happening of a certain event shall not prevent its vesting, and, therefore, the personal representative of a legatee dying before the event happened shall be entitled to receive it at the time the legacy was directed to be paid to him had he lived. Moore v. Lyons, 25 Wend. 144; Everitt v. Everitt, 29 N. Y. 39; Stevenson v. Lesley, 70 id. 512; Warner v. Durant, 76 id. 133; Robert v. Corning, 89 id. 225."

See Van Brunt v. Van Brunt, 111 N. Y. 178, 187.

Gift with time of payment postponed. Goebel v. Wolf, 113 N. Y. 405, digested p. 272.

Gift with time of payment postponed. Miller v. Gilbert, 144 N. Y. 68, digested p. 304.

Time of payment postponed—when bequest was given not payable

until beneficiary was thirty years old, it vested on death of testator; on death of beneficiary under that age it passed under her will.

Matter of Murphy, 144 N. Y. 557.

Where the gift of a legacy is absolute, and the time of payment only postponed, as where the sum of $1,000 is given to A. to be paid when he shall attain the age of twenty-one, the *time* not being of the substance of the gift, postpones the payment, but not the vesting of the legacy; and if the legatee die before the time specified, his representatives are entitled to the money. But where the legacy is given *when* the legatee shall attain, or *provided* he does attain the age of twenty-one, *time* is of the substance of the gift, and the legacy does not vest until the contingency happens.

But even where the legacy is given *when* the legatee attains the age of twenty-one, if the devisor directs the *interest* of the legacy to be applied in the meantime for the benefit of the legatee) there being an absolute gift of the *interest*, the *principal* will be deemed to have *vested*.

So the legacy will be deemed *vested*, if it be left to the discretion of a trustee to pay the legacy *sooner* than the time specified in the will, and it seems that the mere appointment of a *trustee* for the legatee during the minority will have the same effect *Patterson* v. *Ellis*, 11 Wend. 260.

See Van Brunt v. Van Brunt, 111 N. Y. 178, digested p. 452.

Where the testator gave to each of his grandchildren who should be living at the time of his death the sum of $6,000 to be paid upon their attaining the age of twenty-one or marrying, such payment however to be subject to the approbation of the parents of the grandchildren and the time of payment to be fixed by them, the legacies were vested and not contingent, and the power given to the parents did not prevent the vesting of the legacies. *Hone's Executors* v. *Van Schaick*, 20 Wend. 563.

See Moore v. Lyons, 25 Wend. 144, digested p. 296.

It is a general rule, that legacies chargeable upon the real estate and payable at a future day, are not vested, and lapse by the death of the legatees before the time of payment arrives.

But this rule has never been extended to a case where the estate was given to a stranger, upon condition that he pay the legacy charged thereon, and the rule has been much limited, even as between the legatees and heirs at law.

Where the time of payment of the legacy is postponed for the benefit of the estate, and not with reference to any particular circumstances in relation to the legatee, the legacy becomes vested at the death of the testator, and is transmissible to the personal representatives of the legatee, although he dies before the time of payment arrives. *Birdsall* v. *Hewlett*, 1 Paige, 32.

Where a testator devised his residuary estate, to be equally divided among the children of his two brothers and his sister, when they should severally become of age; *Held*, that the children of the brothers and sister *in esse* at the death of the testator, took immediate vested estates in possession, as tenants in common, and that the vesting of the estate of each did not depend upon the contingency of his or her arriving at the age of twenty-one.

Where it is clear that the testator intended a person *in esse* and capable of taking the legal estate at the time of making the will should have the whole beneficial interest in the estate, during his minority as well as afterwards, if there is nothing in the will indicating an intention to give the legal estate to another in trust for him during

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such minority, the court will construe it as a devise of the legal estate, to be vested in possession in him immediately, and to be taken care of for him by his legal guardian until he is of age. *Hoxie* v. *Hoxie*, 7 Paige, 187.

Where the testator made his will and died previous to the adoption of the revised statutes, leaving a widow, and a married daughter who was his only child and heir at law; and by his will directed that his executors should sell all his real and personal estate and put out the proceeds thereof at interest upon landed security, and should pay such interest to his widow for life, for her support, and a part of the principal of the fund also if it should be necessary for that purpose; and that immediately after her decease all the moneys then remaining should continue at interest, and that the interest thereof should be appropriated to the support of his daughter, in case she be left a widow, and from that time for and during her natural life or until she should again marry; and that if the interest should not be sufficient for her support, she should then have so much of the principal of the fund annually as the executors should deem sufficient; and that immediately after the death or remarriage of his daughter, all the moneys then due and remaining should be paid to her children, or the legal heirs of her body, as they should respectively become of age. *Held*, that by the true construction of the will the executors were to accumulate the interest of the fund, after the death of the widow, during the joint lives of the daughter and her husband for her support in case she should become a widow; and that in the event of her dying during the lifetime of her husband, which event actually occurred, the executors were to pay such accumulated interest, as well as the principal of the fund, to her children as they respectively became of age. *Held*, also, that the children of the testator's daughter, who were *in esse* at the time of her death, took vested interests in their several shares of the accumulated fund, although the payment of their several shares was postponed until they became of age; and that there was an implied trust for the executors to accumulate the interest of the several shares for the benefit of the children during their respective minorities. *Wood* v. *Cone*, 7 Paige, 471.

An interest in the personal estate of the testator, given by his will to a legatee who is *in esse*, although it is not to vest in possession until after the death of another person, vests in interest in the legatee immediately upon the death of the testator, and is capable of being released by such legatee at any time. *Hoes* v. *Van Hoesen*, 1 Barb. Ch. 379.

Where a legacy is given to a person to be paid at a particular age or at the end of a fixed time, he takes a vested interest. *Burrill* v. *Sheil*, 2 Barb. 457.

When distinct legacies are given to individuals, or an aggregate fund is directed to be divided among them in equal shares without the benefit of survivorship, their interests are several; and if any of them die before the shares are vested, what was intended for them will fall into the residue.

There are cases of a legacy lapsing where the party interested dies after the testator, provided it happen before the legacy is payable. But in order to have this effect, it must clearly appear that the time of payment is made the substance of the gift, and that the testator meant the time of payment to be the period when the legacy should vest; and if, in such case, the legatee happens to die before the time arrives, although after the testator's decease, the legacy necessarily fails. On the other hand, if the gift is immediate, and the payment only is postponed to a future period (let it be of definite or uncertain duration, and distinct from the gift), the legacy is vested, and the death of the legatee after the testator will not defeat it.

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If lands are devised or descend to the heir, charged with the payment of a pecuniary legacy to some third person, payable at a future day or upon some subsequent event, and the legatee happened to die before the time appointed for payment, the law favors the heir and considers the legacy lapsed.

The true rule with respect to the vesting of legacies payable out of real estate is this: Where the gift is immediate, but the payment postponed, it is contingent, and will fail if the legatee dies before the time of payment arrives; but where the payment is postponed, in regard to the convenience of the person and the circumstances of the estate charged with the legacy, and not on account of the age, condition or circumstances of the legatee, it will be vested and must be paid, although the legatee should die before the time of payment. *Marsh* v. *Wheeler*, 2 Edw. Ch. 155.

Will containing many legacies contained provision that none of them "shall be executed or take effect until" a certain hall nearly finished at the time of the will "shall be completed and entirely paid for out of my estate" does not suspend the vesting but the payment of legacies. Jones v. Habersham, 107 U. S. 174.

"I give to B., in trust for my son C., $1,000, the interest to be used for his benefit until of lawful age, then the principal to he his or his heirs," etc. C. died after testator and before majority. Legacy vested in C. at testator's death. Newberry v. Hinman, 49 Conn. 130.

If reason of postponement is position of fund, bequest vests at once; if it is position of legatee, remainder is contingent. Scofield v. Olcott, 120 Ill. 362.

When entire fund is given in fractional parts at successive periods that must arise, all the interest vests together. Little's Appeal, 117 Pa. 14.

Legacy directed to be paid son *when* he could satisfy executor that he was worth $8,000, and if executor thought children unfit to have principal of the legacies, the shares should be invested and the income paid them for life, vests at testator's death and contingency only relates to time of payment. Schwartz's Appeal, 119 Pa. 337.

Bequest in trust for daughter and that trustees in that discretion pay over to her when she shall arrive at age or marry, vests. Weatherhead v. Stoddard, 58 Vt. 623.

See Warren v. Hemtree, 8 Ore. 118; Major v. Major, 32 Gratt., Va., 819; Green v. Davidson, 4 Baxter, Tenn., 488; Pike v. Stephenson, 99 Mass. 188; Green v. Green, 86 N. C. 546; Silvers v. Canary, 114 Ind. 129; Reed's Appeal, 118 Pa. 215 (principal and interest were directed by will to be non-attachable, yet the interest vested.)

5. SHARES TO BE ASCERTAINED BY A DIVISION OR CONVERSION, AND LIMITATION OVER IN CASE OF THE DEATH OF THOSE FIRST DESIGNATED PRIOR TO THE DIVISION OR CONVERSION.

Where shares or interests in real or personal property, to be ascertained by a division, are given, and directed to be sold and the proceeds divided, the estate or interest of the devisee or legatee in the property to be divided or converted is a vested interest before the conversion or division, and limitations over to take effect in case of the death of those first designated prior to the division or sale refer to the time appointed for division or sale and not to the period of their completion,* in the absence of language clearly expressing a contrary intention.

*Joseph v. Utitz, 34 N. J. Eq. 1; Johnes v. Beers, 57 Conn. 295.

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5. SHARES TO BE ASCERTAINED BY A DIVISION OR CONVERSION, AND LIMITATION OVER IN CASE OF THE DEATH OF THOSE FIRST DESIGNATED PRIOR TO THE DIVISION OF THE CONVERSION.

Manice v. Manice, 43 N. Y. 305, 368; Murdock v. Ward, 67 id. 387; Robert v. Corning, 89 id. 225, 241; Finley v. Bent, 95 id. 364; Hobson v. Hale, id. 588; Williams v. Freeman, 98 id. 577; Goebel v. Wolf, 113 id. 405; Palmer v. Dunham, 125 id. 68; Matter of Gardner, 140 id. 123; Dimmick v. Patterson, 142 id. 322; Forsyth v. Rathbone, 34 Barb. 388; Torrey v. Shaw, 3 Edw. Ch. 376; McKinstry v. Sanders, 2 Sup. Ct. (T. & C.) 181, aff'd 58 N. Y. 662.

See Matter of Young, 145 N. Y. 538; Hays v. Gourley, 1 Hun, 38; Snell v. Tuttle, 44 id. 325; Van Camp v. Fowler, 59 id. 311; Matter of Embree, 9 App. Div. 602; Fargo v. Squiers, 6 id. 485.

When shares or legacies are to be paid out of a fund or surplus to be collected or ascertained and divided, the interest of the legatees are held to vest absolutely before the fund is collected, or the surplus ascertained, or division actually made; and a limitation over to take effect in case of the death of the legatee before he has received his share, does not take effect if the legatee live to become entitled to it though he die before it has been paid (369). 2 Jarman on Wills, ch. 20, sec. 3, page 539, 2d Am. ed.; Gaskell v. Harman, 6 Ves. 159, and Same Case on Appeal, 11 id. 490; Wood v. Penoyre, 18 id. 325; In re Arrowsmith's Trusts, 2 DeG., Fisher & Jones, 474; Hutchin v. Mannington, 1 Ves. 366. Mixed fund of realty and personalty. Martin v. Martin, L. R., 2 Eq. Cases, 404.

When terms of a bequest import a gift and also a direction to pay at a subsequent time, the legacy vests and will not lapse by the death of the legatee before the time for payment has expired, but will pass to his personal representatives. Traver v. Schell, 20 N. Y. 89; Everitt v. Everitt, 29 id. 39.

This is not in conflict with the rule that "a gift must not only vest within the time limited by the rule against perpetuities, but the interests of the respective parties must be *capable* of ascertainment within that period." Curtis v Lukin, 5 Beav. 147. It is sufficient if the interests are vested and capable of ascertainment, although not actually ascertained and set off. *Manice* v. *Manice*, 43 N. Y. 305, 370.

See Embury v. Sheldon, 68 N. Y. 227 (236); Bennett v. Garlock, 79 id. 302 (324); Smith v. Edwards, 88 id. 92 (105); Wells v. Wells, id. 323 (331); Beardsley v. Hotchkiss, 96 id. 201 (215); Radley v. Kuhn, 97 id. 26 (35); Shipman v. Rollins, 98 id. 311.

Legatee died before full division and his next of kin took his interest. *Murdock* v. *Ward*, 67 N. Y. 387, rev'g 8 Hun, 9.

Estate vested, subject to limitation over in case of death before distribution. *Robert* v. *Corning*, 89 N. Y. 225 (241), digested p. 330.

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The words "die before full payment," mean, not before actual payment, but before the share becomes actually payable; and therefore, the share of A. was not divested, but passed as a part of her personal estate to her legal representatives, not to her child. *Finley* v. *Bent*, 95 N. Y. 364, digested p. 934.

For estates vesting on final division on death of last life annuitant, see *Hobson* v. *Hale*, 95 N. Y. 588, digested p. 442.

Citing, Colton v. Fox, 67 N. Y. 348; Everitt v. Everitt, 29 id. 39; Warner v. Durant, 76 id. 136; Smith v. Edwards, 88 id. 92.

F. by will directed his executors to divide his residuary estate "share and share alike" among certain of his children named, each to "have the use and benefit of one of such equal parts for life," the principal thereof then to go to his or her children, if any, if not, to the next of kin. The executors were empowered to sell the real estate, and in case of sale to keep the proceeds on deposit or invested "until a final settlement" of the estate.

Construction:

No trust was created, as to the residuary estate, but each child entitled to an interest therein, took a legal estate for life in an equal share; the direction as to the disposition to be made of the proceeds of any sale until "final settlement," had reference to the final settlement of the accounts of the executors, and thereupon each beneficiary became entitled to the possession of his or her share for life, subject to the remainders limited thereon. *Williams* v. *Freeman*, 98 N. Y. 577; 83 id. 561.

The will of T. gave his residuary estate to trustees in trust, to pay one-half of the net profits and income of the real estate to the testator's wife, for the support and maintenance of herself and the testator's minor children, and to apply the other half in payment of mortgages upon the real estate, and after such payment to invest the residue for the benefit of his children. The trustees were authorized to take charge of the testator's store, stock in trade, etc., to continue the business until the youngest child should arrive of age, and invest the net proceeds; also to sell the personal estate, convert it into money and invest the same for the benefit of his children. Then, after providing for an advancement to each of his children when they respectively arrive of age or marry, the clause continued thus: "Immediately upon the arrival of my youngest child at the age of twenty-one years, in case my said wife shall not then be living, to divide all my estate, real and personal, and the accumula-

tions of interest equally among my children, share and share alike, after deducting all advances made as above provided to any of my children, so that each of my children shall have and receive an equal share of my estate." In an action to obtain a judicial construction of the will, it appeared that one of four infant children living at the time of the testator's death had since died under age and without issue.

Construction :

The gift was not to the children as a class, but each took a vested remainder in one-fourth of the residuary estate dependent upon the termination of the trust, and the share of the one who died, with the accumulations of income therefrom, descended to his heirs or next of kin, according to the nature of the property; also such descendants were entitled to any income that may thereafter accrue during the trust period.

The general rule that when a testamentary gift is found only in a direction to divide at a future time, the gift is future and contingent, and not vested, is subordinate to the primary canon of construction, that the construction shall follow the intent to be collected from the whole will. *Goebel* v. *Wolf*, 113 N. Y. 405.

See Townshend v. Frommer, 125 N. Y. 446 (463 ; Matter of Tienkin, 131 id. 391 (407) ; Matter of Gardiner, 140 id. 122 (129) ; Matter of Seeheck, id. 241 (248) ; Matter of Gilbert, 144 id. 68 (73).

NOTE—**From opinion.**—When a devise is made or a legacy given, of which the enjoyment is postponed, "the leading inquiry upon which the question of vesting or not vesting, is, whether the gift is immediate, and the time of payment or enjoyment only postponed, or is future or contingent, depending upon the beneficiary arriving at age, or surviving some other person, or the like." Denio, J., Everitt v. Everitt, 29 N. Y. 67. In harmony with this general rule, another general proposition has been formulated, that where the only gift is found in a direction to divide at a future time, the gift is future, and not immediate ; contingent, and not vested. Leake v. Robinson, 2 Mer. 363 ; Warner v. Durant, 76 N. Y. 133 ; Smith v. Edwards, 88 id. 92." (412.)

Remainder vested in children living at death of testatrix under a gift to executors in a trust fund, part of which they were directed to invest and pay over the income to D. "for and during her natural life, and upon her death, to pay over said principal sum to her lawful issue, share and share alike." The residuary clause of the will provided "that in case of the death of any of the beneficiaries or persons entitled to share in the investments herein directed to be made before the time limited for the payment thereof, my will is that the sum be paid over to their next of kin as, according to the statute of distributions, their per-

sonal estate would be divided or distributed." D. died in 1887, leaving a son, three grandchildren, the issue of a son who died after the death of the testatrix, and a granddaughter, the issue of a son who died before the will was executed. *Palmer* v. *Dunham*, 125 N. Y. 68.

The will of a testatrix first gave to her executors all of her property not specifically disposed of, in trust, to be disposed of and expended as they might think best for the support and maintenance of a brother of the testatrix during life; all that remained thereof at his death, after certain legacies, which were directed to be paid therefrom, the testatrix directed her executors to divide in four equal parts, each to be paid to a beneficiary named "each to share and share alike". One of these beneficiaries died before the time of distribution arrived.

Construction:

The share did not lapse upon such death, but passed to the parties who were lawfully entitled to succeed to the estate of said beneficiary; upon the death of the testatrix the residue vested in the persons named, subject to the life estate. Goebel v. Wolf, 113 N. Y. 405.

Matter of Gardner, 140 N. Y. 123, digested p. 107.

See Bowditch v. Ayrault, 138 N. Y. 222, digested p. 281; Dimmick v. Patterson, 142 id. 322, digested p. 280.

A will and codicils were construed to mean that testator intended that the final division of a general fund out of which annuities were to be paid should be postponed until after the death of the three annuitants. This postponement of the division or possession of the fund did not prevent the estate from vesting absolutely on the death of the testator. *Forsyth* v. *Rathbone*, 34 Barb. 388.

Testator devised his estate, real and personal, to executors, in trust for daughter for life; and after her death, for all her children (testator's grandchildren) equally and their heirs when the youngest came of age. Rents, until then, to be applied in education. Proviso, that if his grandchildren die leaving issue, the latter substituted. Executors had discretion to advance any part of their share before majority. One grandchild died before his mother, but of full age, unmarried. The grandchildren took vested estates at the death of the testator. *Torrey* v. *Shaw*, 3 Edw. Ch. 376.

A will provided that the executor should convert the real and personal estate into cash and that, if after the payment of debts and legacies "there shall remain an amount not exceeding $20,000, that *then* my said executor pay over the whole of said amount so remaining" to a religious society; "but in case the amount of said moneys so remaining shall exceed $20,000, *then* my executor shall pay" to said society "only $20,000, and that he pay over the residue thereof to my nephews and nieces who shall *then* be living to be equally divided between them." After the payment of the $20,000, there was a surplus. At the testator's death there were fourteen of his

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nephews and nieces living, One niece died about a year after death of testator, and another about two years after, but before final distribution.

Construction:

The shares of the nephews and nieces vested at the time of the death of the testator, and the representatives of the deceased nieces were entitled to share in the distribution.

The law favors the vesting of estates and unless the intention is unequivocally expressed to the contrary, it will not be imputed to the testator. *McKinstry* v. *Sanders*, 2 Sup. Ct., 2 T. & C., 181, aff'd in 58 N. Y. 662.

Legatee's share was limited over in event of his death without issue before distribution. He was declared an habitual drunkard and guardian was appointed. Distribution was made except to him and could have been made to him. His share vested. Miller v. Colt, 32 N. J. Eq. 6.

Distribution was postponed until the youngest child was of age, and if any child should then have died, leaving children, latter to take. If child die before such time his children take legacy free from debts of parents. Battle v. House, 11 Lea, Tenn., 202.

6. DEVISE TO B. FOR LIFE, REMAINDER TO B.'S ELDEST SON, VESTS IN B.'S ELDEST SON AT HIS BIRTH.

Wendell v. Crandall, 1 N. Y. 491.

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Devise to A. or A.'s child when he shall become of age, with remainder over if he die under age, creates a vested estate in the first taker, defeasible by condition subsequent.

Manice v. Manice, 43 N. Y. 305; Roome v. Phillips, 24 id. 463; Everitt v. Everitt, 29 id. 76; Radley v. Kuhn, 97 id. 26; Matter of N. Y., L. & W. R. Co. v. Van Zandt, 105 id. 89; Avery v. Everett, 110 id. 317; Matter of Crossman, 113 id. 503; Van Axte v. Fisher, 117 id. 401; Dimmick v. Patterson, 142 id. 322.

See Lockman v. Reilley, 29 Hun, 434, reversed 95 N. Y. 64; Ramsey v. Deremer, 65 Hun, 212; Matter of Lehman, 2 App. Div. 531; Shangle v. Hallock, 6 id. 55.

(a) Where, after a devise or bequest in language denoting an absolute gift of the whole estate in fee, there is a subsequent limitation over in the event of the first devisee dying under age and without issue, the gifts are not repugnant to each other, but the latter is a valid executory gift.

Norris v. Beyea, 13 N. Y. 273; Roome v. Phillips, 24 id. 463; Watts v. Ronald, 95 id. 226; Radley v. Kuhn, 97 id. 26; Avery v. Everett, 110 id. 317; Matter of Crossman, 113 N. Y. 503.

See *ante*, p. 115.

(b) Executory gifts limited to take effect upon the prior legatee dying under age and without issue are not defeated by the death of the

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prior legatee under age and without issue in the lifetime of the testator; but such gifts take effect immediately upon the death of the testator as though there had been no preceding limitation.

Norris v. Beyea, 13 N. Y. 273.

See Bell v. Lowell, 18 S. C. 94; Eisner v. Koehler, 1 Demarest, N. Y., 277.

(c) But in the case stated in subdivision *seven*, if the first legatee attain the prescribed age, or have issue and afterward die in the testator's lifetime, the future estate would not take effect, but the whole provision would fail.

Norris v. Beyea, 13 N. Y. 273; Watts v. Ronald, 95 id. 226; Radley v. Kuhn, 97 id. 26.

(d) Where a devise is limited to take effect on a condition annexed to the preceding estate, or if the preceding estate should never arise, the remainder over will nevertheless take place, the first estate being considered only as a preceding limitation and not as a preceding condition to give effect to the subsequent estate.

Norris v. Beyea, 13 N. Y. 273.

(e) Shares vested in taker upon his arriving at a certain age.

Dimmick v. Patterson, 142 N. Y. 322.

(f) Where legacies were given and were certain or capable of being rendered certain in amount, they were vested, although the exact amount could not be determined until the period of payment arrived.

Titus v. Weeks, 37 Barb. 136.

Testator bequeathed $1,000 to each of his daughters, B., C., D., and E., and a certain one-half of other moneys equally, and the other one-half of such moneys and the remainder of his personal estate to his sons, F. and G.; and in case of the death of either son before he attained the age of twenty-one years and without lawful issue, he gave his personal estate to his surviving sisters in equal shares. In the event of either of the daughters dying before attaining the age of twenty-one years, and without lawful issue, he gave the estate of the daughter so dying to her surviving sisters equally. The testator died in 1844; B., daughter, died before him and F., son, after the testator, each under age and without issue. C., daughter, married in 1846 and died in December, 1848, under the age of twenty-one years and without issue, her husband surviving.

Construction:

(1) The legacy given to B. vested in her sisters surviving at the death of the testator without further limitation over.

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(2) The legacy and bequest to C. passed to her surviving sisters and not to her administrator.

(3) The share of F. in the personal property vested in his surviving sisters and was not further limited over so that the administrator of C. was entitled to her portion thereof.

(4) The gifts limited to take effect upon the prior legatee dying under age and without issue were not defeated by the death of the prior legatee under age and without issue in the lifetime of the testator, but took effect immediately upon the death of the testator as though there had been no preceding limitation. But, had the first legatee, for instance, B., daughter, attained the age of twenty-one or had she had issue, the future estates would not have taken effect, but the whole provision would have lapsed. *Norris* v. *Beyea*, 13 N. Y. 273.*

NOTE.—Where a devise is limited to take effect on a condition annexed to any preceding estate, or if that preceding estate should never arise, the remainder over will nevertheless take place, the first estate being considered only as a preceding limitation and not as a preceding condition to give effect to the subsequent estate.

Devise to B., father, remainder to C., testator's only child and heir at law, after the decease of B. and "when he, the said child, shall become twenty-one years of age and become married and have children," and in case of C.'s death before that period and after death of B., devise over to others.

Construction:

(1) C. took vested remainder at death of testator subject to be divested *only* on his dying under the age of twenty-one.

(2) Upon death of B., C. became entitled to possessiou on his attaining the age of twenty-one, *or* upon his marrying and having children before that age.

(3) Devise over could only take effect on C.'s dying before arriving at the age of twenty-one.

(4) Devise to C., in fee, "*when* he attains the age of twenty-one" is a vested remainder, provided the will contained an intermediate disposition of the estate, or of rents and profits during B.'s minority, or if it be limited over in the event of C. dying under age. The word "when" was a demonstration of the time when the remainder should *take effect in possession*, and did not operate as a condition precedent to the estate

*See under Estates Contingent, Nellis v. Nellis, 99 N. Y. 505; Buel v. Southwick, 70 id. 581.

vesting in title, but the dying under twenty-one is a condition subsequent on which the estate is divested.

(5) "When he, the said child, shall become twenty-one years of age *and* become married and have children" construed "shall become twenty-one years of age *or* become married and have children." *Roome* v. *Phillips*, 24 N. Y. 463.

See Everitt v. Everitt, 29 N. Y. 76.

Devise to C.'s child when he shall become of age, with remainder over, if he die under age, creates a vested estate in the infant child, defeasible by condition subsequent. Here nothing is interposed between the infant and the enjoyment of his estate in possession, he has a vested estate, subject to be defeated by the condition subsequent of his dying under age. This is so as to estates of real property but there is some difference as to personal property. *Manice* v. *Manice*, 43 N. Y. 305, 380, digested p. 423.

Doe v. Moore, 14 East, 604; Roper on Legacies, 571; Roome v. Phillips, 24 N. Y. 463; Patterson v. Ellis, 11 Wend. 259; Everitt v. Everitt, 29 N. Y. 76, 82, 97; Phillips v. Ackers, 9 Ct. & Finnelly, 583; Kane v. Gott, 24 Wend. 641; Phips v. Williams, 5 Simons, 44; 2 Redfield on Wills, 592–641; Gilman v. Reddington, 24 N. Y. 16.

J., by her will, gave to her husband $5,000, which was about one-third of her estate and also the use and benefit of the residue until her oldest daughter, M. S., became of age; she directed that such residue should then be divided equally between her two daughters, M. S. and M., each to come into possession of her share at the age of twenty-one, the husband to have the use of M.'s share until her arrival at that age. In case of the death of either of the daughters, before arrival of age, the will directed that "the one living shall receive the share of the one deceased, but in the order of their ages as above described." In case of the death of the two daughters before arrival at the age of twenty-one their respective shares were directed to be divided equally between the testator's "brothers and sisters or their immediate heirs, but in the order above mentioned." M. S. died intestate after she arrived at the age of twenty-one; after that, but before her arrival of age, M. died. *Held*, that the share of M. S. passed, upon her death, to her next of kin, but that the share of M. went to the brothers and sisters of the testatrix. *Watts* v. *Ronald*, 95 N. Y. 226.

Devise to executors in trust to receive rents and profits and therefrom pay $700 to each of two grandsons when of age, in case of the

death of either, to the survivor; trust to continue until testator's son C. became twenty-five years of age, when he was to have net income less the $1,400 for life; if he left children estate to become theirs in fee when of age. C., as owner of the next eventual estate, took surplus of the income arising during trust term; C.'s children, if any, would take fee, and in case of their death under age, the fee would vest in their heirs, if C. died without issue, the fee would vest in testator's heirs. *Radley* v. *Kuhn*, 97 N. Y. 26, digested p. 443.

NOTE.—It seems, that had there been a contingent limitation over, limited on the fee, to take effect in case of the first devisee dying before twenty-one, this would not have prevented the vesting of the estate in the first devisee.

Estates vested to be divested in case of death without issue. *Matter of N. Y., L. & W. R. Co.* v. *Van Zandt*, 105 N. Y. 89, digested p. 356.

The will of S. devised his real estate to his wife for life if she remained unmarried, and upon her decease or marriage, to C.; in the case of the death of the latter without children, the remainder to go to A.

Construction:

Upon the testator's death C. took a vested remainder in fee, subject to be defeated by his death without children, upon which event the substituted remainder, given on that contingency to A., would vest in possession. Vanderzee v. Slingerland, 103 N. Y. 47; In re N. Y., L. & W. R. R. Co., 105 id. 89. *Avery* v. *Everett*, 110 id. 317, aff'g 36 Hun, 6.

See Van Axte v. Fisher, 117 N. Y. 401.

The will of C. directed that $100,000 should be invested and the income thereof paid to his wife during her life; upon her death the principal to be paid to H., the testator's adopted son, if he shall then have arrived at the age of twenty-eight years; if not, it was to be kept invested and the income applied to his use until he arrived at the age of twenty-eight, and then the principal with any accumulations of income, to be paid to him. In case of his death before arriving at that age, without leaving lawful issue, the will directed that said principal should be divided among certain beneficiaries named; if he left lawful issue, then said sum was directed to be paid to such issue. The residuary clause of the will provided as follows: "All the rest, residue and remainder of my estate, real and personal, wheresoever and whatsoever, and such as I shall hereafter acquire, I do give, devise and bequeath to my adopted

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son, * * * to be paid over to him when he shall have arrived at the age of twenty-eight years." Following this were provisions disposing of the residuum in case of the death of H. before reaching the age of twenty-eight. C. died, leaving his widow and H. surviving him. H. died after reaching the age of twenty-eight; the widow survived him.

Construction:

H. took a vested interest in remainder in the $100,000, if not by virtue of the clause setting it apart, at least under the residuary clause. 2 Roper on Legacies, 453; King v. Strong, 9 Paige, 94; In re Benson, 96 N. Y. 499; Cruikshank v. Home of the Friendless, 113 id. 337.

Matter of Crossman, 113 N. Y. 503.

See Smith v. Smith, 141 N. Y. 29, 34.

NOTE.—"The will contained no direction as to the disposition of the income of the residuary estate until H. reached the age of twenty-eight. Under the Revised Statutes (1 R. S. 726, sec. 40), the rents and profits of the real estate were payable as they accrued to H., he being presumptively entitled to the next eventual estate, and so far as the residuary estate was personal, its income belonged to H. as the owner of the *corpus* thereof, and was payable to him as it accrued. Gilman v. Reddington, 24 N. Y. 9; Manice v. Manice, 43 id. 303; Radley v. Kuhn, 97 id. 26."

B. died, leaving a widow and two children, a son and a daughter, him surviving. By his will he directed his residuary estate to be divided into three parts. He gave the rents, issues and profits of one part to his wife, of one to his daughter during life, and of the other part to the son until he should reach the age of thirty years, when one-half of said part was given to him absolutely, the other half when he attained the age of forty. In case of the death of the son before his third became vested in him, either in part or wholly, the portion that had not vested was given to his children, if any survived him. The will directed that at the death of the widow the part appropriated to the use of the widow should be divided and one-half thereof added to the daughter's part, the other half to that of the son, each "to be governed and affected in every respect" by the provisions of the will touching the parts of the children respectively "as fully and particularly as if such additions had originally constituted portions of said parts." The son died after reaching the age of forty, leaving children. Thereafter the widow died. Action for the construction of the will.

Construction:

It was the clear intention of the testator that the son should become vested with one-half of all he was to take under the will at the age of

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thirty, and with the other half at forty, subject, however, to the life estate of the widow in the one-third set apart for her, and so an assignment by the son of his interest carried with it one-half of that third. *Dimmick* v. *Patterson*, 142 N. Y. 322, rev'g 66 Hun, 492.

The absolute ownership of an estate was not suspended by direction to pay or apply the interest to four nephews during the minority of J., as the infants took an absolute interest in the legacies given to them respectively, and such legacies were certain or capable of being rendered certain in amount and payable at a definite period, although the exact amount that they should receive could not be determined until that period arrived. *Titus* v. *Weeks*, 37 Barb. 136.

See, generally, Moore v. Hegeman, 72 N. Y. 676; Knowlton v. Atkins, 134 id. 313; Miller v. McBlain, 98 id. 517.

8. ESTATES GIVEN TO SEVERAL PERSONS WITH A LIMITATION OVER OF EACH SHARE TO THE SURVIVORS; SUB-SHARES VEST ABSOLUTELY IN THE SURVIVORS.

When an estate is given to several persons with a limitation over of each share to the survivors in the case of the death of any first taker, upon the death of any one of the first takers the sub-shares taken by the survivors vest absolutely, unless a contrary intention appear.

Manice v. Manice, 43 N. Y. 305; Norris v. Beyea, 13 id. 273; Smith v. Scholtz, 68 id. 41, digested p. 285; Moore v. Hegeman, 72 id. 376, 383; Oxley v. Lane, 35 id. 340; Guernsey v. Guernsey, 36 id. 267; Everitt v. Everitt, 29 id. 39; Beardsley v. Hotchkiss, 96 id. 201 (213).

See Henley v. Robb, 86 Tenn. 474.

9. THE VESTING OF ESTATES OR INTERESTS IN PERSONS TAKING BY SUBSTITUTION.

Guernsey v. Guernsey, 36 N. Y. 267; Gilman v. Reddington, 24 id. 9; Provoost v. Calyer, 62 id. 546; Radley v. Kuhn, 97 id. 26; Van Brunt v. Van Brunt, 111 id. 178; Vanderpoel v. Loew, 112 id. 167; Nelson v. Russell, 135 id. 137; Bowditch v. Ayrault, 138 id. 222; Champlin v. Haight, 10 Paige, 274.

Estates defeasible in case taker die without issue.—By the terms of the will, the testator had devised his estate to his three children in fee, share and share alike, providing, however, that in case either should die without issue, that such share should go to the surviving children equally.

One of the children died, leaving an heir, and such heir took absolutely the estate of its parent. *Guernsey* v. *Guernsey*, 36 N. Y. 267.

When estates vested in issue by substitution. *Van Brunt* v. *Van Brunt*, 111 N. Y. 178, digested p. 452.

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When interests vest in remainderman by substitution. *Vanderpoel* v. *Loew*, 112 N. Y. 167, digested p. 454.

See Gilman v. Reddington, 24 N. Y. 9.

While, as a general rule, the law favors the vesting of legacies as soon as possible after the death of the testator, it is a question of intent; the will must be construed as made, and the intent of the testator as therein made manifest must control.

So, also, while as a general rule, in the case of personalty, where there is no gift except by way of a direction to the executor or trustee to pay, or to divide and pay at a future time, the vesting of the property in the beneficiary will not take place until that time arrives, the intention of the testator must control and must be sought from the language actually employed.

A., by his will, provided for the creation of several separate and independent trusts, some of which might last for the full term permitted by statute; his residuary estate he gave to his trustee, who was directed to sell and convert the whole thereof, both real and personal, into money, and, "as fast as practicable," to divide two-thirds thereof between the children, "who may be living at the time" of his death, of his brothers and sisters named, "and to the descendants of such of said children as may be deceased when said estate, or any part thereof, is distributed," said two-thirds "to be divided between all such children and their descendants equally, * * * all the children of a deceased person to receive collectively the portion their parent would, if living at such distribution, be entitled." Action for the construction of the will.

Construction:

The gift was in substance to the children of the testator's brothers and sisters living at the time of his death, and it then vested in those children, subject to be divested by the death of a child thereafter, and the substitution of his or her descendants, if any; if there were no such descendants, then the share remained vested, and, upon the death of the child, formed part of his or her estate, to be disposed of by the will of such decedent, or, in case of intestacy, as provided by statute. *Bowditch* v. *Ayrault*, 138 N. Y. 222, aff'g 63 Hun, 23.

Where an estate is devised in fee, in remainder, after the termination of a particular estate in the premises, with an executory limitation over to the issue of the devisee in case of the death of such devisee, such dying is to be construed to apply to the time when the remainder is limited to take effect in possession, and not to the time of

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the death of the testator; and the term issue, in such a case, is a term of purchase and not of limitation. *Champlin* v. *Haight*, 10 Paige, 274.

See, generally, Radley v. Kuhn, 97 N. Y. 26; Provoost v. Calyer, 62 id. 546; Nelson v. Russell, 135 id. 137.

10. ESTATES GIVEN TO A CLASS.

Where the members of the class take vested interests in a legacy distributable at a period subsequent to the death of the testator, but subject to open and let in afterborn children, they take vested interests in their shares subject to a diminution thereof as the number of members of the class is increased by future members; and in case of the death of any of the children previous to the period for distribution, their shares will go to their respective representatives.

Tucker v. Bishop, 16 N. Y. 402, 404; Provoost v. Calyer, 62 id. 545; Stevenson v. Lesley, 70 id. 512, 517; Surdam v. Cornell, 116 id. 305, 309; Kent v. Church of St. Michael, 136 id. 10; Hannan v. Osborn, 4 Paige, 336.

See Dulaney v. Middleton, 72 Md. 67; Hatfield v. Sohier, 114 Mass. 48.

(a) Where there is a future devise to children or issue with a substituted devise in case they die during the precedent estate, the remainder vests as soon as a child is born, subject to let in afterborn issue and to be divested as to any of such issue who may die during the continuance of the precedent estate.

Smith v. Scholtz, 68 N. Y. 41; Moore v. Littel, 41 id. 66; Bliven v. Seymour, 88 id. 469; Knowlton v. Atkins, 134 id. 313; Campbell v. Stokes, 142 id. 23; Matter of Seaman, 147 id. 69; Matter of Baer, id. 348; Chism v. Keith, 1 Hun, 589; Titus v. Weeks, 37 Barb. 136; Lawrence v. Bayard, 7 Paige, 70; Williamson v. Field's Exr's, 2 Sandf. Ch. 586; Adams v. Becker, 28 St. Rep. 910.

(b) If the language of the instrument creating the remainder is capable of any construction which will permit the issue of one of the class dying before payment to participate in the remainder, such construction will be adopted in preference to one which will exclude such issue.

Matter of estate of Brown, 93 N. Y. 295, 299; see, Low v. Harmony, 72 id. 408; Scott v. Guernsey, 48 id. 106; Byrnes v. Stilwell, 103 id. 453; Carpenter v. Schermerhorn, 2 Barb. Ch 314; Doe v. Provoost, 4 Johns. 61.

(c) Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto and affecting the jurisdiction of the courts to deal with the same, represent the whole estate and stand not only for themselves, but also for the persons unborn.

Kent v. Church of St. Michael, 136 N. Y. 10; Mead v. Mitchell, 17 id. 210;

* See gift to a class, p. 282.

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Moore v. Littel, 41 id. 76; Campbell v. Stokes, 142 id. 23; see, Townshend v. Frommer, 125 id. 446; Matter of Baer, 147 id. 348.

(d) Where an estate is given to a person for life, with remainder to heirs of a living person, such persons living as are the presumptive heirs of such living person, have been held to take the remainder vested in interest, subject to the divesting in whole, or *pro tanto* as stated in subdivision ten.

Mead v. Mitchell, 17 N. Y. 210;[1] Moore v. Littel, 41 id. 76; dig. p. 298; Campbell v. Stokes, 142 id. 23; see, also, Eldridge v. Eldridge, 41 N. J. Eq. 89; Post v. Van Houghton, id. 82; Coit v. Rolston, 44 Hun, 548; Chism v. Keith, 1 id. 589; Bowman v. Pinkham, 71 Me. 295; Swett v. Thompson, 149 Mass. 302. See pp. 255–6. Smith v. West, 103 Ill. 332; Croxall v. Shererd, 5 Wall. 288; Kumpe v. Coons, 63 Ala. 448.

A testator bequeathed his residuary personal estate to his executors, in trust, to invest the same, declaring that one-half, principal and interest, should be for the benefit of the children of a grandson, the other half for those of a granddaughter, "and to be paid over in the following manner:" One-half of the income to be applied annually for the benefit of the children of each grandchild respectively; and whenever either of the children of the grandson should come of age, to pay over to that child his or her proportion of the one-half of said principal; with the same provision for the children of the granddaughter.

Construction:

Each of the great-grandchildren living at the death of the testator took an immediate vested interest in an equal share of the fund bequeathed to the children of his parent, subject to be diminished in quantity by the birth of subsequent children before the first child of the class became of age; if the uncertainty of the quantity of the interest of the children in being at the death of the testator would suspend the power of alienation (as, per Paige, J., it does not), such suspension could only endure for one life in being at the creation of the estate, that of the parent; therefore, the will involves no illegal suspension of the absolute ownership or power of alienation. *Tucker* v. *Bishop*, 16 N. Y. 402, 404.

NOTE **from opinion.** — "Where the period of distribution is postponed until the attainment of a given age by the children, the gift will apply only to those who are living at the death of the testator, and who shall have come into existence before the first child attains the age named, being the period when the fund is first distributable in respect to any one object or member of the class. Where the members of a class take testator, but subject to open and let in afterborn children, they take their vested interests in their shares subject to the distribution of those shares, as the number of mem-

[1] See Addenda, Minot v. Minot, 17 App. Div. 521; see, also, McGillis v. McGillis, 11 id. 359.

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bers of the class is increased by future births; and on the death of any of the children previous to the period for distribution, their shares will go to their respective representatives. Collin v. Collin, 1 Barb. Ch. R. 630; Jenkins v. Freyer, 4 Paige, 53; Davidson v. Dallas, 14 Ves. 576; Hill v. Chapman, 1 id. 405; 2 Jarm. on Wills, 76, 79, 408; Middleton v. Messenger, 5 Ves. 136; Clarke v. Clarke, 8 Sim. 59; Walker v. Shore, 15 Ves. 122; Whitbread v. Lord St. John, 10 id. 152. (p. 404-5.)"

Although previous to the Revised Statutes, a devise without words of limitation or inheritance carried a life estate only (1 N. Y. 489; 4 id. 61; 36 id. 231), yet if, from the whole will, it might be inferred that the intent was to convey a fee, the intent would govern.

Devise of certain premises to son "during his natural life, after his decease to his lawful children."

Construction:

Son took a life estate and children *in esse* at death of testator a vested remainder in fee, which would open to let in afterborn children.

It not otherwise appearing, it was to be presumed that all of testator's property was specified in the will, and this authorizes inference of intent to give remainderman a fee. Gernet v. Lynn, 31 Penn. 94.

As testator used words of inheritance in some places in will and omitted them in others, it was deemed evident from the whole will that testator did not deem words of inheritance important to vest the whole estate. *Provoost* v. *Calyer*, 62 N. Y. 545.

NOTE.—Under the rule in Shelley's case son did not take a fee, as the word "children" used was not equivalent to heirs. (552.)

Decision relates to the will of John Hopper, who died in 1819. Devise to three grandchildren, B., C., and D., "and their heirs forever" of real estate, to be disposed of by the executors named as follows: "The said real estate shall not, at any time hereafter, be sold or alienated, but my said executors * * * shall * lease * * the same in such terms * * * as they may deem most advantageous to my said heirs, and the rents, issues and profits shall be annually paid by my executors * * * to my said heirs * * * in equal proportions * * * and in case any of my said heirs and devisees shall die without lawful issue, then and in such case my will is that the share of the one so dying shall be and inure to the sole use, benefit and behoof of my said grandchildren and the survivor of them, and the heirs of such survivor forever."

The persons named were the heirs of the testator. *Held*,

(1) The executors took the legal estate.

(2) The grandchildren took equitable life estates.

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(3) The word "heirs" meant heirs of the body, or issue, and a remainder vested at the death of the testator in such issue of the grandchildren as were then living, subject to let in afterborn issue, and subject to be divested as to any such issue dying during the continuance of the life estate. 6 Green'l Cruise, 237–239; Bundy v. Bundy, 38 N. Y. 410; Taggart v. Murray, 53 id. 233.

(4) Each grandchild took, in addition to their life estate, a future estate contingent upon one or both of the other grandchildren dying without issue surviving such death. *Smith* v. *Scholtz*, 68 N. Y. 41.

The same will was involved in Striker v. Mott, 2 Paige, 387; Brewster v. Striker, 2 N. Y. 19; Striker v. Mott, 28 id. 82.

See Cochrane v. Schell, 140 N. Y. 516, 539.

NOTE[1].—The will was to be construed as if written as follows: "I give my real estate *in trust* for the benefit of grandchildren respectively, and after their death to their issue respectively; and if any such grandchildren shall die without issue, the surviving grandchildren shall take his share."*

It will be observed that the remainder to the issue vested as soon as they were born; before that it was as to such issue contingent, as there was, until some issue was born, no person in being who would have immediate right to the possessions of the lands upon the ceasing of the life estate.

The remainder given to grandchildren was contingent, because, until the death of any child, it could not be known whether he or she would die without issue.

NOTE[2].—If of A., B., and C., A. die without leaving issue, B. and C. would take A.'s share equally and absolutely; if then B. died without leaving issue, C. would take B.'s share; he would not also take B.'s share of A.'s share. Guernsey v. Guernsey, 36 N. Y. 267; Everitt v. Everitt, 29 id. 85, where cases pro and con are reviewed; Norris v. Beyea, 13 id. 273; and if C. died without issue he would leave an absolute estate in his own share, in B.'s share, and one-half of A.'s share.

The will is construed as if there were three separate parts of the real estate, so that at A.'s death a final disposition was made of his share, and the same as to B. and C.

Where the devise is to a class, viz., children of, to take effect in enjoyment at a future time, the child of A., born subsequent to the death of the testator, and before the time for the distribution of any part of the corpus of the estate has arrived, is entitled to a share therein. *Stevenson* v. *Lesley*, 70 N. Y. 512 (517).

Tucker v. Bishop, 16 N. Y. 402; Teed v. Morton, 60 id. 506; Johnson v. Valentine, 4 Sandf. 37; 3 Wash. on Real Prop. 511.

See further, Gilman v. Reddington, 24 N. Y. 9; Smith v. Edwards, 88 id. 92, 104; Matter of Smith, 131 id. 239, 247; Hotaling v. Marsh, 147 id. 29; Bowditch v. Ayrault, 138 id. 222.

B., by will, gave to each of his six daughters a life estate in one-tenth part of his residuary estate, with remainder over as follows: "Upon the death of either or any of my said daughters, I give, devise and bequeath

* A different construction was suggested in Tyson v. Blake, 22 N. Y. 562.

unto such child or children, as my said daughter shall have or leave living at her decease, and to the heirs or assigns of such child or children as tenants in common, one part or share of my said estate; the children of said daughters to have the share whereof the mother received the rent and income during her life."

Construction :

The remainder limited upon the life estate of each daughter vested in all of her children, subject only to open and let in afterborn children, and descendible to the heirs of any of said children which might die before their mother; and, hence, the children of a son of one of the daughters dying before her, were entitled to participate in the remainder limited upon his mother's life estate. *Matter of Estate of Brown*, 93 N. Y. 295, 299, aff'g 29 Hun, 412.

NOTE [1].—Devise "to the children of my said son, David Manners, and to their respective heirs, assigns, was held to show an intention to benefit not only David's children, but the families of such of them as might die before the contingency happened upon which the children were to take."

NOTE [2].—The significance of the words "have or leave" and the distinction between "having" and "leaving" are recognized in several of the authorities. Weakley v. Rugg, 7 T. R. 322; White v. Hill, L. R., 4 Eq., 265; Bryden v. Willett, L. R., 7 Eq., 472. Such words meant here that upon the death of each of his daughters the remainder should go to the children she might have, or leave living, the living children, and to the heirs and assigns of those who might have died, as tenants in common. The language was equivalent to this, "to such child as my daughter so dying shall have (or leave living at her death) and to the heirs and assigns of such child." (See opinion 301.)

See further, Monarque v. Monarque, 80 N. Y. 320; Matter of Paton, 111 id. 480; Mullarky v. Sullivan, 136 id. 227; Soper v. Brown, id. 251; Matter of Truslow, 140 id. 605.

A clause in the will of G., after a devise to his daughter Maria of two lots, continued thus: "And from and immediately after the death of my said daughter Maria, I give, devise and bequeath the last aforesaid two lots * * * unto the lawful child or children of my said daughter, his or their heirs forever; if more than one, share and share alike as tenants in common." In case any of the children of Maria "at the time of her death be dead leaving a lawful child or children, him or her surviving," it was provided that "such child or children shall take the share or portion which his, her or their parent would be entitled to if living." In an action for the partition of the land devised, it appeared that at the time of the death of the testator the daughter named was the mother of six children, three of whom

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died without issue before her death. After the testator's death five more children were born to her, all of whom survived her.

Construction:

The six children living at the testator's death took a vested remainder in fee subject to open and let in children born thereafter; the five children thereafter born became entitled to a share in the remainder; the shares were not enlarged by the death of three of the remaindermen without issue, but their shares were alienable, descendible and devisable; the words "if living" did not refer to the time of the death of the life tenant, and were not intended to limit the number of shares to those of her children who should survive her, but had special reference to the share or shares which the issue of the deceased children were to take in case they left issue.

An estate in fee, created by a will, can not be cut down or limited by a subsequent clause, unless it is as clear and decisive as the language of the clause which devises the estate. *Byrnes* v. *Stilwell*, 103 N. Y. 453.

Distinguishing, Nodine v. Greenfield, 7 Paige, 544; De Peyster v. Clendining, 8 id. 295; Kane v. Astor's Executors, 5 Sandf. 467; In re Ryder, 11 Paige, 185; Sheridan v. House, 4 Keyes, 569; Moore v. Littel, 41 N. Y. 66; Smith v. Scholtz, 68 id. 41; Kelso v. Lorillard, 85 id. 177.

Modifying, Byrnes v. Lahagh, 38 Hun, 523.

See Dole v. Keyes, 143 Mass. 237; but see Darnell v. Barton, 75 Ga. 377.

From opinion.—"An estate in fee, created by a will, can not be cut down or limited by a subsequent claim, unless it is as clear and decisive as the language of the clause which devises the estate. Thornhill v. Hall, 2 Clark & Fin. 22; Roseboom v. Roseboom, 81 N. Y. 356, 359; Campbell v. Beaumont, 91 id. 467; Freeman v Coit, 96 id. 63, 68. The effect of the construction contended for by the counsel for the respondent would be that, in case all the children of the testator's daughter had died during her lifetime without issue and there were no survivors, the estate would pass to the collateral heirs. The grandchildren of the testator would thus be divested of any absolute interest in the estate by remote kindred. They would take only an unsubstantial estate, and in case they did not survive their mother, they would be vested with no interest whatever.

The law favors the vesting of estates, and courts will always give such a construction to a will as will tend to best provide for descendants or posterity, and will prevent the disinheritance of remaindermen, who may happen to die before the termination of the precedent estate. Moore v. Lyons, 25 Wend. 119, 142; Scott v. Gurnsey, 48 N. Y. 106; Low v. Harmony, 72 id. 408.

We are referred by the counsel for the respondent to numerous cases, which, it is claimed, sustain the position contended for by him, but none of them are precisely in point. Those relied upon in this state are clearly distinguishable, as will be noticed upon an examination of the same. In Nodine v. Greenfield, 7 Paige, 544, the devise was to the widow for life and then to the children of another person, who should be living at her death, and the issue of such as should die; and in default of such chil-

dren or issue then living, then over to such person; and if he were dead, to the testator's next of kin. It will be seen that the facts differ materially from those presented in the case now considered, and the case is not analogous.

In DePeyster v. Clendining, 8 Paige, 295, there was a devise of the life interest to his wife, then to his children and upon their death to their issue; and if either of them died without issue, their shares to go to the survivors. Here is an express provision in favor of the survivors, which makes a marked distinction between the case cited and the one at bar, and renders it entirely inapplicable.

In Kane v. Astor's Executors, 5 Sandf. 467, 469, the devise was to the daughter during life and then to the surviving issue, thus expressly providing for any who survived.

In Matter of Ryder, 11 Paige's Ch. 185, the devise was to A. for life, remainder to her surviving children, and to the issue of such as should have died leaving issue at her death. Here also the survivor is provided for.

In Sheridan v. House, 4 Keyes, 569, there was a grant to J. for life, and after his decease to his heirs forever; and it was held that this vested future estate of each child, though liable to be defeated by the child's death before that of his father, is, nevertheless, under our statute law, devisable, descendible and alienable. This decision sustains the view that the devisees have a vested interest, which they could lawfully dispose of; and it does not aid the plaintiff's case. If anything, it establishes that the devisees, who died, had an interest which was vested and transferable and devisable, subject to the conditions provided for in the grant. As the remainder in the case cited was limited to the heirs and assigns for life, before the right is absolute the tenant for life must die to terminate the estate and to ascertain the heirs. The character of heir must be gone before the remainder vests in possession, and hence the remainder may be defeated by the death of any child before his father. In the case at bar, the devise is to the child or children of the life tenant, thus specifying the character of the devise after the death of the life tenant and leaving no uncertainty as to who was entitled to the remainder.

In Moore v. Littel, 41 N. Y. 66, the devise was to a person named, and after his death to his heirs and assigns forever, and the remarks made concerning the case last cited are applicable.

In Smith v. Scholtz, 68 N. Y. 41, the devise was to the grandchildren of the testator, with a provision in favor of the survivor and the heirs of such survivor, and it contains nothing adverse to the views we have expressed.

Reliance is also placed on Kelso v. Lorillard, 85 N. Y. 177, where the devise was to the husband for life, remainder to a son if he should live until he became of age, and then over. Here is an express provision for defeat of the estate in case of the death of the son before maturity, and the case in no way sustains the rule contended for by the respondent's counsel. * * *

The appellants' counsel cited several cases to sustain the position that the testator intended that, upon his death, his daughter should be entitled to, and should take a life estate in his land, and that her children who should then be living should at the same time be entitled to, and should take a vested remainder in fee in the lands; if more than one, share and share alike, and as tenants in common, subject, however, to open and let in afterborn children to an equal share with them. Wemple v. Fonda, 2 Johns. 288; Doe v. Provoost, 4 id. 61; Livingston v. Greene, 52 N.Y. 124; Embury v. Sheldon, 68 id. 233.

It is true that the authorities referred to tend strongly to uphold this construction

of the testator's will. While they bear upon the subject, they do not, however, precisely cover the point here presented, and can not be regarded, therefore, as entirely conclusive."

Estate vested in children in shares subject to open to receive afterborn children. *Surdam* v. *Cornell*, 116 N. Y. 305, 309, digested p. 458.

Estate vested in children, defeasible by death during minority; in case of such death over to their mother; by death of mother before children; children's estate then became indefeasible by descent. *Knowlton* v. *Atkins*, 134 N. Y. 313, digested p. 316.

Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn.

Where an unrecorded deed of land has been lost, an action in equity is maintainable to compel the grantor, or after his death those representing his title, to execute another deed, so as to clothe the grantee with the record title.

Such an action is not dependent upon any of the provisions of the Code of Civil Procedure, secs. 1638, 1650, 2345, in reference to the determination of adverse claims to real estate and authorizing actions in cases specified to procure a conveyance, but has its sanction in the general jurisdiction of a court of equity.

Plaintiffs as executors of K., under a valid power of sale contained in his will, contracted to sell certain premises to defendant; it refused to complete the purchase on the ground of defect of title to one-half the premises. K. had in fact purchased and paid for that half, and received a deed thereof, which was not recorded and was lost. S., K.'s grantor, had died leaving a will devising all her real estate to her executors in trust, for her three children during life, and after the death of any child to pay over and divide his or her share to and among his or her children then surviving, and the lawful issue of any such child or children then deceased. Plaintiffs brought an action against trustees appointed by the will of S., her three children and also her grandchildren then living, asking that defendants execute and deliver a deed; a special guardian was appointed for the infant defendants, and in pursuance of a judgment in said action granting the relief sought, the adult defendants in their own names, and the infants by their special guardian executed a deed to plaintiffs, and to the devisees and heirs at law of K. The grant-

ees in said deed then united in a deed to defendant, which it refused to accept.

Construction:

The grandchildren of S. took under her will vested remainders in the shares of their parents, subject to open and let in afterborn grandchildren; the defendants in the action so brought by plaintiffs represented the whole title to the real estate of S.; afterborn grandchildren were concluded by the judgment, and the deed of said defendants conveyed a good title; the said judgment simply confirmed the title to land which S. had conveyed, and there was no occasion for the court to make provision therein for persons not *in esse* as they by the adjudication never could have an interest. *Kent* v. *Church of St. Michael*, 136 N. Y. 110.

See, Kilpatrick v. Barron, 125 N. Y. 751; Harris v. Strodl, 132 id. 392; Monarque v. Monarque, 80 id. 320; Cheeseman v. Thorne, 1 Edw. Ch. 629; Mead v. Mitchell, 17 N. Y. 210; Brevoort v. Grace, 53 id. 245, distinguished. See Moore v. Littel, 41 id. 76; Townshend v. Frommer, 125 id. 446. Matter of Baer, 147 id. 348.

From opinion.—"The judgment against the trustees and heirs of Mrs. Stewart was in a proper action and proper form, and the question is whether it will bind the afterborn grandchildren if any, of Mrs. Stewart. We think it will.

The trustees, children and grandchildren of Mrs. Stewart could not cut off or affect the title in the land of unborn grandchildren by any conveyance *in pais*. R. S., part 2, ch. 1, tit. 2, art. 1, sec. 14. By such a conveyance they could convey no greater title than they had. The effect of such a conveyance was under consideration in Kilpatrick v. Barron, 125 N. Y. 571, and Harris v. Strodl, 132. id. 392.

If the title to this land had actually been devolved under the will of Mrs. Stewart, and an action were brought to partition it, or to foreclose a mortgage upon it, or in some other way to change or extinguish the title, it would be the duty of the court to protect the rights of unborn grandchildren by setting apart land, or the proceeds of the land, to represent in some form their interests. Cheesman v. Thorne, 1 Edw. Ch. 629; Mead v. Mitchell, 17 N. Y. 210; Brevoort v. Grace, 53 id. 245; Monarque v. Monarque, 80 id. 320.

Where an estate is vested in persons living subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. This is a rule of convenience, and almost of necessity. The rights of persons unborn are sufficiently cared for, if, when the estate shall be sold under a regular and valid judgment, its proceeds take its place and are secured in some way for such persons. Calvin on Parties, 48; Mitford's Pleadings, 173; 2 Spence Eq. Jur. 707; 1 Smith's Ch. 92; Story's Eq. Pl. secs. 144, 148; Wills v. Slade, 6 Ves. 498; Gaskell v. Gaskell, 6 Sim. 643; Nodine v. Greenfield, 7 Paige, 544."

The will of M. directed his executors to divide his residuary estate into as many shares as he had children, and gave, for each child surviv-

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ing him, one share to the executors to be held in trust for said child for life. Upon the death of the beneficiary the executors were directed to "convey, transfer, pay over and deliver" the share to his or her lawful issue if any survive the parent. In case none survived provision was made for the disposition of such share. All of the testator's children and sixteen grandchildren were living at his death. In an action for partition of lands of an interest in which M. died seized, the grandchildren were not made parties. Action to compel specific performance of a contract for the purchase of said lands, to which plaintiff claimed title under a deed on sale pursuant to judgment in the partition suit.

Construction:

The issue of any child of the testator living at his death took a vested remainder in the share held in trust for the parent, subject to open and let in afterborn children, and to be divested by their death before the death of the parent; the rights of the grandchildren were not dependent in any way upon the action of the trustees, nor did the vesting of their interest await the exercise by the trustees of their power to "convey, transfer," etc., but they took as remaindermen independent of the power.

Accordingly, the grandchildren of the testator were necessary parties to the partition suit, and so plaintiff's title was defective and he was not entitled to enforce his contract. *Campbell* v. *Stokes*, 142 N. Y. 23, aff'g 66 Hun, 381.

NOTE.—"The issue living are presumptively entitled in remainder and during the life of the parent, they living, have a vested future estate in the parent's share. The case of Moore v. Appleby, 108 N. Y. 237, is a direct authority for the conclusion above stated, and follows prior cases as well as the rule of the statute. Mead v. Mitchell, 17 N. Y. 210; Moore v. Littel, 41 id. 76; 1 Rev. St. 723, sec. 13. The case of Townshend v. Frommer, 125 N. Y. 446, does not and was not intended to overturn the general doctrine, that remaiudermen are not bound by a conveyance of the estate to which their interest attaches unless they are parties thereto in fact or in law. The case was peculiar and anomalous and involved complicated questions under the law of trusts and powers. It arose under a trust deed, whereby the grantor retained the beneficial use of the property for life and which contained directions for the disposition of the fee after her death, to persons who were not ascertainable until the happening of that event. The intention of the grantor, deduced by the court from the transaction, was to postpone the accruing of any future interests until that event happened. The present case affords no ground for such a presumption. Whether the remainders in this case were vested or contingent, the persons in being when the partition action was commenced, presumptively entitled to possession on the death of the life tenant, were necessary parties." (P. 30).

See Bliven v. Seymour, 88 N. Y. 469; Miller v. Gilbert, 144 id. 68; Moore v. Littel, 41 id. 66; Johnston v. Brasington, 86 Hun, 106.

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S. died in October, 1876, and bequeathed the residue of his estate to his executors in trust to apply and pay over the income of an undivided equal part thereof to his adopted daughter and niece, E. S., during her natural life, and upon her decease he gave, devised and bequeathed the same to the children of his nephew Geo. A. S., living at the time of her death, share and share alike. He subsequently directed his executor to apply and pay over the income of the other equal undivided half part of his estate, held in trust by them, to his adopted son and nephew, Geo. A. S., during his natural life, and upon his decease he gave the same to the children of the said Geo. A. S., living at the time of his death, share and share alike. Both life tenants were living at the testator's death and both died in January, 1893. At the testator's death there were living four children of Geo. A. S., who still survived and who took into their possession the remainders upon the termination of the trust.

Construction :

The four children of Geo. A. S. took vested interests in the residuary property, both real and personal, at the death of the testator, subject, on one hand, to open and let in afterborn children, and on the other, to be defeated by death without issue during the running of the life estate. *Matter of Seaman*, 147 N. Y. 69.

Citing, Campbell v. Stokes, 142 N. Y. 23.

See Matter of Baer, 147 N. Y. 348.

From opinion.—" The case cited related to real estate, but except as to a suspension of absolute ownership, limitations of future or contingent interests in personal property are subject to the same rules as those which relate to future estates in land. 1 R. S. 773, sec. 2. The respondent, nevertheless, relies upon the rule applying to bequests of personalty that, where time is of the essence of the gift, and there is no present gift, nothing passes until the prescribed period arrives. Warner v. Durant, 76 N. Y. 133 ; Smith v. Edwards, 88 id. 92. A reference to those cases and others which have followed them shows that the rule formulated was for the construction of bequests where there was no gift at all, except that involved in the direction to divide at a future time. Here there are words of present gift, for the phrase 'upon her decease,' like the expression 'from and after,' does not prevent the legacy from vesting. Nelson v. Russell, 135 N. Y. 137. Explicitly the will says, 'I give, devise and bequeath' the estates in remainder, and we are not compelled to resort to a direction to divide for an inference of an intention to give at all. I think the rule referred to has no application to a case like the present, where there are explicit words of gift beyond a direction to divide.

Upon that view of the will it is obvious that a right of succession to the estates in remainder passed at once on the death of the testator to the four children and was a vested interest, although subject to be defeated or modified by subsequent contingencies."

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10. ESTATES GIVEN TO A CLASS.

The provisions of a will, by which real property is given to "the heirs of the body of A., whom she shall leave her surviving," give to the devisees, during the lifetime of A., a vested remainder in fee, liable to open and let in afterborn children, and liable, also, to be defeated by the death of any devisee before the decease of A. *Chism* v. *Keith*, 1 Hun, 589.

Where a will contains a bequest to several children, and they become vested with the property upon the death of the testator, such children take distributively and not as a class, unless a contrary intent appears in the will. *Matter of Merriman*, 91 Hun, 120.

Citing, Goebel v. Wolf, 113 N. Y. 405; Bowditch v. Ayrault, 138 id. 222; Matter of Seebeck, 140 id. 241; Matter of Tienken, 131 id. 391; Matter of Young, 145 id. 535–9; Stevenson v. Lesley, 70 id. 512.

In an action brought for the partition of certain lands devised by Philip P. Harter, it appeared that he left a will, by the fifth clause of which he devised certain lands to his son, George H. W. Harter, for the term of his natural life "if he dies without leaving children, and then to be equally divided among my grandchildren, including the children of my adopted daughter, Jane Bedell, share and share alike, but if the said George H. W. should leave a child or children then to be his and theirs forever, subject to the conditions hereinafter mentioned." The testator died in July, 1876, and his son George died without issue in May, 1894, and in the intermediate period two of the testator's grandchildren died intestate, unmarried and without issue. The question was whether these two grandchildren took a vested interest at the death of the testator.

Construction:

The will should be so construed as if possible to avoid the disinheritance of the remaindermen who had died before the termination of the precedent estate.

The testator intended to keep the property in the line of his blood, and that the right to the estate vested in the grandchildren upon the death of the testator, while possession was postponed until the death of George H. W. Harter without issue.

The persons to whom the remainder was limited were ascertained, the event upon which the remainder would go into effect was certain, and the remainder, therefore, was vested.

The words of the will, "then to be equally divided among my grandchildren," were used merely to indicate the time when the right of possession should begin, namely, at the close of the antecedent life estate. *Sage* v. *Sage*, 3 App. Div. 38.

Where a direction in a will that $1,000 be placed at interest and the interest be paid to S. during his life and at his death the principal sum to his children, the living children took vested interests in that bequest subject to be divested, etc. *Titus* v. *Weeks*, 37 Barb. 136.

Where the sister of the testator, at the time of the making of his will and at his death had but one child, and he devised the residue of his real and personal estate to such sister, to hold the same to her and her children forever, with a devise over, in case she should die, and all her children should die, leaving no children; under the Revised Statutes, the sister took an estate for life in the property, and the child took a vested remainder in fee, subject to open and let in afterborn children; and the limitation over after the death of all the children of the sister without issue was void, being too remote as to the afterborn children. *Hannan* v. *Osborn*, 4 Paige, 336.

Where an act of the legislature directed the proceeds of certain bank stock to be paid to the oldest son of B. who should be living at the death of L., and at the passage of that act, in 1831, B. had two sons living, both of whom survived L., the eldest

son of B. at the time of the sale had a vested interest in the proceeds of the stock in the nature of a vested remainder, subject to be divested by his death during the life of L. *Lawrence* v. *Bayard*, 7 Paige, 70.

When the person to whom a remainder after a life estate is limited is ascertained and the event upon which it is to take effect is certain to happen, it is a vested remainder, although by its terms it may be entirely defeated by the death of such person before the determination of the particular estate.

It is the uncertainty of the *right* of enjoyment which renders a remainder contingent, not the uncertainty of its actual enjoyment.

The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested from a contingent remainder, not the certainty that the possession ever will become vacant while the remainder continues.

A testatrix devised real estate to three trustees in fee, in trust to receive the rents, issues and profits thereof and pay the same to her grandson during his natural life, and from and after his death in further trust to convey the same to his lawful issue living at his death in fee; and if he should not leave any lawful issue at the time of his death, then in further trust to convey the same to another grandson of the testatrix in fee, or to such person in fee as he might by will appoint, if he died prior to the tenant for life. The children of the tenant for life (all of whom were born after the death of the testatrix) took vested equitable remainders in fee in the real estate as they were born respectively, which remainders were liable to be divested as to each on his or her dying during the lifetime of their father, and were subject to open and let in the afterborn children of the tenant for life.

Under such a devise, no conveyance of the legal title by the trustees is now necessary in order to vest the whole estate in the children at the determination of the particular estate. *Williamson* v. *Field's Exrs.*, 2 Sandf. Ch. 586.

Where a testator devised to each of his six children an equal undivided sixth part of his real estate for life, and after the decease of each child devised the same to the children of such child and to their heirs and assigns forever, the devise in remainder was not to such of the testator's grandchildren as should survive their parents, but one-sixth of the estate in remainder was given to all the children of each child of the testator, as to a class; each grandchild, the moment it came into existence, took a vested interest in the remainder, in fee, subject to open and let in afterborn children; and such of them as died leaving issue, transmitted that interest by descent to his or her issue, even in the lifetime of the tenant for life, as a vested remainder in fee. But the parent from whose side the estate came was the heir at law of such of the grandchildren of the testator as had died without issue, after the death of the testator, and in the lifetime of such parent. *Carpenter* v. *Schermerhorn*, 2 Barb. Ch. 314.

P. devised lands to his daughter C., "during the term of her life, and immediately after her death, unto and among all and every such child and children as the said C. shall have lawfully begotten at the time of her death, in fee simple, equally to be divided between them, share and share alike."

Construction:

The four children of C., who were living at the time of the devise, and at the death of the testator, took a vested remainder in fee, and in case there had been any children born afterwards, the estate would have opened for their benefit; and the children of a daughter of C., who died in the lifetime of her mother, were therefore, entitled to the share of C., who was living at the death of the testator. *Doe* v. *Provoost*, 4 Johns. 61.

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10. ESTATES GIVEN TO A CLASS.

Gift by will of the use of one-half of testator's property to A. for life, residue to B. at his majority. If B. died without issue, devise over to testator's brothers and sisters. If B.'s death occurred before A.'s, A. was to have the use of three-fourths of the premises for life, remainder to the brothers and sisters of the testator.

Construction:

B. took a vested fee subject to the life estate and subject to be divested by his death in the event named; also the brothers and sisters of the testator took a contingent remainder. *Adams* v. *Becker*, 28 St. Rep. 910.

11. ESTATES DEPENDENT UPON SURVIVORSHIP.

Gibson v. Walker, 20 N. Y. 476; Embury v. Sheldon, 68 id. 227; Miller v. McBlain, 98 id. 517; Kane v. Gott, 24 Wend. 641; Moore v. Lyons, 25 id. 119. See Weed v. Aldrich, 2 Hun, 531.

Devise in 1810 to trustees in fee for the use of the testator's married daughter, her heirs and assigns forever, exempt from the control or debts of her husband. If such husband should die before his wife, then in trust to convey the legal estate to the latter in fee; and in case the daughter should die before the testator, then in trust for the use of such children as she might leave at her decease, their heirs and assigns forever; and if the said daughter should die childless then in trust for another son and daughter; and in case of their deaths then for the right heirs of the testator forever.

Construction:

The contingency of the daughter's dying childless and the subsequent limitations refer to her death in the lifetime of the testator.

The remainder in fee devised to the daughter, after the death of the mother, became indefeasible upon her surviving her father. *Gibson* v. *Walker*, 20 N. Y. 476.

Devise to trustees to receive rents, issues, etc., during life of J., son, and pay same to J., A., D., and P., children of the testator. Devise upon death of J. as follows: one-fourth to J.'s children; one-fourth to A., D., and P. severally. In case A., D., or P. die leaving lawful issue surviving them, such issue shall take the share of principal and income given to the parent, and should no issue survive A., D., or P., so dying, the share of the one so dying should go *per stirpes* to the survivors of A., D., or P. and children of J., equally.

Testator died in 1864. P. died before testator without issue; D. died in 1869, leaving son born in 1867, who died in 1873, and wife, plaintiff, to whom he devised his estate.

Construction:

D. took a vested remainder on death of testator, subject to trust for life of J., inasmuch as the provision for the issue of A., D., or P. taking

in case either died, referred to such person dying before the testator. *Embury* v. *Sheldon*, 68 N. Y. 227.

Citing, Moore v. Lyons, 25 Wend. 119. See Gilman v. Reddington, 24 N. Y. 9; Oxley v. Lane, 35 id. 340.

D., by his will, gave his estate, real and personal, to his wife during her life, and directed that after her death the residue should be divided into twelve parts, one of which he gave "absolutely and wholly," to each of his twelve children. In case any of his children died without issue, he directed that "his, her, or their part or parts * * * shall be divided between the survivors or their heirs, in equal portions."

Construction:

The words of survivorship related to the expiration of the life estate, and the period of distribution; each child then living took one share absolutely; and so, the title thereto was not divested by a subsequent death of the beneficiary without issue. *Miller* v. *McBlain*, 98 N. Y. 517.

Where a will was made directing real estate to be sold, the proceeds to be invested, and the income to be applied to the support of two nieces until they arrived at the age of twenty or married, and then the income to be paid to them in equal proportions during their respective lives; on the death of one without issue, *the whole income* to be paid to the survivor; on the death of both leaving issue, *the whole trust fund* to go to such issue; one moiety to the children of each, and on the death of the nieces without issue, the property to go to the mother of the testator; the nieces took immediate vested interest in their respective moieties of *the income* of the estate during their lives, with a remainder to the survivor for life in the moiety of the other dying without issue; and on the death of both leaving issue, the fund went to their children. *Kane* v. *Gott*, 24 Wend. 641.

In a devise of real estate to one for life, and from and after his death to three others or to the survivors or survivor of them, their or his heirs and assigns forever, the remaindermen to take a vested interest at the death of the testator, and consequently, though at the time of the decease of the tenant for life there be but one of the remaindermen surviving, he takes only one-third of the estate, and the heirs at law of the two others take the residue. The words of survivorship refer to the testator, and not to the death of the tenant for life, unless from other parts of the will it be manifest that the intent of the testator was otherwise. *Moore* v. *Lyons*, 25 Wend. 119.

Testator left estate to trustees to devote income to mother and two sons, and "from and after the death of my mother I do give, etc., unto my sons." An infant son died before mother and brother. *Held*, he had vested estate which passed by succession to his heirs. Cronin's Estate, Mynch's Probate, Cal., 252.

See, also, Little's Appeal, 9 Cent. 309; 117 Pa. 14; Lombard v. Willis, 6 N. Eng. 318; 147 Mass. 13. Legacy payable after the death of wife in case legatee is living or has left issue, is vested, etc. Churchman's Appeal, 11 Cent. 640; Fitzhugh v. Townsend, 59 Mich. 427. When remainder is to children "then surviving," *i. e.*, at first taker's death, children of those dying previous to that event take nothing. Roundtree v. Roundtree, 26 S. C. 450.

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11. ESTATES DEPENDENT UPON SURVIVORSHIP.

To same effect, see Shanks v. Mills, 25 S. C. 358; Walther v. Regnault, 56 Hun, 560; Matter of Ogilshie, 30 N. Y. S. R. 459; Re Hedger's Estate, 9 N. Y. Supp. 347; Matter of Post's Estate, Surr. Ct. 30 N. Y. S. R. 217.

Contra, Anthony v. Anthony, 5 N. Eng. 41; 55 Conn. 256; Seemingly *contra*, Willett v. Rutter, 84 Ky. 317.

But, see, as opposed to last case, Goebel v. Wolf, 113 N. Y. 405, and Owens v. Dunn, 85 Tenn. 131. But when children who will take are uncertain, the estate does not vest. Bates v. Gillet, 132 Ill. 287; see, Goldtree v. Thompson, 79 Cal. 613; Cusack v. Tweedy, 56 Hun, 617, aff'd 126 N. Y. 81.

Devise for life to widow, remainder to his children "now living, or who may be at the time of her decease," vests in those children living at testator's death. Rood v. Hovey, 50 Mich. 395; compare Porter v. Porter, id. 456. Re Paton, 41 Hun, 498.

12. BASE FEE DETERMINABLE UPON DYING UNDER A CERTAIN AGE, OR DYING DURING LIFE ESTATE, AND REMAINDER LIMITED THEREON.

Gilman v. Reddington, 24 N. Y. 9; Moore v. Littel, 41 id. 66; Sheridan v. House, 4 Abb. Ct. App. 218; Maurice v. Graham, 8 Paige, 483; Waldron v. Gianini, 6 Hill, 601.

Devise and bequest of residue of estate to executors in trust to manage and apply the same, or the income thereof, or so much of the estate or income as they should see fit in the exercise of a sound discretion, to the education and support of A.'s (testator's) infant children, or such of them as should survive, or of the issue of any who might die, until the two youngest should attain the age of thirty years, or die under that age; at which time the trust estate should "be paid, conveyed or made over" to such of said three children as should then survive, or to the then living issue of any then dead, of the parent's share; if all children at time of distribution be dead, estate should go to A.'s widow and others. Youngest child died two years after testator.

Construction:

(1) Trustees took title.

(2) At death of testator there vested in the three children a base or qualified fee determinable as to each on dying without issue before arriving at the age of thirty years, at which time it would become absolute, and the estate would become an estate in possession.

(3) The widow and others took substituted remainder contingent on death of all children under age of thirty without leaving issue. *Gilman* v. *Reddington*, 24 N. Y. 9.

See Oxley v. Lane, 35 N. Y. 340; Manice v. Manice, 43 id. 378; Crooke v. Co. of Kings, 97 id. 449; Van Horne v. Campbell, 100 id. 325; Matter of N. Y., L. & W. R. Co., 105 id. 89.

Since the abrogation of the rule in Shelley's case, and the enactments in the Revised Statutes of New York, a grant "to A. for life, and after

his death to his heirs and their assigns forever," gives to the children of the latter a *vested* interest in the land; although liable to open and let in afterborn children of A., and liable also (in respect of the interest of any child) to be wholly defeated by his death before his father.

Such an interest, whether vested or contingent, is alienable during the life of A. (the tenant for life), and passes by deed or mortgage, subject only to open or be defeated in like manner as before. *Moore* v. *Littel*, 41 N. Y. 66; see 40 Barb. 488; 52 id. 9.

See Roome v. Phillips, 24 N. Y. 463; Jackson v. Jackson, 50 id. 660; Livingston v. Greene, id. 118 (123); Jackson v. Littell, 56 id. 108 (111); Smith v. Scholtz, 68 id. 41 (61); House v. McCormack, 57 id. 310 (315); Byrnes v. Stilwell, 103 id. 453 (461); Surdam v. Cornell, 116 id. 305 (309); Campbell v. Stokes, 142 id. 23 (30); Radley v. Kuhn, 97 id. 26 (35).

The uncertainty which makes a remainder contingent is the uncertainty as to who will take at any given time, if the precedent estate should then terminate. If there are persons in being who would be entitled to take if the precedent estate should presently determine, their interest is a vested future estate, under the Revised Statutes, notwithstanding that it may be liable to be defeated—*e. g.*, by the death of such a person, before the precedent estate actually determines.

Under a deed of lands to A. for life, and after his death, then to his heirs and assigns forever, the children of A., during his life, have a vested future estate in remainder, which is not made contingent by the fact that it is liable to be defeated or modified by death of any of them, or the birth of other children, during his life. *Sheridan* v. *House*, 4 Abb. Ct. App. 218.

A testator by his will provided as follows: "I give to my daughter Fanny M. Peaslee twenty thousand dollars in money or its equivalent in stocks, as my executor may decide, and twenty thousand dollars in trust, the same to revert at her death, if without issue, equally to my wife and my son."

In accordance with the judgment rendered in an action brought for the purpose of ascertaining the duty of the executor of such will in relation to the trust fund, the executor paid over the $20,000 to Fanny M. Peaslee, and she was directed by said judgment to safely and securely invest and hold the same for those entitled to the principal sum at her death; the judgment did not require her to give security, nor was any given.

She invested the money in stocks and bonds, and prior to the summer of 1880 lost the entire amount. Shortly thereafter she informed her mother and her brother of the loss, but no action was taken by either of them until the year 1892, when a proceeding was instituted to compel a restitution of or security for the fund, in which it appeared that the testator's widow, who had subsequently died, had in her lifetime released her interest in the fund to her daughter.

Held, that the intent of the testator was to effectually dispose of this fund, and that

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Fanny M. Peaslee obtained a vested interest therein which would survive her and go to her issue, if any, and that upon her death without issue it would go to the wife and son of the testator if living, and in the event of the death of either of them the one-half in which the one so dying had a contingent interest would become the absolute property of the daughter.

That one-half of the fund became the absolute property of Fanny M. Peaslee upon the death of her mother, and that her mother's executors were not entitled to security therefor.

That the son of the testator was entitled to security for the other half of the fund.

That the non-interference of the *cestui que trust*, Edward, before his interest came into possession, did not constitute an assent on his part to the breach of the trust, nor did his knowledge of such breach and his inaction set the statute of limitations running. *Hitchcock* v. *Peaslee*, 89 Hun, 50.

Where the testator, subsequent to the adoption of the Revised Statutes, devised a house and lot to J. and E. and their heirs and assigns forever, provided they both attain the age of twenty-one, and to the survivor if only one of them attained that age, and further directed that if they both die leaving no child or children, the house and lot should go to L. and her heirs and assigns forever; J. and E. took determinable estates in fee in their respective moieties of the house and lot, subject to be divested in favor of the survivor if either died under age, and subject to be determined in favor of L. in case J. and E. should both die without leaving issue, before or after they attained the age of twenty-one. Such contingent limitations over of the house and lot were both valid, under the provisions of the Revised Statutes. *Maurice* v. *Graham*, 8 Paige, 483.

F., dying in 1798, devised a farm to his son Medcef, his heirs and assigns forever, and another farm to his son Joseph in like manner. The will contained this clause: "It is my will, and I do order and appoint that if either of my sons should depart this life without lawful issue, his share or part shall go to the survivor." In 1801, the sheriff sold all the estate which Medcef then had in his share, by virtue of a *fi. fa.* against him; and Joseph died in 1813, leaving Medcef surviving. The estate devised to Medcef was a base, qualified and determinable fee, which became a fee simple on the death of Joseph, and belonged to W. *Waldron* v. *Gianini*, 6 Hill, 601.

13. WHERE A LIFE ESTATE IS GIVEN WITH A REMAINDER TO TAKE EFFECT AT, AFTER, UPON OR FROM THE DEATH OR MARRIAGE OF THE FIRST TAKER, THE REMAINDER VESTS AT THE DEATH OF THE TESTATOR.

Scott v. Guernsey, 48 N. Y. 106; Livingston v. Greene, 52 id. 118; Smith v. Van Ostrand, 64 id. 278; Ackerman v. Gorton, 67 id. 63; Monarque v. Monarque, 80 id. 320; Williams v. Freeman, 98 id. 577; Van Axte v. Fisher, 117 id. 401; Nelson v. Russell, 135 id. 137; Miller v. Gilbert, 144 id. 68; Matter of Collins, id. 522; Matter of Young, 145 id. 535; Crosby v. Wendell, 6 Paige, 548; Barker v. Woods, 1 Sandf. Ch. 129.

See Bedell v. Guyon, 12 Hun, 396; Matter of Bogart, 28 id. 466; Van Camp v. Fowler, 59 id. 311; Balen v. Jacquelin, 67 id. 311.

The will of S., after a devise of certain premises to his daughter, P. G., during her life, contained the following clause: Then to be equally divided amongst her now surviving children, or any of them that may be

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alive at her decease, or the heirs of any that may be dead at the time of executing this my last will." The time referred to was the time the will took effect, by vesting the estate in possession upon the death of P. G. *Scott* v. *Guernsey*, 48 N. Y. 106.

See, Provoost v. Calyer, 62 N. Y. 545; Matter of Brown, 93 id. 299; Byrnes v. Stilwell, 103 id. 453; Matter of Truslow, 140 id. 599 (605); Matter of Paton, 111 id. 480; Matter of Logan, 131 id. 456.

Life estate to wife in real estate and then " from and after the decease and death of my wife, I give and bequeath all my real estate to all my children and to their heirs and assigns to be equally divided, share and share alike; and should any of my children die and leave lawful heirs, such heirs to receive the parent's portion. By a subsequent clause the testator declared that upon the death of his wife and a division of the estate, as provided among his children, their shares should be an estate in fee, and they were empowered to convey, etc.

Wife and eleven children survived testator. Three subsequently died intestate and without issue. A son then died without issue, devising his interest in the real estate; thereafter testator's widow died.

Construction:

1. The last clause referred to an absolute fee, of which a conveyance could only be made by the children after the death of the widow.

2. The words "after" and "upon the death of my wife" did not make a contingency, but simply indicated when the estate of children took effect in possession.

3. Children took vested remainder, not defeated by their death prior to the widow. *Livingston* v. *Greene*, 52 N. Y. 118.

Distinguishing Moore v. Littel, 41 N. Y. 66.

The will of S. bequeathed to his wife the sum of $1,650, in lieu of dower, for her support during her natural life or so long as she should remain his widow, then "her said dower," to be transferred to testator's three children, fifty dollars of said sum to be paid to the widow as soon as practicable after the testator's decease, and the residue in about six months thereafter. The bequest gave to the widow of S. the use of the $1,650 during her life or widowhood, with power to apply so much of the principal as might be necessary for her support, but with no further power of disposition; and, subject to the exercise of this power, gave a remainder in the principal to the children; remainder was not repug-

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nant to the prior gift and was valid; and upon the death of the widow, the children were entitled to so much of the fund as remained undisposed of for her support. *Smith* v. *Van Ostrand*, 64 N. Y. 278.

Devise to wife, B., of real estate "tobe used by her during her natural life, and from and immediately after her decease * * * to be divided equally among" his children. By codicil authority to wife to sell and convey his real estate, subject to approval of all his heirs surviving at the time of such sale.

The widow, with consent of surviving heirs, sold real estate, but prior thereto judgment had been entered and docketed against one of the children.

Construction:

Children took vested remainder in lands subject to execution of power by wife.

The wife's life estate was not enlarged into a fee by power of sale. 1 R. S. 732, sec. 81.

The parties took the same interest in the proceeds of sale as in the land.

The lien of the judgment was subject to power of sale and was by the sale transferred to the proceeds. *Ackerman* v. *Gorton*, 67 N. Y. 63, rev'g 6 Hun, 301.

NOTE. — Words "from and immediately after her death" did not operate to postpone the vesting of the remainder in the children until the death of the life tenant, but by well settled construction denoted simply the period when they would become entitled to the estate in possession (66). Livingston v. Greene, 52 N. Y. 118; Taggart v. Murray, 53 id. 233.

Devise (1) to B., widow, for her life; (2) gift of income of estate to four daughters "to be divided between them *share and share alike*, during *each of their respective lives*, remainder to their respective children," their heirs, etc.

Construction:

(1) Life estate to B.

(2) Life estate in an undivided one-quarter to each daughter.

(3) Estates in an undivided one-quarter of the property vested at testator's death in fee in the children of daughters, subject to open and let in afterborn children. 2 Jones on Wills, 15; 2 Wash. on Real Prop.;

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Savage v. Burnham, 17 N. Y. 561; Everitt v. Everitt, 29 id. 39; Stevenson v. Lesley, 70 id. 512.

(4) The power of alienation was suspended only for the lives of B., and as to each one-quarter for life of one daughter.

(5) A gift of income is equivalent to the devise of a life estate. *Monarque* v. *Monarque*, 80 N. Y. 320, rev'g 19 Hun, 332.

Citing, Kerry v. Devrick, 8 Co. 95b; Cro. Jac. 104; Earl v. Grim, 1 Johns. Ch. 494; Schermerhorn v. Schermerhorn, 6 Johns. 70; 3 Wash. on Real Prop. 450.

The will gave to the executors $4,000 to be held in trust, the income to be paid to a sister of the testator during her life, and upon her death the principal to go into the residuary estate; also $25,000 to be held in trust for the benefit of the testator's wife, "during her natural life or widowhood," and "at her decease or re-marriage," the principal to revert to his estate.

Construction:

The beneficiaries entitled to the residuary estate took vested estates in remainder in said trust funds. *Williams* v. *Freeman*, 98 N. Y. 577; s. c., 83 id. 561.

The will of F. gave his residuary estate to his executor, in trust, with power to sell and invest the proceeds, to pay the interest and income to D. during life, and to appropriate so much of the principal as should be necessary to the proper maintenance of D.; the balance the testator gave to J. "upon the death of" D. J. died before D., intestate, and leaving children.

Construction:

Under the will J. took, upon the death of the testator, a vested remainder (1 R. S. 723, secs. 10, 13), subject to the exercise of the power of sale, and upon the death of J. his interest descended to his issue. *Van Axte* v. *Fisher*, 117 N. Y. 401.

NOTE.—"The mention of the brother J., by name, without allusion to his heirs, is not material. The fee would pass without them. Hennessy v. Patterson, 85 N. Y. 101. A discretionary power in the executor to appropriate the estate itself to the support of the objects of the trust was considered by Judge Comstock, in Gilman v. Reddington, 24 N. Y. 9, to be no objection to the trust. Nor could it logically be an objection to the vesting in interest of the right to the *corpus* of the estate upon the cessation of the trust."

The words "from and after" used in a testamentary gift of a remainder, following a life estate, do not afford sufficient ground in themselves

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for adjudging that the remainder is contingent and not vested, and unless their meaning is enlarged by the context, they are to be regarded as defining the time of enjoyment simply and not of the vesting of title. Moore v. Lyons, 25 Wend. 118; Livingston v. Greene, 52 N. Y. 118; Rose v. Hill, 3 Burr. 1882; Doe v. Prigg, 8 B. & C. 231.

The presumption is that a testator intends that his disposition shall take effect in enjoyment or interest at the date of his death, and, upon the happening of that event, unless the language of the will by fair construction makes his gifts contingent, they will be regarded as vested.

Words of survivorship and gifts over on the death of the primary beneficiary are to be construed, unless a contrary intention appears, as relating to the death of the testator. Vanderzee v. Slingerland, 103 N. Y. 55: Matter of N. Y., L. E. & W. R. Co., 105 id. 92.

Vendee sought to be relieved from the performance of a contract for the purchase of real estate. B., who died seized of the premises, by his will, devised them to his two daughters for life, and "from and after" their decease to two grandchildren named and their heirs, the heirs of a deceased grandchild to take the share "that parent would have taken if living." One of the daughters died prior to the execution of the contract which was made by the other daughter, and the two grandchildren who executed a deed to plaintiff in accordance with the contract which he refused to accept.

Construction:

The two grandchildren having survived the testator, took upon his death a vested remainder in fee in the premises; the provision for their issue was by way of substitution in case of the death of the parent during the life of the testator; and therefore, the vendor's deed conveyed a good title. *Nelson* v. *Russell*, 135 N. Y. 137; rev'g 61 Hun, 528.

The holographic will of G., an illiterate person, contained a provision by which he gave to his wife "a free and uncontrollable use and occupancy" of certain houses and lots as long as she continued his widow. If she ceased to be such by death, then the premises were directed to be sold and the proceeds equally divided among the testator's four children named "or their heirs." If the widow ceased to be such by marriage then the premises were directed to be sold and one-half of the proceeds to be hers, "to be used for her comfort and support so long as she shall live, and then it shall revert back" to said children, the other

half to be equally divided among them "as aforesaid." In an action for partition of the premises brought after the death of the widow it appeared that the children named survived the testator; two of them died before their mother.

Construction:

There was no equitable conversion, but the fee of the premises vested upon the testator's death in the four children; the direction to sell and divide could not be regarded as a gift, but simply as a suggested mode of division in lieu of legal proceedings. *Miller* v. *Gilbert*, 144 N. Y. 68, aff'g 3 Misc. Rep. 43.

Citing, Matter of Tienken, 131 N. Y. 391.

NOTE. — It has been often held that if futurity is annexed to the substance of the gift the vesting is suspended; but where the gift is absolute and the time of payment only is postponed the gift is not suspended but vests at once. Smith v. Edwards, 88 N. Y. 103. (737.)

The court might well substitute "and" for "or." Roome v. Phillips, 24 N. Y. 463; Jackson v. Blanshan, 6 Johns. 56.

The will of C. gave to his wife the use and income of his residuary estate during her widowhood; in case she remarried she was given the use of a house and lot specified during life and an annuity of fifty dollars, the residue of the income to be divided between the testator's children until the youngest arrived of age. At that time, if the widow had remarried, all of the estate, except said house and lot, and the amount set apart to raise the annuity, the will directed, should be divided between the children. At the death of the widow, it was directed that the house and lot should be sold by the executors and the proceeds divided among the testator's "descendants."

No trust was created by the will, but purely legal estates were devised, which vested in the devisees at once upon the death of the testator. *Matter of Collins*, 144 N. Y. 522, aff'g 70 Hun, 273.

H., by his will, gave to his wife the use of his dwelling-house until his farm should be sold. It directed a sale of the farm as soon after his decease as it could be done without undue sacrifice, and a reservation out of the proceeds of the sale of $4,000 for the use of his wife during life, the same after her decease to be divided among his three children. The testator then gave to his children, within one year after the aforesaid sale of real estate and the reservation for the use of the wife, the whole of the balance of his property. Debts owing by the

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children were referred to as a part of their inheritance. One of the children died during the lifetime of the widow. Action for the construction of the will.

Construction:

The intent of the testator was to give to the children all of his estate except that given to the wife, and so it covered the trust fund as a remainder; at his death the title vested in the three children, and the share of the one who died passed upon her death to her representatives. *Matter of Young*, 145 N. Y. 535; aff'g 78 Hun, 521.

Where a testator declared it to be his will that his wife should continue to reside with his children in his dwelling house and retain in her possession the plate, furniture, etc., during her widowhood, if his children should continue to live with her; and in case of her remarriage, and his children should not continue to live with her, that she should deliver the plate, furniture, etc., to his executors for the use of his children; and that the executors should receive the rents and income of his estate until the youngest child should attain the age of fourteen, and should apply so much thereof as should be necessary for the support of his minor children; and that from and immediately after the youngest child attained the age of fourteen years, if his wife should then have married, he devised the dwelling house to his son Philip in fee; and devised all the residue of his estate to his children as tenants in common; the wife took an estate in the dwelling house to continue after the youngest child arrived at the age of fourteen if she then remained unmarried and the children lived with her; and Philip took a vested remainder in fee in the dwelling house after the youngest child became fourteen, to commence in possession so soon thereafter as the wife's estate should have terminated, by her marriage or otherwise; and such remainder to him was not intended by the testator to be limited upon the contingency of the widow's having married a second time before the youngest child arrived at the age of fourteen. *Crosby* v. *Wendell*, 6 Paige, 548.

A testator directed his executors to invest a fund, the interest of which he gave to his wife, and after her decease, he gave the principal to his two children equally. The children took vested interests in the legacy at the death of the testator. *Barker* v. *Woods*, 1 Sandf. Ch. 129.

Devise to sister "during her natural life and at her death to go and vest in her children in fee simple" gives all children a vested estate at testatrix's death; Tippin v. Coleman, 59 Miss. 641. See, also, Davidson v. Koehler, 76 Ind. 398; Landers v. Bartle, 29 Hun, N. Y., 170; Re Brown, id. 412; McKee's Appeal, 96 Pa. St. 277; Grayson v. Tyler, 80 Ky. 358; Smith v. West, 103 Ill. 332.

14. REMAINDER MAY BE LIMITED TO BENEFICIARIES OF A TRUST TO TAKE EFFECT IN POSSESSION UPON ITS TERMINATION, VESTING IN INTEREST AT THE DEATH OF THE TESTATOR.

Stevenson v. Lesley, 70 N. Y. 512; Provoost v. Provoost, id. 141.

Remainder may be limited to beneficiaries of a trust to take effect in

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possession upon its termination and vesting in interest at death of the testator. *Stevenson* v. *Lesley*, 70 N. Y. 512, digested p. 285

See, Embury v. Sheldon, 68 N. Y. 227; Gilman v. Reddington. 24 id. 10; Provoost v. Provoost, 70 id. 141.

Testator, in case he leave a surviving child not of full age, devised all his real estate to trustees, in trust, to pay the net income from the rents and profits to widow, until all of his living children should be of full age; and then directed that trusts should cease, and devised to widow a life estate in certain premises, remainder to son D. and made other specific devises.

Construction:

The trust was for the life of the widow and terminable in any event at her death, and subject to be terminated by the arrival of children to full age during the widow's life, and was valid.

The devises took effect at testator's death, subject to the life estate. No division of the property was necessary, as this was accomplished by the will. The words "upon the arrival of all my children at full age" did not change this. *Provoost* v. *Provoost*, 70 N.Y. 141, aff'g 7 Hun, 81.

15. A VESTED ESTATE IS NOT DIVESTED BY SENTENCE FOR IMPRISONMENT FOR LIFE.

Avery v. Everitt, 110 N. Y. 317.

The will of S. devised his real estate to his wife for life, if she remained unmarried, and upon her decease or marriage to C.; in the case of the death of the latter without children, the remainder to go to A.

The wife of the testator survived him, and after her death, C., who, at the time was unmarried and without children, was convicted of murder in the second degree and sentenced to imprisonment in a state's prison for life.

Action of ejectment wherein plaintiff claimed under A., brought while C. was living.

Construction:

The title of C. to the real estate devised was not divested as a consequence of his sentence, and A., or his grantee, had no present vested interest upon which to maintain ejectment.

Assuming a civil death consequent upon such a sentence, operates, *eo instanti*, to divest a person sentenced, of his estate, whether such a death

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was contemplated by the testator, and the words of limitation to A. were to be construed as applying only to a natural death of C., *quære.*

By the general rule of common law civil death did not operate as a divestiture of the estate of the convicted. Whatever may have been the effect of the provision of the act of 1799 (Laws of 1799, ch. 57), declaring that where a person shall be convicted for felony and sentenced to imprisonment for life, such person shall be deemed to be "civilly dead to all intents and purposes in the law," when the language was changed by the provision of the Revised Statutes, 2 R. S. 701, sec. 20, re-enacted in Penal Code, sec. 708, enacting simply that a person sentenced to imprisonment for life "shall thereafter be deemed civilly dead" this was declaratory of and restored the rule of the common law.

The statutory provisions regulating the transfer and devolution of property upon the death of the owner, refer simply to a natural, actual death.

A resumé of legislation and of judicial decisions in this state and in England upon the subject of property rights, as affected by civil death, given. *Avery* v. *Everitt*, 110 N. Y. 317, aff'g 36 Hun, 6.

16. AN ESTATE MAY VEST SUBJECT TO AN EXECUTION OF A POWER OF SALE OR PARTITION.

Henderson v. Henderson, 113 N. Y. 1, 12; Robert v. Corning, 89 id. 225; Scholle v. Scholle, 113 id. 261; Persons v. Snook, 40 Barb. 144.

Estate vested subject to execution of power to partition. *Henderson* v. *Henderson*, 113 N. Y. 1, 12, digested p. 636.

Estates vested in lands of which conversion was authorized. *Scholle* v. *Scholle*, 113 N. Y. 261, digested p. 938.

Although the power of an executor to convey was suspended for the term of three years, the remainder subject to the execution of the power remained vested in the heirs at law. *Persons* v. *Snook*, 40 Barb. 144.

See Robert v. Corning, 89 N. Y. 225.

17. A POWER OF APPOINTMENT DOES NOT PREVENT THE VESTING OF A FUTURE ESTATE.

Real Property Law, sec. 31. Dana v. Murray, 122 N. Y. 604.

18. SHARE GIVEN ON CONDITION VESTS.

Share vests although there is a condition precedent that in accepting share it shall be in full satisfaction of all claims against the estate, and although there is provision that if legatee contests will, share shall go elsewhere. Little's Appeal, 117 Pa. 14. See Conditions, p. 1079.

When legacy vests, notwithstanding condition. *Five Points House of Industry* v. *Amerman*, 11 Hun, 161.

18. *CONTINGENT ESTATES—CASES.

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5. CONTINGENT LIMITATION IN FAVOR OF PERSONS NOT IN BEING, p. 325.

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19. CONTINGENT INTERESTS OF PERSONS, BENEFICIARIES IN PROPERTY HELD BY TRUSTEES UNDER AN EXPRESS TRUST—WHETHER NECESSARY PARTIES TO ACTION FOR FORECLOSURE, p. 341.

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18. CONTINGENT ESTATES—CASES.

1. REMAINDERS FAVORED RATHER THAN EXECUTORY DEVISES, AND VESTED RATHER THAN CONTINGENT ESTATES.

A limitation is never construed into an executory devise when it may take effect as a remainder, nor as a contingent remainder when it can be taken to be vested. *Manice* v. *Manice*, 43 N. Y. 305, 368, digested p. 423.

Wolfe v. Van Nostrand, 2 N. Y. 436, 442; Lott v. Wykoff, id. 355; Thomson v. Hill, 87 Hun, 111; Johnson v. Valentine, 4 Sandf. 36.

See Vested Estates, *ante*, p. 259.

2. ESTATES BY SURVIVORSHIP.

See, also, Vested Estates, sub. 11—Death—Estates on Contingency of, p. 346.

(a) When issue of one who, if living, would take as a survivor, do not take as survivors.

Guernsey v. Guernsey, 36 N. Y. 267; Wylie v. Lockwood, 86 id. 291; Davis v. Davis, 118 id. 411; Mullarkey v. Sullivan, 136 id. 227; see Mowatt v. Carow, 7 Paige, 328. See pp.

See Widrig v. Finster, 18 Hun, 237; Coe v. De Witt, 22 id. 428.

(b) Tenants in common creating, by parol, estate by survivorship.

Murphy v. Whitney, 140 N. Y. 541, p. 14.

Devise to B., C., D., and E., sons, "to them and their heirs lawful of their bodies, share and share alike," and if any son should die without issue, all his right, title * * * should devolve on survivors equally; if all sons should die without lawful issue, then children of daughter should have estate "to them, their heirs and assigns forever."

Testator died in 1801 leaving four sons and daughter and grandchildren, and all sons died without issue.

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2. ESTATES BY SURVIVORSHIP.

Construction:

(1) Devise to B., C., D., and E. was an estate tail in an undivided fourth part.

(2) B., C., D., and E. took cross remainders between themselves.

(3) Such cross remainders were to await the termination of the primary estate and were remainders and not conditional limitations.

(4) As the limitation was on the default of issue of the shortest lives they were contingent.

(5) The statute abolishing entails, turned the estate in tail into absolute fees and cut off both the contingent cross remainders and the limitation over to children. *Lott* v. *Wykoff*, 2 N. Y. 355; 1 Barb. 565.

NOTE.—When a limitation over could take effect as a remainder, it should never be construed as an executory devise. Wolfe v. Van Nostrand, 2 N. Y. 436; Purefoy v. Rogers, 2 Saund. 386; Doe v. Morgan, 3 Term. R. 763.

By the terms of the will, the testator had devised his estate to his three children in fee, share and share alike, provided, however, that in case either should die without issue, that such share should go to the surviving children equally.

Construction:

One of the children dying, leaving an heir, such heir took, absolutely, the estate of its parent.

Also, such heir could not be deemed to be included in the term "survivor or survivors," as used in the will. On the death of one of the three without heirs, the remaining child living, took such share.* *Guernsey* v. *Guernsey*, 36 N. Y. 267.

Estates to issue, or, if none, to survivor of one of two legatees dying before a division of the estate. *Manice* v. *Manice*, 43 N. Y. 303, 368, digested p. 423.

See, Buel v. Southwick, 70 N. Y. 581, digested p. 320.

Estates by survivorship. *Kelso* v. *Lorillard*, 85 N. Y. 177, digested p. 322.

Estates by survivorship. *Beardsley* v. *Hotchkiss*, 96 N. Y. 201, digested p. 442.

Devise to two grandsons of real estate jointly and in equal proportions, and provision that in case of the death of either without lawful

*Grandchildren were not regarded as surviving children in Jackson v. Blanshan, 3 Johns. 292; Jackson v. Staats, 11 id. 337; Mowatt v. Carow, 7 Paige, 328; Lowery v. O'Bryan, 4 Rich. Eq. 262.

See, also, Wylee v. Lockwood, 86 N. Y. 291.

issue, the survivor should take the whole, and that upon his death, if without issue, the estate should go to the children of his son H.

Construction:

By the provision in reference to the two devisees dying without issue, a death prior to that of the testator was not alone intended, but as well a death after his decease, and the two devisees took a contingent estate in fee subject to be reduced to a life estate as to each, by his death without issue. In the case of the death of both without issue, the devise to the children of H. would take effect as a valid contingent limitation upon a fee, and hence the grandchildren living at the testator's death were proper and necessary parties to an action of partition.

The rule was not changed by the fact that the primary devise was chargeable with legacies and other burdens; the gift of an absolute fee could in no case be implied from the fact that the legacy is charged simply upon the lands, not upon the devisee personally; and when the language of the will is explicit and unambiguous and gives an estate less than a fee, although it charges the devisee personally with the payment of legacies, the payment thereof will not enlarge the estate to an absolute fee. *Nellis* v. *Nellis*, 99 N. Y. 505.

Distinguishing Livingston v. Greene, 52 N. Y. 118; Embury v. Sheldon, 68 id. 227; Kelly v. Kelly, 5 Lans. 443, aff'd 61 N. Y. 47.

The will of D. disposed of his real estate as follows: "I give and bequeath all my real estate in fee simple to my three sons" (naming them), "and the survivor and survivors of them in case either die before me without issue; and in case either die before me leaving issue, the share of such deceased child shall go to such issue." Two of the sons died before the testator, first H., who left three children, and thereafter J., who left no issue.

Construction:

The surviving son took two-thirds and the children of H. one-third. *Davis* v. *Davis*, 118 N. Y. 411, aff'g 44 Hun, 365.

See, gift to a class, p. 282.

The rule that words of survivorship in a will refer to the time of the testator's death applies only to an absolute gift to one and in the case of his death to another; it has no application in a case where the first devisee or legatee takes a life estate. Vanderzee v. Slingerland, 103 N. Y. 47; In the Matter of N. Y., L. & W. R. Co., 105 id. 89; Fowler v. Ingersoll, 127 id. 472; Mead v. Maben, 131 id. 255.

18. CONTINGENT ESTATES—CASES.

2. ESTATES BY SURVIVORSHIP.

While the courts favor a construction of a will which will permit the children of a deceased child of the testator to take, rather than one which will exclude them, this principle has no application in a case where the language of the will is plain and the intention of the testator is so clearly expressed as to leave no room for construction.

The will of S. provided that all his real estate should be deemed converted into personalty, his residuary estate he gave to his executors to invest and hold the same in equal shares and apply the income to the use of his surviving children "during the life of each of them severally and upon the death of each * * * to pay over the capital of the share of said child so dying to his or her descendants," and in case of the death of a child "without leaving any descendants, then to pay over the capital of such child's share to his or her surviving brothers and sisters." The testator left surviving him six children, two of them died, one without descendants and the other leaving two children, then a third child died without descendants.

Action for the construction of the will.

Construction:

The share of the child who died last went to the children of the testator who survived the child so dying, and said two grandchildren were not entitled to share therein.

Same will:

The testator made specific devises and bequests to certain of his daughters for life then to their descendants, adding these words to each, "if she leaves no issue surviving her then to my other daughters that may be in life at the time of the death of my said daughter, and the child or children of any of my daughters that may have died, if such there be, taking *per stirpes* and not *per capita.*"

Construction:

The difference in the language of the two provisions instead of tending to show that the intent of the testator in both cases was the same, served but to emphasize the different intention. *Mullarky* v. *Sullivan*, 136 N. Y. 227, rev'g 63 Hun, 156.

It appeared from the complaint that H. died leaving seven surviving children, of whom the defendant, M., is the last survivor, none of which ever married except the father of the plaintiff. At the death of H. his children, becoming tenants of a farm, agreed to own it as joint tenants, and upon the death of any one of them the farm should pass by

devise and descent to the survivors. After the marriage of the plaintiff's father and the birth of the plaintiff, it was agreed at a family meeting of all the children that the prior agreement should be reaffirmed and that upon the death of the last survivor the farm should by devise and descent pass to the plaintiff. This agreement was kept until M., as survivor, became vested of the title. The other defendants, living in the family, and aware of the agreement, by fraud and undue influence and coercion, obtained from M. deeds of the farm and were appropriating the proceeds. The plaintiff asked that the conveyances be set aside and that they be required to account for the proceeds of the real estate sold. On demurrer it was held that a good cause of action was set forth and that the agreement was neither against public policy nor in contravention of the statute of perpetuities, and that, although not in writing, there was a sufficient part performance to take it out of the statute of frauds; also, that plaintiff had a vested remainder. *Murphy* v. *Whitney*, 140 N. Y. 541, aff'g 69 Hun, 573.

3. ESTATES DEPENDENT UPON SURVIVING PREVIOUS TAKER OR BENEFICIARY, OR THE EXPIRATION OF THE TRUST.

Carmichael v. Carmichael, 1 Abb. Ct. App. 309; Colton v. Fox, 67 N. Y. 348; Floyd v. Carow, 88 id. 560, 568; Delafield v. Shipman, 103 id. 463; Townshend v. Frommer, 125 id. 446; Knowlton v. Atkins, 134 id. 313; Adams v. Beekman, 1 Paige, 631. See Lougheed v. Dykeman's B. Church, 129 N. Y. 211; Camp v. Cronkright, 59 Hun, 488; Nathan v. Hendricks, 87 id. 483.

The terms of the will gave all testator's estate to his wife for her life, after her death, a remainder to testator's children, who might *then* be living, share and share alike, the share of one son, named, to be held and invested by testator's executor, during the lifetime of said son, and the income paid to him, etc.

Construction:

The latter clause did not give the son a vested interest on testator's death; but the son, like the other children, took only in case he survived at the widow's death. *Carmichael* v. *Carmichael*, 1 Abb. Ct. App. 309.

J., by his last will, bequeathed his personalty to his executor in trust, to pay the income to W. B. J. during his life; upon his death, the income to be divided equally and paid to C. and G. during their lives, and upon the death of both, the whole estate to pass to the child or children of G.; if G. die without issue, then to the trustees of Columbia College.

Held, that by the terms of the will there was no vested estate in

remainder until the death of the three *cestuis que trust*, and that the bequest was therefore void. *Knox* v. *Jones*, 47 N. Y. 389.

Estates to trustees to pay income to two brothers and two sisters in equal portions during their joint lives and after their "several deaths" to divide among their children. Estates to children were contingent on their surviving the parent, and the provision was void as unduly suspending power of alienation. *Colton* v. *Fox*, 67 N. Y. 348, digested p. 428.

Distinguishing, Everitt v. Everitt, 29 N. Y. 40; Monarque v. Monarque, 80 id. 320; Wells v. Wells, 88 id. 323.

See, Schettler v. Smith, 41 N. Y. 328; Knox v. Jones, 47 id. 389; Warner v. Durant, 76 id. 136; Smith v. Edwards, 88 id. 92; Hobson v. Hale, 95 id. 588, 614; Shipman v. Rollins, 98 id. 311; Ward v. Ward, 105 id. 68, 74; Coster v. Lorillard, 5 Paige, 172; 14 Wend. 265.

The will of D. gave his residuary estate to trustees in trust "to apply and manage the same for the benefit, support and comfort" of the testator's wife and six children, who survived him, in the manner provided, which was in substance, that the trustees should provide a furnished house for a home for the widow and children, and to pay all expenses of keeping up the same during her life, and to make a dividend of the residue of the income between the widow and children; each receiving an equal share, and each "to defray out of his or her share" his or her personal expenses. The will directed the trustees, upon the death of the widow, to make an equal division of the trust estate between his children *then* living, the issue of any deceased child to receive the share the parent would have received if living. Harriet, one of the children, died during the lifetime of the widow, leaving her husband one child surviving, and leaving a will by which she gave all her property to her husband for life, and remainder to child.

Action for the construction of the will of D.

Construction:

D.'s children took no vested interest in the *corpus* of the trust estate until the death of the widow, but it was vested in the trustees, Warner v. Durant, 76 N. Y. 133; Smith v. Edwards, 88 id. 92; Shipman v. Rollins, 98 id. 311; the widow and children took the surplus income, not as a class, but distributively as tenants in common; Hoppock v. Tucker, 59 N. Y. 202; when the daughter died the one-seventh of such surplus income payable to her did not pass to the surviving six beneficiaries, but was undisposed of under the will, and devolved upon the

child of the daughter under the Revised Statutes. 1 R. S. 726, sec. 40. *Delafield* v. *Shipman*, 103 N. Y. 463, rev'g 34 Hun, 514.

NOTE.—The testator vested the whole estate in the trustees during the life of his widow, and during that time evidently intended that it should remain there, and not be subject to the disposal of his children, or liable to be seized by their creditors; and after the death of his widow he gave it, not to the children living at his death, but to children and descendants of children, deceased, living at her death.

Devise in trust to executors for life and benefit of widow, remainder to daughter; death of daughter gave widow a future estate, dependent on the precedent estate of the trustees and enjoyable on the termination thereof. *Asche* v. *Asche*, 113 N. Y. 232, digested p. 192.

Trust to pay income to grantor and at her death to "convey the said lands and every part of them in fee simple" to her children "living at her decease and the surviving children of such of them as may be dead," conferred no interest in the estate during the grantor's life upon any member of the class of intended beneficiaries, and so they were not necessary parties to a foreclosure of a mortgage existing at the time of the grant. *Townshend* v. *Frommer*, 125 N. Y. 446.

Cited in Curtis v. Murphy, 129 N. Y. 645; distinguished in Knowlton v. Atkins, 134 id. 313, 317; Campbell v. Stokes, 142 id. 23, 30.

See U. S. Trust Co. v. Roche, 116 N. Y. 120; Mead v. Mitchell, 17 id. 210; Moore v. Appleby, 108 id. 237; aff'g 36 Hun, 368.

A. conveyed to defendant certain lands by deed absolute in terms. A. died leaving a widow and two minor children; after his death defendant executed a declaration of trust, stating that the conveyance was made to him in trust to sell the lands and collect the rents, etc., for the benefit of the widow and children of the grantor, the widow to receive one-third of the net income and proceeds of sale during life, the remaining two-thirds to be used for the support and education of the children during minority, or for the use of the survivor in case of the death of either without issue before his majority, the trust to terminate when the younger of the children or the survivor became of age; the property unsold then to be conveyed to the children as joint tenants, subject to the widow's dower right, and the proceeds of sales and unexpended income to be equally divided between them after first paying the widow the value of her interest. In case of the death of both children without issue before the age of maturity, the property and trust fund then to be conveyed and paid over to her. The widow died, and thereafter both of the children died during minority, both on the same day, but

the one surviving the other. The immediate relatives left were defendant, brother of A., and plaintiff, brother of his widow.

Construction:

The deed and the declaration of trust were to be considered as one instrument; under it, the children took a vested future estate, defeasible by death, during minority; the limitation over to the widow created in her an estate in expectancy, limited upon the contingencies of the death of both children in infancy, and defeasible by her death before that of her children; therefore, it was defeated by such death, and assuming that thereupon the estate of the children became indefeasible, one-half descended first to the survivor, and from and through him the whole of it to the parties to this action in the proportion of three-fourths to the defendant and one-fourth to plaintiff. *Knowlton* v. *Atkins*, 134 N. Y. 313, aff'g 56 Hun, 408.

From opinion.—"The brother having the title was the creator of the trust, and if, as the defendant contends the estate then reverted to his heirs, he, as such heir, took it. The plaintiff, on the contrary, insists that the widow Cordelia had by the trust an estate in expectancy in the property, which on her death descended to her two children; and that on their death in minority the estate became absolute and vested in their heirs. And because it came to them in that event on the part of their mother, it descended to their maternal uncle, except as to one-half which came to Albert by descent from his brother Osmin M., whom he survived; and as to that half both the defendant and plaintiff, as his paternal and maternal uncles, took and shared equally. This would be so upon the assumption that such was the stock of descent, since for the purpose of determining who in that manner take under our statute, reference is had to the immediate source of descent, and not to the blood of him in whom was the earlier inheritable title. 1 R. S. 752, secs. 10, 13; Hyatt v. Pugsley, 33 Barb. 373. The main inquiry here is whether or not the widow Cordelia had in the property an estate which descended on her death to her children. Her alleged estate was the product of the grant made by Osmin W. Atkins to the defendant for the declared purpose of the trust. And the fact that this was an express trust, and, therefore, vested the whole estate in the trustee subject to the execution of the trust (1 R. S. 729, sec. 60), did not prevent Cordelia and the children taking through the same grant so made vested future estates in the property, although they were held until its termination subject to the execution of the trust. Id. sec. 61; Embury v. Sheldon, 68 N. Y. 227, 234; Goebel v. Wolf, 113 id. 405; Van Axte v. Fisher, 117 id. 401; in re Tienken, 131 id. 391. Upon this proposition in the present case, Townshend v. Frommer, 125 N. Y. 446, has no necessary application. The future estates which there were the subject of consideration were treated as contingent."

NOTE 1. Her (mother's) survivorship of the children was not essential to such expectant estate, unless made so by the contingency upon which it was limited, although it could not become absolute without the death of the children in minority, and the estate so descending from their mother never could be enjoyed by them. Hennessy

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v. Patterson, 85 N. Y. 91; Kenyon v. See, 94 id. 563; Van Axte v. Fisher, 117 id. 401; Griffin v. Shepard, 124 id. 70.

NOTE 2. And it may be observed that upon doubtful construction the tendency of the law is to favor that which permits the descent to remain in the line of ancestral blood. Quinn v. Hardenbrook, 54 N. Y. 83; Wood v. Mitcham, 92 id. 375.

The separate devises of the premises in the seventh clause of the will to Laura F. Carow and Sarah Elizabeth Sanderson upon the death of the testator's wife, of a life estate to them respectively, and of the fee on their death to their issue then surviving, was not an absolute disposition of the whole estate of the testator in the land: The devisees for life were unmarried at the date of the will and at the death of the testator. The estates devised to the unborn issue of the life tenants were contingent remainders in fee, depending upon a double contingency, viz.: the birth of issue and their survivorship. *Floyd* v. *Carow*, 88 N. Y. 560, 568.

Grandchildren living at the death of the testator did not take a vested interest in the share of their parents, subject to open and let in afterborn children. Their interests were contingent, and dependent entirely upon the event of their surviving their parents. Parsons v. Snook, 40 Barb. 144.

Where there is a bequest in remainder after the determination of a particular estate, with an executory limitation over in case of the death of the legatee, the legatee takes only a contingent interest which will be divested if he dies during the continuance of the particular estate, and the limitation over will take effect. *Adams* v. *Beekman*, 1 Paige, 631.

4. ESTATES CONTINGENT UPON DEATH OF PREVIOUS TAKER UNMARRIED WITHOUT ISSUE, OR WITHOUT LEAVING CHILDREN OR ISSUE.

See, Vested Estates, 7.

(a) Acceleration of remainders. **p. 318 note 1.**

(b) Devise over on death of "legitimate heirs" means on death of children.

Lytle v. Beveridge, 58 N. Y. 592.

(c) Devise to A. for life, then to his issue, if any; if none, over; if A. die without issue in testator's lifetime, contingent limitation takes effect.

Downing v. Marshall, 23 N. Y. 366; Norris v. Beyea, 13 id. 273.

Devise to B., wife, for life, "and after her death, in case C., only child, should die without having married, or without leaving child," to nephew.

C. survived B., married and died without ever having children.

Construction:

(1) Life estate to B.

(2) Remainder to the nephew contingent upon C. having died before her mother, without leaving children.

(3) Fee *descended* to C. as heir at law of testator during mother's life.

(4) C., not having died before mother, leaving no issue, took the fee.

(5) Those claiming under nephew took nothing, as his remainder never vested.

(6) Extrinsic facts were resorted to, viz.: age of C. and B.; fact that it was city property that could not have been utilized either for C. or nephew under other construction, for if the claim had been maintained that the death of C. without leaving issue referred to any time, whether before or after B.'s death, then all through C.'s life it would have been doubtful about her taking an absolute estate, and as the nephew's estate would be equally doubtful the city land would not have been useful. *Wolfe* v. *Van Nostrand*, 2 N. Y. 436.

Executory gifts, limited to take effect upon the prior legatee dying under age and without issue, are not defeated by the death of the prior legatee under age and without issue in the lifetime of the testator, but such gifts take effect immediately upon the death of the testator, as though there had been no preceding limitation.[1]

But it seems, that, if the first legatee had attained the prescribed age or had issue, and afterwards had died in the testator's lifetime, the future estates would not have taken effect. *Norris* v. *Beyea*, 13 N. Y. 273.

See, Downing v. Marshall, 23 N. Y. 366; McLean v. Freeman, 70 id. 81.

[1] Under a bequest to one for life, with remainder over, if the particular beneficiary die before testator, the remainder takes effect at the latter's death.

This rule applies, although the will give trustees a discretion to devote the entire principal to the use of the life legatee. (See cases cited in opinion.)

Sauter v. Muller, 1 Dem. 389.

Where the provision rejected by the widow consists of a life estate in real and personal property, which by the terms of the will is given to a third person after the widow's death or remarriage, the renunciation of the widow does not defeat the gift in remainder, but the latter becomes immediately accelerated, but charged, however, with the equity in favor of disappointed devisees. Sarles v. Sarles, 19 Abb. N. C. 322.

See note to this case reviewing similar decisions in several states.

The general rule, that by the death of the legatee before the testator, his interests under the will lapses, relates only to the interest of the party so dying, and where there are other interests grafted or limited upon that of the deceased legatee, they do not necessarily fall.

Where a life tenant dies before the testator, but the party entitled in remainder survives him, the death of the life tenant only extinguishes the life estate, and the remainderman is let in to the immediate right to the gift, the moment the will takes effect. Taylor v. Wendell, 4 Bradf. 324.

Where an interest in property is given to a person, with a limitation over of the same interest to his children, or others upon his death before the time appointed for such interest to vest in possession, the death of the first devisee or legatee, in the lifetime of the testator, does not produce a lapse of the limitation over to the substituted objects of the testator's bounty. Mowatt v. Carow, 7 Paige, 328; McLean v. Freeman, 9 Hun, 246; Crozier v. Bray, 39 id. 121; Den v. Hance, 11 N. J. L. R. 244.

When first taker declines the estate, the estate next limited upon the expiration of the estate so declined, takes effect at once. Brown v. Hunt, 12 Heisk., Tenn., 404.

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Devise taking effect before Revised Statutes to B., daughter, "her heirs and assigns forever," but if she should die unmarried *and* without leaving child surviving her, then limitation over to sisters; but if B. "shall die either before or after my decease, leaving lawful issue," then devise "unto such child or children" of all given to their mother," and in case B. shall die without lawful issue, and at the time of her death her sisters should be dead and have a child or children then living," the shares given to their respective mothers are given to such children. B. married and died leaving daughter surviving her.

Construction:

1. Devise to B. was reduced by the restrictions subsequently imposed upon it, and by the event of her leaving a child, either to a determinable fee or to a life estate. In either case the devise over carried upon her death an estate in fee to her daughter as purchaser, and not as heir of her mother.

2. Devise to B. was a fee simple, which would be absolute in the event of her marrying and having no children, or having and surviving them.

3. The executory devise in favor of her sisters could determine her fee only upon the *double* contingency of B. dying unmarried *and* without leaving a child. *Chrystie* v. *Phyfe*, 19 N. Y. 344.

See, Fleming v. Burnham, 100 N. Y. 1 (12), digested p. 741; Crooke v. County of Kings, 97 id. 421 (449), digested p. 444.

Grant to B. in trust to receive and pay rents to the use of A. for his life, and assign and convey estate to A.'s issue, and if A. died without issue to convey to nephews. Nephews took executory devise. *In re Livingston*, 34 N. Y. 555.

The will of I., who died in 1823, contained a devise to his son J., of certain real estate, "during his natural life, but if he leave no legitimate heirs" then the property to "revert back" to his son D., his heirs and assigns. I. died leaving six children. A clause in the will expressed the testator's purpose to divide his property among his children. No other provision was made for D., while provision was made for all the others. By another clause D. was required to pay a grandson of the testator twenty dollars "when he enjoys my homestead, as specified." J. had been married many years, and had no children. Provision was made for his wife, in case she survived him. Action of ejectment brought by devisees of J.

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Construction:

The meaning of the testator, in the use of the words "if he leave no legitimate heirs," was, if he leave no children born in lawful wedlock living at the time of his decease; the words "legitimate heir," as used, were words of purchase, nor of limitation, and, therefore, the rule in Shelley's case did not apply; the devise was to J. for life, with a remainder to D., in fee, contingent upon the death of J. leaving no child surviving; and this contingency having happened, D. took an absolute fee. *Lytle* v. *Beveridge*, 58 N. Y. 592.

Devise of premises to each of three children, C., J. and W., respectively, "and his, her or their direct lineal descendants, should he, she or they have any, in fee simple absolutely," subject to the conditions and contingencies, viz., "in the event that either shall die, leaving no children or descendants of any children, then" the devise to the one so dying to go "to the children of the survivors or survivor * * * equally, share and share alike, the direct lineal descendants, if any, of such of my said three children * * * as may then be deceased to be entitled to the same share which a child or children so deceased would have been entitled to if living." C. died without having had a child *born*.

Construction:

The death referred to was not one during the life of the testator.

The devise to C. gave a contingent estate in fee, subject to be reduced to a life estate by his death without children, or the descendants of children, and therefore upon his death the fee passed to the children of J. and W., then living.

The devise over was a valid contingent limitation upon a fee (1 R. S. 724, sec. 24) and did not unduly suspend power of alienation. 1 R. S. 723, secs. 14, 15. *Buel* v. *Southwick*, 70 N. Y. 581.

Distinguishing Livingston v. Greene, 52 N. Y. 118; Embury v. Sheldon, 68 id. 227.

See Nellis v. Nellis, 99 N. Y. 505 (512), digested p. 310; Fowler v. Ingersoll, 127 id. 472 (478), digested p. 358.

Gift by will as follows: One-half to E., son; one-fourth to J., daughter, and one-fourth to E., in trust, to pay interest to W., testator's son, during life, and that said fourth should be divided equally between W.'s children, if he left any; if he left none, then that the one-fourth so held in trust should be given to E. and J. equally.

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Construction:

(1) E. and J. had an estate in expectancy in the one-fourth left in trust, which would become absolute upon the death of W. without issue surviving him.

(2) E.'s and J.'s interests were alienable and a release and conveyance by them to W. of their interest in the trust estate carried to W. their expectant interest in such one-fourth in trust. *Ham* v. *Van Orden*, 84 N. Y. 257.

NOTE.—Whether E. and J. took a vested or contingent estate was not decided.

See Kelso v. Lorillard, 85 N. Y. 177, 184; Beardsley v. Hotchkiss, 96 id. 214; Griffin v. Shepard, 124 id. 75, 76.

Devise to wife, to be held by her to and for the chief purpose of keeping and protecting the same for her own and her daughter's benefit, the same to be used for the maintenance and support of herself and said daughter. In case of remarriage of widow, the executors were empowered to take control of the premises from her and also guardianship of the daughter, and then the following: "If my said daughter Margaret should get married, or die without leaving any children, and that her husband should live after her death, he shall not inherit the said property or any part thereof; but if there are any children born of my daughter, and living after her death, the property shall be theirs. * * * Should my said daughter Margaret die without leaving any issue, then the said property shall be left to my nephew, John Foley." The wife, Foley and daughter survived the testator and thereafter died in the order named, the daughter without issue.

Construction:

Foley took an estate in expectancy, to wit, a contingent remainder, which vested in him as a right, according to its character, upon the death of the testator, and which descended to his heirs; so that upon the death of Margaret without issue, the estate vested absolutely in the heirs of Foley and a deed executed by the daughter was inoperative. *Hennessy* v. *Patterson*, 85 N. Y. 91.

(This opinion considers the common law and changes made by statute.)

See Griffin v. Shepard, 124 N. Y. 70 (76), digested p. 342; Knowlton v. Atkins, 134 id. 313 (319), digested p. 315.

NOTE.—It is considered that Margaret took by implication a life estate after the death of her mother. (98, 104.)

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The rule in Shelley's case applied only to the first taker, and would not apply to the gift to Margaret. (98.)

Alternative estates or contingencies with a double aspect were valid at common law. (99, 100.)

Even if Margaret had taken a base or determinable fee, the limitation to Foley would have been good as an executory devise. (99.)

Foley's estate was descendible unless his survivorship was an element of the contingency upon which the estate was limited. (99, 100, 101.)

Under R. S. a fee may be limited on a fee. (100.)

The word "then" in the sentence, "should my daughter M. die without leaving any issue, *then* the said property shall be left to my nephew, John Foley," refers to the event, the happening of the contingency, viz., the death of M. without leaving any issue, and not to the time at which Foley's right should commence.

Distinction between vesting of a right to a future estate and the vesting of the same *in possession* pointed out. (103, 104.)

C. died seized of real estate devised to her by her mother, and leaving a will giving all her estate to her husband for life, remainder to her son T., if he should live until he became of age; if he should marry and die before maturity, leaving a child or children, then such child or children should take; if he died before maturity unmarried and leaving no child, then she gave all the estate given to her by her mother to her two sisters L. (plaintiff) and E.; if either should die, leaving no child, the survivor to take the whole; if both should die leaving a child or children, the share of each parent to go to her child or children; if either should die leaving no child, the child or children of the one who died leaving a child or children to take.

The day following the execution of the will the testatrix died; soon after her husband died; her son T. died under age, unmarried and leaving no child; her sister E. died before T., leaving no child, and leaving by will all her estate to her husband. The action was by plaintiff L. (sister) to compel performance of contract of purchase of such real estate from her.

Construction:

Upon death of C., testatrix, her husband took an estate for life; son T. took a vested remainder in fee, subject to be defeated by his death before majority unmarried and without issue. The clauses following the devise to him speak as of the date of such death (T.'s death) whereupon the absolute fee would immediately vest in the person or persons indicated; there was no unlawful suspension of the power of alienation.

Each sister took an estate in expectancy, that is, a remainder contin-

gent upon the death of the son before maturity, unmarried and without a child, and contingent upon her surviving him.

Upon the death of E., leaving no child, her interest ceased, and the estate in expectancy of plaintiff was enlarged so as to include the whole of the land, which, upon the death of T., ripened into an absolute fee, whereby she could convey a perfect title. *Kelso* v. *Lorillard*, 85 N. Y. 177, aff'g 9 Daly, 300.

Distinguishing Moore v. Lyons, 25 Wend. 119, where words of survivorship referred to the death of the testator and not to the death of the tenant for life.

This case is distinguished in Byrnes v. Stilwell, 103 N. Y. 453, 462.

Y. devised real estate to his son for life, and directed that upon the son's death the land should "be equally divided among his children, should he have any;" if no issue or descendants survived the son, the farm was to be equally divided among "the children of issue" of the testator's brothers and sisters. At the time of proceedings to sell the testator's real estate for the payment of debts, the son and four of his children were living, also several children of testator's brothers and sisters, who were not made parties to the proceeding. The purchaser thereon contracted to sell to plaintiff, who refused to take on account of defect of title.

Construction:

(1) The children of the brothers and sisters were necessary parties to the proceeding to sell the real estate, as they took a good contingent remainder in the land, subject to be defeated if any of the children of testator's son survived. 1 R. S. 724, sec. 16.

(2) the power of alienation was not unduly suspended. *Wilson* v. *White*, 109 N. Y. 59.

Citing Monarque v. Monarque, 80 N. Y. 325; Baker v. Lorillard, 4 id. 257.

Estate limited on death of first remainderman without children. *Avery* v. *Everett*, 110 N. Y. 317, digested p. 278.

An estate was held to be contingent for the reason that the persons to whom the estate was limited to take effect remained uncertain. The children of the testatrix now living might die leaving children who would take in their parent's stead, when the event occurred upon which the precedent estate was terminable. *Dana* v. *Murray*, 122 N. Y. 604–617, digested p. 461.

See generally on this subject, Mullarkey v. Sullivan, 136 N. Y. 227, digested p. 312; Baker v. Lorillard, 4 id. 257, digested p. 91.

A testator by his will devised the residue of his estate to his children, and then pro-

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vided as to the share devised to one daughter, "that in case of her death without issue, that then and in that case such share shall go to my surviving children." The daughter survived the testator, and had children born before his death. The daughter and the other children of the testator joined in a conveyance of a portion of the residuary estate.

Held, that the children of the daughter took no estate in the lands.

That the daughter took an estate in fee with a contingent limitation over.

That even if she took a life estate only, the remainder or future expectant estate was not in her children, but in the surviving children of the testator and was alienable by them. McLoughlin v. Maher, 17 Hun, 215.

Gift to A., contingent upon her death married and without children, or prior to the death of her brother or sister, went over in case A. died married and without children, or unmarried previous to her brother or sister. *Beck* v. *Ennis*, 54 Hun, 126.

A contingent remainder was created to take effect in the event that the persons to whom the first remainder was limited should die under the age of twenty-one years and without leaving lawful issue him or her surviving. *Fowler* v. *Depau*, 26 Barb. 224.

Where the testator, by his will, devised to his granddaughter a house and lot of land from and immediately after his youngest grandchild named in the will attained the age of twenty-one, to hold the same to the granddaughter for life, with remainder in fee to such child or children as might be born of her body; and devised other real estate, in like manner, to his other grandchildren for life, with remainder to their children in fee; and by a subsequent clause of his will, directed that if any of his grandchildren should die without leaving lawful issue at the time of their death, the devise to such grandchild so dying without issue, should vest in the other grandchildren, their heirs and assigns forever; held, that the granddaughter took a contingent estate for life in the house and lot, which became vested in possession when the youngest grandchild of the testator arrived at the age of twenty-one; and that such of the children of the granddaughter as were then in existence, or, if none were then in existence then those who were born afterwards, at their birth, took a remainder in fee, subject to the contingency of their dying without leaving issue living at the death of their mother, and subject also to open and let in afterborn children. *Matter of Sanders*, 4 Paige, 292.

T., by his last will, after giving to his nephews, R., N., S., etc., each £1,000, as they came of age, devised two houses and lots "with every right agreeable to the deeds of the same," to R., to be delivered to him as soon as he came to the age of twenty-one years; and if he died "before he came to age and without male issue," he devised the same to N., "to be delivered to him as soon as he comes to the age of twenty-one years." "The first possessor, as soon as his first male child shall come to the age of twenty-one years, it is my will that the right of the said houses be to him, his heirs and assigns, forever; but not to be disposed of before his eldest son comes to age;" whoever gets the houses, to have no claim to the £1,000, before left him, but his share to be equally divided with the other legatees. R. arrived at the age of twenty-one years, but had no issue.

Construction:

By the words "dying without male issue," R. took an estate tail, by the *English* law, or an estate in fee under our statute; the fee vested in R., on his attaining the age of twenty-one years or having male issue, either event being sufficient for that purpose. *Roosevelt* v. *Thurman*, 1 Johns. Ch. 220.

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Devise to M. "and if he should die, not having any male heir" then over, gives fee on birth of male issue. Graham v. Moore, 13 S. C. 115.

Devise to daughter (only heir at law) and over if she died childless during her minority, as she did. Estate never vested in daughter, and daughter did not take as she would have taken as heir at law. Plant v. Weeks, 39 Mich. 117; Sager v. Galloway, 113 Pa. 500.

5. CONTINGENT LIMITATION IN FAVOR OF PERSONS NOT IN BEING.

Harrison v. Harrison, 36 N. Y. 543; Manice v. Manice, 43 id. 305.

Future contingent limitations of real estate in favor of unascertained persons, especially the issue to be born of a son or daughter of the testator, are not prohibited by the statute. *Harrison* v. *Harrison*, 36 N. Y. 343.

A remainder in fee in real estate, to take effect after the expiration of two lives in being, at the testator's death, may be created in favor of a person not in being at that time; and in such a case a further contingent remainder in favor of a person not in being at the creation of the estate may be limited, to take effect in the event that the person to whom the remainder is first limited shall die under the age of twenty-one years. *Manice* v. *Manice*, 43 N. Y. 303, 376.

6. ESTATES TO A CLASS, AS TO CHILDREN, HEIRS OR ISSUE.

See Vested Estates, sub. 10, Gift to a Class, p. 282.

A devise to a class of persons takes effect in favor of those who constitute the class at the death of the testator, unless a contrary intent be inferred from some particular language of the will or from such extrinsic facts as may be entitled to consideration in considering its provisions.

Campbell v. Rawdon, 18 N. Y. 412. See Vested Estates, p. 282.

(a) A devise of a future estate to heirs, in a strict sense, of a living person is a valid limitation of a contingent remainder during the life of the ancestor. This was a rule at common law, and on principle should be the rule under the Revised Statutes.

Campbell v. Rawdon, 18 N. Y. 412, 417, 418; Cushman v. Horton, 59 id. 149. See pp. 255-258, 282, 283.

(b) There are various decisions to the effect that although the ancestor be living, the persons standing to him in the relation of heirs are the presumptive owners of the remainder and have a vested estate therein, subject to open and let in afterborn children and to be divested as to any members of the class dying during the existence of the precedent estate.

Moore v. Littel, 41 N. Y. 66. See pp. 255-7.

See Vested Estates, p. 282.

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(c) But limitations in wills in favor of the heirs of a living person have been considered to mean appointments in favor of the children of the ancestor named, or his descendants or the particular persons who would be his heirs if he were dead. The word "heirs" is used as synonymous with children or issue.

See pp. 255–7, 282.

(d) But until the birth of a member of the class the remainder is contingent.

Baker v. Lorillard, 4 N. Y. 257.

(e) Where there is a devise and bequest to A. of real and personal estate for life, to go to his heirs in case he die leaving issue, and in case he die without issue to go to a class of persons, if A. die without issue before the testator there is no lapse but the contingent limitation takes effect in favor of those of the class living at the testator's death capable of taking and holding the property.

See *ante*, p. 318.

Downing v. Marshall, 23 N. Y. 366. See Vested Estates, p. 274.

(f) Future contingent limitations of real estate in favor of unascertained persons, especially the issue to be born of a son or daughter of the testator, are not prohibited by the statute.

Harrison v. Harrison, 36 N. Y. 543; Manice v. Manice, 43 id. 305.

(g) Children and grandchildren are words of purchase, and point not at the heritable succession but at individual acquisition.

Baker v. Lorillard, 4 N. Y. 257. See p. 1440 *et seq.*

Devise taking effect in 1807 to B., grandson, of "the use and improvement" of real estate, with power to dispose of the same to B.'s children or grandchildren, and for want of such children or grandchildren the estate should descend to testator's son and his heirs; and by a subsequent clause, this: "I give the use of my house * * * to my grandson and then to his child or children, *as the other real estate is given.*"

Construction:

(1) B. took a life estate and not a fee tail.

(2) Remainder in fee to B.'s children or grandchildren. Until the birth of a child there was a contingent remainder; first born took vested remainder subject to open and let in afterborn children or grandchildren, and subject to be defeated by the exercise of power of appointment.

(3) Executory limitation (devise) over to testator's son, in default of

children or grandchildren by B. at his death, and surviving at his death.

(4) If B. survived his children or grandchildren limitation over to testator's son and heirs would take effect. Wilson v. White, 109 N. Y. 59 (62).

(5) Whether a sale under order of court of chancery could bind afterborn children. *Quære.* See Campbell v. Rawdon, 18 N. Y. 412.

(6) "Children" and "grandchildren" are words of purchase; they "point not at heritable succession but at individual acquisition." *Baker* v. *Lorillard*, 4 N. Y. 257. See p. 1440 *et seq.*

Devise executed in 1819, taking effect in 1832, to B. and C., sons, and D., housekeeper, of land "to them and their heirs, for their use, improvement and equal emolument during their natural lives, and after their decease to the heirs of John Bill." Bill died in 1825, leaving three children who survived the testator.

Construction:

(1) B., C., and D. took life estates as tenants.

(2) The heirs of Bill, *in esse*, took contingent remainder in fee vesting in interest at the death of the testator.

(Before R. S., devise to carry a fee must have express words of inheritance or words that show an intention to carry more than a life estate, or the taker will only get a life estate. 18 N. Y. 416; Harvey v. Olmstead, 1 Comst. 483; 4 id. 56; Edwards v. Bishop, id. 61.)

(3) Devise to a class takes effect at the testator's death in favor of those who *then* constitute the class, unless from the will or extrinsic facts the contrary can be inferred. 1 Jarman on Wills, 286, 287; 1 Eq. Cases Abr. 214; Carne v. Roche, 4 Moore & Payne, 862.

(4) The rule construing the word "heirs" in a will in respect to a living person as merely *designatio personarum* is inapplicable to a devise of a future estate, when the word has its strict legal meaning and carries inheritance, in absence of a contrary intent; unless a contrary intent appears, the testator is presumed to use the words in a technical sense. *Campbell* v. *Rawdon*, 18 N. Y. 412.

Citing, Harvey v. Olmstead, 1 Comst. 489; see Moore v. Littel, 41 N. Y. 66, 92.

NOTE 1.—The contingency may reside in the very fact that the persons described as heirs are uncertain, while the ancestor lives. 18 N. Y. 418; 1 R. S. 723, sec. 13.

NOTE 2.—If the children of Bill had died before Bill, the estate would have gone to his collateral heirs (419). The term included all who could inherit from Bill; it is

nomen collectivum "and it is the same to say heirs of J. S., as to say heirs of J. S. and heirs of that heir, for every particular heir is in the loins of the ancestor, and parcel of him."

NOTE 3.—If Bill had been living at the time of the termination of the life estate, it might have defeated the remainder. (It could not now under R. S. 725, sec. 34.)

Devise and bequest to B., son, for life, then to his heirs, in case he died leaving issue. Bequest to executors in trust to apply income to B.'s support for life, "and if he should die leaving lawful issue, then to pay the principal to such issue." (The will elsewhere referred to this as a part of B.'s estate.) In subsequent portion of the will provision that if B. should die without lawful issue "all the real and personal estate above devised and bequeathed to him was to go to" nephews. B. died before the testator, without issue.

Construction:

1. The contingent limitation took effect in favor of nephews, etc., both as to property devised directly to B., and that which was given in trust for him.

2. When one of a class can not take, as for alienage, the others capable of taking take all.

3. When none can take, estate descends to heirs.

4. Death of B. did not refer to death *only* after death of testator.

Downing v. *Marshall*, 23 N. Y. 366.

If the person primarily designated dies during a trust term lawfully constituted in respect to its duration, the statute permits the use to be shifted to some other object of the testator's bounty; and it is not necessary that such person should be in existence at the time of creating the trust.

Future contingent limitations of real estate in favor of unascertained persons, especially the issue to be born of a son or daughter of the testator, are not prohibited by the statute. *Harrison* v. *Harrison*, 36 N. Y. 543, digested p. 420.

Distinguishing Amory v. Lord, 9 N. Y. 543.

Remainder in fee of real estate upon the termination of two lives in being at the creation of the estate, may be limited to a person not in being at that time, and a further contingent remainder in favor of a person not in being at the creation of the estate may be limited to take effect in the event that the person to whom the first remainder is first limited shall die under the age of twenty-one years; thus to C. for life, remainder to C.'s children unborn (may be at the creation of the estate),

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if child die under age to its issue (may be unborn at creation of the estate). *Manice* v. *Manice*, 43 N. Y. 305, digested p. 423.

Bequest of use and profits to B. for life, after his death the principal to the heirs of C. C. survived testator and B. Estate did not vest until on the death of C. it was determined who his heirs were. *Cushman* v. *Horton*, 59 N. Y. 149, digested p. 1445.

See, Lawton v. Corlies, 127 N. Y. 100, 108; Heath v. Hewitt, 127 id. 166, 172; Heard v. Horton, 1 Denio, 165; Montignani v. Blade, 145 N. Y. 111, 122.

Devise in remainder to children of C. now in existence or afterwards to be born, who should be living at the happening of a specified contingency, creates a contingent and not vested remainder, for, as devisees are not all in existence when devise takes effect, remainder can not vest at that time. Intention of testator prevails over unwillingness of law to create a contingent remainder. Stephens v. Evans, 30 Ind. 39; following 38 Mass. 311, and distinguishing 21 Pa. 504; 7 Monr., Ky., 623; 25 Wend. 115; 2 Denio, 9; 34 Barb. 388; 25 N. H. 459.

The common law rule that devise to a class takes effect in favor of those constituting the class at death of testator, is modified so that when an estate is devised to the children or other relatives of testator, the lineal descendants of a devisee who dies before testator take the share of their ancestor. Jamison v. Hay, 46 Mo. 546.

Devise to wife "to hold at her pleasure" during life or widowhood, then to be divided between children alive or their bodily children, is a contingent remainder to children alive when the will was made. DeLassers v. Gatewood, 71 Mo. 371.

When remainder is limited to persons not *in esse*, or not *ascertained*, as where it is limited so as to require the concurrence of some dubious uncertain event, independent of the termination of the precedent estate and duration of the estate limited in remainder, to give it a capacity of taking effect, the remainder is contingent. Sager v. Galloway, 113 Pa. 500; Mercantile Trust and Deposit Co. v. Brown, 71 Md. 166.

Devise to husband for life and after his death to stepchildren, naming them, gives vested interest, and clause that in case of death of both stepchildren without issue, over, does not make remainder contingent, but only subject to be divested upon a future contingency. Pa. Ins. Co.'s App. (Pa.), 1 Cent. 551; 109 Pa. 489.

Devise to son for life and after his death to his lawful issue then living, and in default of issue to residuary legatees, gives residuary legatees contingent remainder. Faber v. Potice, 10 S. C. 376.

Devise for life with remainder to any children living at her death, and in default to her brothers residing in this state. Devisee never had children, but brothers living in state at testator's death and her own death. Limitation to brothers was contingent. McElwee v. Wheeler, 10 S. C. 392.

Devise to H., and if she died before her husband, over to such of children as should be alive. A. took for life of husband and there was a contingent remainder to children. Security Co. v. Hardenberg, 53 Conn. 169; 1 N. E. 269.

7. LIMITATION OVER TO ISSUE OF CHILD DYING BEFORE DISTRIBUTION.

See Vested Estates, sub. 5.

Estates vested, when conversion of realty was to take place on death of life tenant. *Vincent* v. *Newhouse*, 83 N. Y. 505, digested p. 930.

Citing, Teed v. Morton 60 N. Y. 502; Matter of Baer, 147 id. 354; Delaney v. McCormack, 88 id. 174 (183); Shipman v. Rollins, 98 id. 325.

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7. LIMITATION OVER TO ISSUE OF CHILD DYING BEFORE DISTRIBUTION.

In case of the death of any child before the testator, the will gave 'such legacies, estates, share or proportion of the one so dying unto his, her or their lawful issue, such issue to take the estate or share his, her or their parent would have been entitled to if living."

The limitation over to the issue of any child dying before the distribution, was the limitation of a future contingent estate to such issue, but the ultimate vesting of the several legacies given primarily to the sons and daughters, could in no event be postponed longer than the life of the parent. On the death of any son or daughter before distribution, leaving issue, the share of the one so dying would immediately vest in such issue, and if there was no issue, it would go to his or her next of kin. See, Norris v. Beyea, 13 N. Y. 273; Trustees, etc., v. Kellogg, 16 id. 83. *Robert* v. *Corning*, 89 id. 241.

8. ESTATE VESTING AT TIME OF PAYMENT, DIVISION OR DISTRIBUTION.

See Vested Estates, Subds. 4, 5.

Notwithstanding the rule obtaining respecting a present gift vesting with the time of payment or possession postponed, as stated under Vested Estates, p. 260, yet where the only gift is a direction to executors or trustees to pay or distribute at a future time, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is the essence of the gift, and until the happening of the future event it must necessarily remain uncertain whether the gift would exist at all and hence it is contingent.

Smith v. Edwards, 88 N. Y. 92, 103, 104; Warner v. Durant, 76 id. 133, 136; Delaney v. McCormack, 88 id. 174, 183; Vincent v. Newhouse, 83 id. 505, 512; Hobson v. Hale, 95 id. 588, 613; Shipman v. Rollins, 98 id. 311; Delafield v. Shipman, 103 id. 463, 467, 468; Magill v. McMillan, 23 Hun, 193: Matter of Baer, 147 N. Y. 348. See Quackenbos v. Kingsland, 102 id. 128. See Matter of Cameron, 76 Hun, 429; Shangle v. Hallock, 6 App. Div. 55; Fargo v. Squires, id. 485.

F., by his will devised certain real estate to his widow for life, and directed the executors to sell sufficient of his other real estate to provide a fund to be invested so as to produce a specified annuity to be paid her during life, etc., and after the widow's death he authorized the executors to sell the residue of the real estate, add the proceeds to the amount invested, and after paying therefrom certain items specified he directed that the balance be "then" divided into eight parts, four of which he gave to certain religious associations not then incorporated, the language of the will showing that the testator was aware of this fact and contemplated a future incorporation; after his death, but before the death of the widow, the said associations were duly incorporated.

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Construction:

The legacies so given did not vest until the death of the widow and the creation of the fund provided for; and, as the beneficiaries named were then capable of taking, the bequests were valid.[1]

Also, it was sufficient if the legatees were so described that they could be ascertained and known when the right to receive the legacies vested.[2] *Shipman* v. *Rollins*, 98 N. Y. 311, rev'g 33 Hun, 89.

See, Warner v. Durant, 76 N. Y. 136; Vincent v. Newhouse, 83 id. 511; Smith v. Edwards, 88 id. 92; Delaney v. McCormack, id. 174; Hobson v. Hale, 95 id. 588; Delafield v. Shipman, 103 id. 463; Matter of Denton, 137 id. 428, digested p. 361.

G., by will, gave real and personal property to his executors in trust to pay to his daughter Emeline the rents and income thereof, and in case of her death leaving issue, to convey the remainder to her child or children and his or her heirs. Thereafter the will provided that in case of the death of Emeline without children, or issue, or descendants, but leaving her sister Matilda surviving, the trustees should apply the rents and income for the benefit and support of Matilda during her natural life, and upon her death convey the remainder "to the children and lawful heirs of my brother Harmon Hendricks, deceased, to share and share alike *per stirpes*."

Emeline died intestate and without issue, March 20, 1885, and Matilda died December 6, 1893. Harmon Hendricks died before the testatrix, leaving ten children surviving, who were all alive at the death of the testatrix, but all of them died before Emeline, some leaving wills under which any interest in the real estate in question which vested in them upon the death of the testatrix would pass.

In a partition action none of the devisees of these children were made parties, but all the persons who answered the description of living heirs of Harmon Hendricks at the date of the death of Matilda, on December 6, 1893, were brought in and bound by the judgment.

Construction:

The testatrix did not intend that the remainder should vest upon her death in the then living children and heirs of her brother, but should be postponed until the time for division and distribution arrived, and then to vest in such persons as answer the description who survived.

[1]Vincent v. Newhouse, 83 N. Y. 505; Hoghton v. Whitgreave, 1 Jac. & Walk. Ch. 145; Power v. Cassidy, 79 N. Y. 602; Savage v. Burnham, 17 id. 561; Manice v. Manice, 43 id. 303; Warner v. Durant, 76 id. 136.

[2]Holmes v. Mead, 52 N. Y. 332; Lefevre v. Lefevre, 59 id. 434; Burrill v. Boardman, 43 id. 254.

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The children of her brother were to take no interest whatever except upon the contingency of her daughter's death without issue. In the case of her daughter leaving issue, such issue would take the remainder absolutely. *Matter of Baer*, 147 N. Y. 348.

From opinion.—"Where final division and distribution is to be made among a class the benefits of the will must be confined to those persons who come within the appropriate category at the date when the distribution or division is directed to be made. Bisson v. W. S. R. R. Co., 143 N. Y. 125; Goebel v. Wolf, 113 id. 405-411; Teed v. Morton, 60 id. 506 In re Smith, 131 id. 239, 247. In such cases the gift is contingent upon survivorship, and if it vests at all before the date of distribution it is subject to be divested by the death before that time of a person presumptively entitled to share in the distribution. While this rule is sometimes made to yield to indications of a contrary intent in the will, yet it may be said to be a general rule and there is nothing to be found in the will in question to prevent its full application.

"Moreover, there is not in this devise any words of direct and immediate gift to the children or heirs of the brother, but a direction that the trustees should convey to them at a future time on a certain contingency. They were to take through the medium of a power in trust, and the time of the vesting of the interest was thus deferred in form, at least, until the time of distribution."

It is a case then where, as the cases express it, "futurity is annexed to the substance of the gift," and warrants the application of the principle that where a future interest is devised not directly to a given person, but indirectly through the exercise of a power conferred upon trustees, the devise is designed to be contingent, and survivorship at the time of distribution is an essential condition to the acquisition of an interest in the subject of the gift. This rule has been applied in numerous cases that do not differ essentially in the material facts from the one at bar. Smith v. Edwards, 88 N. Y. 92; Delaney v. McCormack, id. 174; Warner v. Durant, 76 id. 136; Vincent v. Newhouse, 83 id. 511; Delafield v. Shipman, 103 id. 463; Hobson v. Hale, 95 id. 588.

The will of the testator, having devised all his estate both real and personal to executors in trust, further directed that they collect the income therefrom and distribute it equally to his children until certain of them became of age, whereupon the whole estate was to be converted into money and divided equally between his said children; in case any child die before such period leaving issue, such (latter) child to take the share its parents would have taken if living. The shares in the estate did not become vested until the period of distribution and consequently the share of one having died previously thereto without leaving issue, never having vested, was to be divided among the survivors. *Magill* v. *McMillen*, 23 Hun, 193.

Devise to be divided into two equal parts for two grandchildren of testatrix; income to be paid each until thirty; then one-half principal to each; then income on balance until thirty-five, then balance of principal to be paid. Legal title vested in trustees and if beneficiary died before time limited for payment he lost the sum to be then paid and remainder took effect. Re Ridgway, 4 Redf., N. Y., 226.

J. P., by will, devised the residue of his estate to executors, in trust to pay rents to wife until his youngest child came of age. In case the youngest child came of age during the wife's life, the executors were to sell and after reserving an annuity for the wife, to divide the residue equally among his nine children, or else to make a similar division by partition. In case the youngest child came of age after the wife's death, then a sale and division equally among the nine, or else a partition and

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similar division. "And in case any of my children shall die after me, and after having attained the age of twenty-one years, then the share, portion or interest of the child so dying shall go to the heirs, devisees or legal representatives of the child so dying." There was a declaration that the provision to the widow was in lieu of dower. All the nine children survived the testator, and attained their majority; but four died afterwards and before the youngest had come of age. These were, (1) H., who left infant children and a husband, who administered and became their general guardian; (2) B., who died intestate, leaving a widow and two infant children; and one C. administered upon his estate; (3) J. P., Jr., who left a widow and will, and gave all to her; and (4) G., who died intestate, without issue and unmarried, and his brother R. administered. The mother, wife of the testator, was alive. The executors had sold the estate.

Construction:

The nine children did not take vested interests until the youngest was of age. *Drake* v. *Pell*, 3 Edw. Ch. 266.

When lands are to be equally divided among children when the youngest attains a majority, the proceeds of property to be used meantime to support wife and children, there is no vesting until youngest is of age. Kingman v. Harmon, 131 Ill. 171.

When payment of a legacy was at a future time, or upon happening of contingent event, there being no provision for vesting legacy at present, the future time or happening of the contingency is the essence of the gift, unless contrary intent be shown, as by directing the application of the interest accruing on the fund in the interim to the use of the legatee. Willett v. Rutter, 84 Ky. 317.*

Legacy, if legatee survive probate and codicil; if he dies before payment, over, goes over if he dies before payment. *In re Spencer*, 5 N. Eng. 326; R. I. Index B. B. 25.

Devise to trustees to pay annuities and after "final cessation" of annuities to make distribution. *Held*, estate did not vest in distributees until time fixed for distribution, and trustees could not hasten time by purchasing annuities, nor could annuitants assist the earlier distribution by accepting a gross sum in payment of their interests. Hamilton v. Rodgers, 38 Ohio St. 242.

Devise in trust for ten years, at the end of that time to vest in and be distributed among his three sons and their heirs, but if either should die leaving no issue, over to survivors; estate did not vest for ten years, and widow of son dying before took no interest. Blanchard v. Maynard, 103 Ill. 60.

9. DEVISE TO B. FOR LIFE, REMAINDER TO B.'S ELDEST SON, VESTS IN B.'S ELDEST SON AT HIS BIRTH, p.

See Vested Estates, sub. 6.

Devise to B. for life, remainder to B.'s eldest son, creates a contingent remainder until the birth of B.'s eldest son before the termination of the life estate, when the remainder becomes vested. See Vested Estates, p. 274.

Devise for life to B.; remainder in tail to B.'s eldest son.

Construction:

(1) Remainder was contingent until the birth of B.'s eldest son, before the termination of the life estate, when it became vested.

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(2) Estate tail, although a future estate, was changed by act of 1786 abolishing entails into fee, and, upon death of B.'s eldest son, descended to his heirs. *Wendell* v. *Crandall*, 1 N. Y. 491; s. c., 2 Denio, 9. See Lawrence v. Bayard, 7 Pai. 70.

Where land is devised to one for life, remainder to his oldest surviving son in fee, the remainder, during the continuance of the particular estate, is contingent; and a quit claim deed of the land, made by the oldest son of the tenant for life, in his father's lifetime, will not convey the contingent remainder; nor will the oldest son, if he survive the father, be estopped by the deed from claiming under the limitation in remainder.

But if the oldest son of the tenant for life make a deed before his father's death, purporting to convey his contingent interest under the devise, and in the deed covenant against all claims made by or under him, he will be estopped by his covenant to claim the land at the death of his father, and the estoppel will operate to convey the remainder to his grantee. Robertson v. Wilson, 38 N. H. 48.

Devise of specified land to W. for life and W.'s oldest male heir and his heirs and assigns after W.'s death, and residue of estate to W. and C. jointly. After testator, W.'s son died; then W.'s daughter, both children without issue. The devise to W.'s oldest male heir was contingent and land passed under residuary clause. *Alverson* v. *Randall*, 13 R. I. 71.

10. ESTATES ON CONTINGENCY OF PREVIOUS TAKER DYING UNDER A CERTAIN AGE.

Watts v. Ronald, 95 N. Y. 226. See Vested Estates, p. 274.

(a) Estates contingent on taker arriving at a certain age.

Emmons v. Cairns, 2 Sandf. Ch. 369; Jackson v. Winne, 7 Wend. 47. See Fargo v. Squiers, 6 App. Div. 485; Matter of Lehman, 2 id. 531.

J., by will, gave a sum equal to about one-third of her estate to her husband, and use and benefit of residue until M. S., her oldest daughter, became of age; and directed then that such residue should be divided equally between her daughters M. S. and M. each to come into possession of her share at the age of twenty-one, the husband to have the use of M.'s share until her arrival at that age. In case of the death of either of the daughters, before arrival at the said age, "the one living shall receive the share of the one deceased, but in the order of the ages as above described." In case of the death of the two daughters before said age, their respective shares should be divided equally between the testator's "brothers and sisters, or their immediate heirs, but in the order above mentioned." M. S. died unmarried intestate after she arrived at the age of twenty-one, and thereafter and before such age M. died.

Construction:

The share of M. S. passed upon her death, to her next of kin, but the

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share of M. went to the brothers and sisters of the testatrix. *Watts* v. *Ronald*, 95 N. Y. 226.

From opinion.—"The phraseology of the will, 'in case of the death of my two daughters before they arrive at the age of twenty-one years,' of itself would seem to import that both the daughters must die before arriving at full age in order to entitle the brothers and sisters of the testatrix to a share in her estate, but if taken literally the words are susceptible of the interpretation, that as one of the daughters did die before arriving at the age of twenty-one years, the death of both of them did happen before both of them arrived at that age. * * * * As one of them did not live until that time and as literally both did die before both arrived at the age of twenty-one years, it would seem to be a fair and legitimate inference that the testatrix meant that the interest of the one who did not arrive at full age before her decease should pass to her own brothers and sisters."

A testator gave to his wife for life all the income, rents and profits of his real and personal estate; and after her death gave the like interest to T. for life, out of which she was to support three infants, W., J. and E. Next, he gave the whole rents and income after her death to W., J. and E., for life, as joint tenants; and then gave the residue of his estate to E. absolutely and in fee, first providing for her fifty thousand dollars when she should arrive at age. Then followed a provision that if E. should die without children or issue, that the whole residue of his estate should go to his cousins.

Construction:

The legacy of fifty thousand dollars to E. was contingent on her attaining her full age. *Emmons* v. *Cairns*, 2 Sandf. Ch. 369.

Will devised real estate to three sons, adjudged to be illegitimate, "if they should live to come of age," during their minority the property went to the *heir at law*, though it seems that the heir in such case takes only as *trustee*, and not in his own right. *Jackson* v. *Winne*, 7 Wend. 47.

11. FEES LIMITED ON FEES.

See, Vested Estates, sub. 12.

A contingent remainder in fee may be limited on a remainder in fee. Manice v. Manice, 43 N. Y. 305; Radley v. Kuhn, 97 id. 26; Nellis v. Nellis, 99 id. 505.

A contingent remainder in fee may be limited on a remainder in fee. Manice v. Manice, 43 N. Y. 305, digested p. 423.

Devise to executors in trust to receive rents and profits and therefrom pay $700 to each of two grandsons when of age, in case of the death of either, to the survivor; trust to continue until testator's son C. became twenty-five years of age, when he was to have net income less the $1,400 for life; if he left children, estate to become theirs in fee when of age. C., as owner of the next eventual estate, took surplus of the income arising during trust term; C.'s children, if any, would take

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fee, and in case of their death under age, the fee would vest in their heirs; if C. died without issue, the fee would vest in testator's heirs.

Had there been a contingent remainder, limited on the fee, to take effect in case of the first devisee dying before twenty-one, the estate would have vested in the first devisee, defeasible by condition subsequent; Manice v. Manice, 43 N. Y. 380; Roome v. Phillips, 24 id. 463; and suspension of the absolute power of alienation during the minority of the first remainderman would be authorized by statute. (1 R. S. 723, sec. 16; Real Prop. L. sec. 32.) *Radley* v. *Kuhn*, 97 N. Y. 26, digested p. 443.

Hennessy v. Patterson, 85 N. Y. 91, digested p. 321.

A devise was good as a contingent limitation on a fee. *Nellis* v. *Nellis* 99 N. Y. 505, digested p. 352.

Jackson v. Blansham, 3 Johns. 291.

12. ALTERNATIVE LIMITATIONS.

Two or more future estates may be created, to take effect in the alternative, so that if the first in order shall be void or fail to vest, the next in succession shall be a substitute for it and take effect accordingly.

Schettler v. Smith, 41 N. Y. 328; Manice v. Manice, 43 id. 305; Kiah v. Grenier, 56 id. 220; Hennessy v. Patterson, 85 id. 91, 89, 100; Savage v. Burnham, 17 id 561; Post v. Hover, 33 id. 593, 598; Henderson v. Henderson, 113 id. 1; Cruikshank v. The Home, id. 357; Jarman on Wills, 3d Am. ed., 269; Lewis on Perpetuities, 501–2; Dana v. Murray, 122 N. Y. 604; Purdy v. Hayt, 92 id. 446; Hennessy v. Patterson, 85 id. 91.

13. ESTATES LIMITED ON MORE THAN TWO SUCCESSIVE LIFE ESTATES.

Estates limited on more than two successive life estates. Section 33 of the Real Prop. L., *post*, p. 365, provides that "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 upon the death of those persons the remainder shall take effect, in the same manner as if no other life estates had been created." This section has reference to vested estates only, and not to a contingent remainder limited on more than two successive life estates upon an event that may not be terminable within the first two lives, is void. *Amory* v. *Lord*, 9 N. Y. 403, 419, digested p. 412.

D., by will, gave his real estate to his sisters J. and C. "during their respective lives," and after their deaths directed it to be sold by the

executors, the proceeds to be invested, and the income to be paid by them to E. for her life, and the principal to be divided equally among any children "she may leave;" if none, then the principal to go to other persons. The two sisters and E. survived D. J. died before C. and E. survived them.

Construction:

Sisters took, as tenants in common, life estates with cross remainders; each took a distinct and several freehold for life in one-half of the farm. The remainder given to the children of E. was contingent.

Upon the death of J. and the consequent termination of her life estate, a second life estate vested in C., and upon her death the limit of the estate, as to that share, was reached, and hence the third attempted life estate in E. was void.

The remainder, as to the one-half in which J. had a life estate, to E.'s children or others could not take effect at the death of C., because it could not be ascertained until the death of E. who would take, and hence the remainder was void, and the title to the undivided half of the land, subject to the power of sale, descended to the heirs at law. In re Ryder, 11 Paige, 185; Savage v. Burnham, 17 N. Y. 571; Carmichael v. Carmichael, 4 Keyes, 346.

The devise to E. was valid as to the share of C., as upon her death but one life estate therein had run, and she was entitled to the income from one-half of the proceeds during life, and the remainder limited thereon was valid.

A remainder in fee is not invalid because limited in favor of persons not in being when the limitation is created, or not ascertainable until the termination of the precedent estate, provided the contingency upon which it depends must happen within or not beyond the prescribed period for the vesting of estates. Gilman v. Reddington, 24 N. Y. 9; Manice v. Manice, 43 id. 303; *Purdy* v. *Hayt*, 92 id. 446.

See Dana v. Murray, 122 N. Y. 617-618.

Where, by a devise, a remainder is limited upon three or more successive estates for life, all the life estates subsequent to the first two are void, but their illegality does not affect the prior ones; these, by necessary implication from the statute in relation to the division and creation of estates (1 R. S. 721, sec. 17), are valid, and the remainder takes effect upon their expiration, in the same manner as if no other life estates had been created.

18. CONTINGENT ESTATES—CASES.

13. ESTATES LIMITED ON MORE THAN TWO SUCCESSIVE LIFE ESTATES.

The will provided as follows: "The whole of my property, personal as well as real estate, stock and everything else, I give to my wife during her lifetime. My estates, rights and titles are to be in the occupancy of my daughter, Rose Ellen, and her husband, for the benefit of the family. After the death of the mother, my estate is to go to Rose Ellen, with the appurtenances thereof. In case she has no children, and should die before her husband, he is to have the benefit of it during his lifetime. At his death it is to be divided equally among the rest of my children. In case Rose Ellen has children, it is secured to her and to them forever." *Woodruff* v. *Cook*, 61 N. Y. 638; 47 Barb. 304.

Distinguishing Amory v. Lord, 5 Seld. 403.

From opinion.—"The will in question contained a provision for the creation of a third estate for life in the husband of Rose Ellen Cook after her death on the contingency of the happening of that event without having had children, if he survived her. That provision was unauthorized and void, as is declared by said section 17, but its illegality did not affect the prior life estate of the widow of the testator, or of Mrs. Cook. On the contrary, their validity was recognized and necessarily implied by the declaration, that the remainder intended to be limited on the third estate for life (declared void) should, upon the death of the two persons first entitled to such an estate, take effect in the same manner as if no other life estate had been created. In other words, the will was to be construed as if the devise to the husband of Mrs. Cook had not been contained therein, and that the remainder, in case of her death, without having had children, should, immediately on the happening of that event, be divided equally among the other children of the testator. It is evident from the terms of the will that Mrs. Cook was to be entitled to an estate during her life after her mother's death, and that the testator's other children were only to acquire an estate—'to be divided equally' among them—on the death of Mrs. Cook, and then only in case she had no children. * * *

"The views above expressed and the decision herein of the court below are not inconsistent with the decision in Amory v. Lord, 5 Seld. 403, cited and relied on by the appellants' counsel. There the devise by the testator of his estate was to trustees for the purposes of the will—in trust, among other things, to receive the rents and profits of the real estate and apply them to the use of the beneficiaries provided for during the continuance of a term that, as was said by Judge Gardiner, 'endured, and was intended to endure, for three lives at least,' and therefore, contravened the provisions of the statute, which declare that the absolute power to sell real estate shall not be suspended by any condition or limitation whatever for a period longer than two lives in being at the creation of the estate, and was consequently void. The parties there entitled to the rents had no *legal estate* in the land from which they were to be paid, but were to receive them from the trustees to whom the property was devised, and 'through the trust;' and it is well stated in the headnote of that case, as a result of the opinions therein, that 'by said devise the widow and children of the testator, and their surviving wives and husbands, did not take successive *legal estates*, in which case the first two would be valid and the others void; but mere *equities*, all dependent upon the trust, which, being void, the equitable interests all failed.' That important distinction between the cases not only shows that the decision in that case is not adverse to, but in entire harmony with, that of the court below in the case at bar."

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14. REMAINDER TO LIFE TENANT IN THE EVENT OF MARRIAGE AND ISSUE.

Delaney v. McCormack, 88 N. Y. 174.

Devise to J., son, for life and in fee in case J. married and had issue; if J. died without having had lawful issue, direction that executors should sell real estate and distribute proceeds among testator's "next of kin and personal estate according to the laws of the state of New York," etc. Testator left J., also a nephew, and four nieces surviving him; the nieces died leaving children before J., who died without having had issue.

Construction:

1. The executors took an imperative power in trust to sell or distribute as directed, and upon death of surviving trustee the court could appoint person to execute the power.

1 R. S. 732, secs. 74, 77; 1 R. S. 734, secs. 94, 96.

2. The "next of kin" were those who were so at the time of distribution,[1] viz., at the death of J., as the gift was money and as the direction for conversion was absolute, and the nephew was such "next of kin."

3. J. took a base fee (which the opinion states as the preferable construction) or a life estate and remainder, contingent on the birth of issue. *Delaney* v. *McCormack*, 88 N. Y. 174.

15. ESTATES DEPENDENT UPON FIRST TAKER'S MARRIAGE.

See Vested Estates, sub. 13.

By the will of D., who died in 1869, his widow took a fee in certain real estate, determinable upon her remarriage, his infant daughter C., a contingent remainder in fee, depending upon such remarriage. *Dodge* v. *Stevens*, 105 N. Y. 585; s. c., 94 id. 209.

Rev'g 40 Hun, 443.

Devise to a widow so long as she remains unmarried—the estate vests in the remainderman on the day of her marriage. *Aldrich* v. *Funk*, 48 Hun, 367.

16. CONTINGENT REVERSIONS. See p. 231.

A general residuary devise carries every real interest of the testator whether known or unknown, immediate or remote, unless it appears to be manifestly excluded by other parts of the will; the presumption to include obtains.

K., by will, after certain specific legacies, gave all the residue of his property and estate, real and personal, of every name, nature and des-

[1] Warner v. Durant, 76 N. Y. 136; Smith v. Edwards, 88 id. 92; Vincent v. Newhouse, 83 id. 511; Teed v. Morton, 60 id. 506; Matter of Young, 145 id. 538.

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cription whatsoever to his executors, in trust, to receive and pay over the income, less expenses, etc., to the testator's wife for life, and upon her death "to assign, transfer and set over" all his "real estate" not therein and thereby disposed of, to appointees of his wife, and in default of appointment by her, to her heirs at law. Upon the death of his wife he devised certain premises to two devisees named for life, and upon their deaths respectively to their "issue then surviving, and the issue of such of them as may have then departed this life." The two devisees died after the testator, unmarried and without issue.

Construction:

The two devises did not dispose of the whole estate of the testator in the lands, but there was left in him a contingent reversion in fee expectant upon the termination of the life estate and the failure of issue of the life tenants, which, upon their deaths without issue, was changed into an absolute fee, which not having been specifically disposed of, went to the appointees of the testator's widow, and the testator's heirs at law took nothing. *Floyd* v. *Carow*, 88 N. Y. 560.

17. CONTINGENT REMAINDERS TO BROTHERS AND SISTERS—WHEN HALF BLOOD DO NOT TAKE.

H. left surviving him six grandchildren; he bequeathed to each $10,000 to be paid on their attaining respectively the age of twenty-five. "In the event of the decease of either of the said grandchildren prior to attaining the age of twenty-five," the will provided that "the share of such deceased shall be equally divided between the surviving grandchildren." R., who was a widower at the time of his father's death, thereafter married and had two children born before the death of E. *Held*, that said two children were not entitled to share in the legacy given to E., but that the gift was to the survivors of the six legatees. *Matter of Smith*, 131 N. Y. 239.

See Wood v. Mitcham, 92 N. Y. 375, digested p. 231.

18. LIMITATION OVER IN DEFAULT OF EXERCISE OF POWER OF DISPOSITION BY FIRST TAKER.

Crooke v. County of Kings, 97 N. Y. 421; Dana v. Murray, 122 id. 604; Delafield v. Shipman, 103 id. 463; Delaney v. McCormack, 88 id. 174.

See, Vested Estates, subs. 16 and 17.

In case a power of disposition was not exercised by life tenant, a remainder vested in her children at her death—this is an executory devise at common law, or a contingent remainder, or conditional limitation un-

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der Revised Statutes. *Crooke* v. *County of Kings*, 97 N.Y. 421, digested p. 444.

Citing, Pell v. Brown, Cro. Jac. 590; Jackson v. Edwards, 22 Wend 498; Chrystie v. Phyfe, 19 N. Y. 345; Gilman v. Reddington, 24 id. 16; Terry v. Wiggins, 47 id. 512, 518.

Remainder limited on a life estate in a deed of trust, contingent upon the failure of grantor to execute a power of appointment reserved in the deed, took effect by failure to make a valid execution of such power. *Dana* v. *Murray*, 122 N. Y. 604, digested p. 461.

See, Hillen v. Iselin, 144 N. Y. 365, 376; Purdy v. Hayt, 92 id. 446; Hawley v. James, 5 Paige, 318.

19. CONTINGENT INTERESTS OF PERSONS, BENEFICIARIES, IN PROPERTY HELD BY TRUSTEES UNDER AN EXPRESS TRUST—WHETHER NECESSARY PARTIES TO ACTION FOR FORECLOSURE.

Trust to pay income to grantor and at her death to "convey the said lands and every part of them in fee simple" to her children "living at her decease and the surviving children of such of them as may be dead," conferred no interest in the estate during the grantor's life upon any member of the class of intended beneficiaries and so they were not necessary parties to a foreclosure of a mortgage existing at the time of the grant. *Townshend* v. *Frommer*, 125 N. Y. 446.

Followed in Curtis v. Murphy, 129 N. Y. 645, distinguished in Knowlton v. Atkins, 134 id. 313, 317; Campbell v. Stokes, 142 id. 23, 30.

But see Mead v. Mitchell; 17 N. Y. 210 Moore v. Appleby, 108 id. 237, aff'g 36 Hun, 368; Jenkins v. Fahey, 73 N. Y. 355; Jordan v. Poillon, 77 id. 518; Lockman v. Reilley, 29 Hun, 434; Williamson v. Field, 2 Sandf. Ch. 533. See p. 282, 315.

20. EXPECTANT CONTINGENT ESTATES ARE ALIENABLE AND DESCENDIBLE.[1]

Hennessy v. Patterson, 85 N. Y. 91, 103; Moore v. Littel, 41 id. 66. See p. 251.

See also Luffbarrow v. Koch, 75 Ga. 448; Buck v. Lantz, 49 Md. 439; Freeholders v. Henry, 3 Cent. 686; Halstead v. Westervelt, id. 466; 41 N. J. Eq. 100; Mathews v. Paradin, 74 Ga. 523; Wickersham's Appeal, 1 Cent., Pa., 425; Saint Clara F. Academy v. Sullivan, 116 Ill. 375; Loring v. Arnold, 15 R. I. 428; 3 N. E. 527.

When specific realty, which is subject to a mortgage, is devised or conveyed to a trustee to be converted into money at a future day, and divided between specified persons, they have a vested and equitable interest in the subject of the trust and are necessary parties to an action for foreclosure of the mortgage; but where the interest of such persons is contingent, they are not necessary parties to such an action. *U. S. Trust Co.* v. *Roche*, 116 N. Y. 120, 130.

C., by his will, devised one-third of his real estate to his son J., one-

[1] See, also, Pickert v. Windecker, 73 Hun, 476; but see Johnston v. Spicer, 41 N. Y. 42.

third to his son J. C., and the remaining other third to J. C., provided he should survive his wife or should have a lawful child who should live to the age of twenty-one; in case neither of these events happened, then he gave the said one-third to J. J. deeded all his estate, right and interest in certain premises of which the testator died seized to J. C.; the latter died before his wife, and he had no child who lived to the age of twenty-one.

Construction:

J. had a future expectant estate in the one-third, not absolutely devised to him or his brother, which was alienable, and this estate, with the one-third absolutely devised to him, was conveyed by his deed to J. C. 1 R. S. 723, sec. 10; 725, sec. 35. *Griffin* v. *Shepard*, 124 N. Y. 70, aff'g 40 Hun, 345.

From opinion.—"The contention upon the part of plaintiff is that the interest or estate of Joseph was a mere possibility, and so not alienable. The contention of the defendants is that the estate of Joseph was an expectant estate and so alienable under sec. 35, ch. 1, title 2, part 2, R. S., which provides that 'expectant estates are descendible, devisable, and alienable in the same manner as estates in possession.' Lawrence v. Bayard, 7 Paige, 76; Pond v. Bergh, 10 id. 140; Beardsley v. Hotchkiss, 96 N. Y. 201, 213, 214; Crooke v. County of Kings, 97 id. 421, 449; Ham v. Van Orden, 84 id. 257, 270; Miller v. Emans, 19 id. 384.

"The question for solution, therefore, is, what was the character of the estate in this one-third devised to Joseph upon the failure of these contingencies to occur?

"The chapter of the Revised Statutes above referred to contains the definitions and nomenclature of the various estates in land. 'An estate in expectancy is where the right to the possession is postponed to a future period. Sec. 8, R. S., *supra;* Ham v. Van Orden, 84 N. Y. 257. Judge Danforth, in the opinion in that case, says: 'It does not seem necessary to determine whether an interest at once vested in her, or whether time and the happening of the specified event were of the substance of the gift, and prevented it from vesting until the event happened. In either case she acquired an interest (R. S. 723, art. 1, title 2, part 2, ch. 1, sec. 10), although the right to possession was postponed to a future period and depended upon the contingency of the death of Wessel without children. This did not prevent the creation of the estate, but rendered it liable to be defeated. Art. 1, ch. 1, title 2, part 2, vol. 1, R. S. 725, sec. 31. It was an estate in expectancy (sec. 9, p. 725, id.), however, and could not be destroyed by any alienation, or other act of Wessel or his trustees (sec. 32, id.), and upon his death, without children, would become absolute in the plaintiff. It was, therefore, alienable by her to the same extent as if in possession (sec. 35, id.), and whether it be deemed vested or contingent.' Moore v. Littel, 41 N. Y. 66; Crooke v. County of Kings, 97 id. 421; Hennessy v. Patterson, 85 id. 91; Nellis v. Nellis, 99 id. 505.

"And estates in expectancy are divided into future estates and reversions. Sec. 10, R. S., *supra.* '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.'

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Crooke v. County of Kings, 97 N. Y. 449. '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 when the person to whom or the event upon which they are limited to take effect remains uncertain.' Sec. 13; 97 N. Y., *supra;* Beardsley v. Hotchkiss, 96 id. 203-214.

"From these definitions and characteristics of estates it follows that John C. had an estate in possession and in fee until the happening of at least one of the events specified in the will of Stephen; and Joseph also had a future expectant estate in the same one-third, if said events or contingencies should not happen, and the estates of both of them were created at the same time and under the will of Stephen, their father. Sec. 10, R. S., *supra.*"

Second of two consecutive life estates vests and is transmissible and subject to execution. Luffbarrow v. Koch, 75 Ga. 448.

Contingent remainders pass to those persons who are heirs at law, when the contingency happens. Buck v. Lantz, 49 Md. 439.

Devise in trust for use and support of lunatic daughter and whatever remained at her death to S. Daughter's interest can not be reached to satisfy an execution against her. Chosen Freeholders of Hanterdon v. Henry, 3 Cent. 686. See Halstead v. Westervelt, id. 466; 41 N. J. Eq. 100.

But devise to daughter for life for her separate use and benefit, not to be sold from her, but to remain in her possession to enable her to raise and educate children, etc., and then over, gives life estate subject to execution. Mathews v. Paradin, 74 Ga. 523.

Trust fund created by will is to become part of residuum on death of beneficiary; contingent interest is transmissible. Wickersham's Appeal, 1 Cent., Pa., 425.

Interest in possession, reversion, or remainder, is devisable. Saint Clara F. Academy v. Sullivan, 116 Ill. 375.

Remainder dependent on death of another without issue, is devisable. Loring v. Arnold, 3 N. E. 527; 15 R. I. 428.

21. ULTIMATE LIMITATION TAKING EFFECT, ALTHOUGH THE PRECISE EVENT PROVIDED FOR DOES NOT HAPPEN.

Where the meaning of the testator clearly is that the ultimate limitation should take effect on the failure of a preceding gift, and that gift does fail, but the language in which the limitation over is expressed does not in terms apply to the event which has happened, the limitation over nevertheless takes effect.

In an action brought to determine claims to real estate both the plaintiff and defendant claimed under a clause in the will of Eckford Webb, which, in substance, gave to the plaintiff, provided she remained with him, Eckford Webb, until the time of his death, a house and lot and $5,000 and the furniture of the house, and it was stated that the bequest was made to the plaintiff for her services and in the expectation that she would remain with the testator as long as he lived. There was a further provision that, if she did not remain with the testator up

to the time of his decease, the devise should be void and the house and money and furniture should pass to the defendant.

The defendant, who was not an heir at law of the deceased, and could have no title to the property in dispute except under the will, interposed an answer alleging that the provision in favor of the plaintiff was procured by fraud and undue influence and claimed title under the gift over.

The trial court ruled that if it were shown that the provision in favor of the plaintiff was void, the gift over to the defendant would not take effect since it appeared that the plaintiff had remained with the decedent up to the time of his death.

Held, that the decision was erroneous.

That in case the devise to the plaintiff failed, *for any reason*, the substituted devise took effect.

Ranken v. *James*, 1 App. Div. 272.

From opinion—"We think that, under a proper construction of the will, in case the devise to the plaintiff failed for any reason, the substituted devise to the defendant took effect. This seems to be the rule laid down by a substantially unbroken line of authorities. 2 Jarman on Wills, 1642, 5th Am. ed., 829.

"The earliest reported case is that of Jones v. Westcomb, 1 Equity Abr. 245. The testator, by his will, devised to his wife for life and after her death to the child with which she was then pregnant, and if such child died before it came to the age of twenty-one, then there was a devise over. The testator was mistaken as to the condition of his wife; she was not pregnant. In that case it was held that the gift over took effect on the death of the wife. The King's Bench followed this decision. 2 Strange, 1092.

"In Statham v. Bell, Cowper, 40, the testator was in like error, that his wife was with child, and the devise over was to take effect on the death of such child. It was held that the devise over was operative, though as matter of fact the wife was not pregnant and, of course, there was no such child.

"In Avelyn v. Ward, 1 Vesey, 420, the testator devised his real estate to his brother U., on the express condition that within three months after his decease U. should execute and deliver to the testator's trustee a general release of all demands which he might claim on the estate. But if his brother should neglect to give such release, the said devise should be null and void, and in such case he devised the real estate to W. The testator's brother died before the testator. It was held that the land should not go to the heir at law, but to the devisee over.

"In MacKinnon v. Sewell, 5 Simons, 78; aff'd 2 Mylne & Keen, 202, the gift was of a more complicated character, but the principle involved was the same as that in the preceding cases. The chancellor, in discussing the doctrine of these cases, says: 'In other words, no real difference is made in the result, for the event contemplated has not happened, but something equivalent has taken place; that is, something which made it impossible that the result could be otherwise than that upon which the executory limitation was made to depend. Almost all the cases are those of

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double contingencies, the second being of a negative nature, so that the first not happening amounts to the same thing as if both had happened.'

"But the clearest statement of the rule is to be found in a case where it was held the rule did not apply. In Lenox v. Lenox, 10 Simons, 400, the vice-chancellor writes: 'In a case where the meaning of the testator clearly is that the ultimate limitation should take effect on the failure of a preceding gift and that gift does fail, but the language in which the limitation over is expressed does not in terms apply to the event which has happened, there, in my opinion, the limitation over should take effect.'"

A conditional limitation over of a legacy, upon some specified event, condition or circumstance, takes effect only upon the occurrence of the precise event specified. *Taylor* v. *Wendel*, 4 Bradf., N. Y., 324, 332.

See Humberstone v. Stanton, 1 Vesey & Beames R. 385; Doe v. Brabant, 3 Bro. C. C. 393; Williams v. Jones, 1 Russ. C. R. 517.

22. ESTATES DEPENDENT UPON DISCRETIONARY ACTION OF TRUSTEES.

The extent of the share of the estate, if any, which certain persons might take, depended wholly upon the decision of the trustees respecting the moral character of the proposed beneficiaries. Such decision as to moral character, if made in good faith by the trustees, could not be controlled by the court, as the testator constituted them the sole judges of the fact, and upon their decision the vesting of the remainders depended. Hawley v. James, 5 Paige, 318, 468, 469.

See, Thompson v. Conway, 23 Hun, 621; Colvin v. Young, 81 id. 116; Wetmore v. Truslow, 51 N. Y. 338; Tilden v. Green, 130 id. 29, 79–81.

Where a testator leaves to his son the income of $1,000, to be paid to him by his executors during a certain time, and directs that, at the expiration of that time, if the son has reformed, he be paid the $1,000, and otherwise, that it be paid over to other parties; *held*, that the son dying before the expiration of the time without having reformed, it was the intention of the testator that the prohibitionary period should end with the life of the son, and that the $1,000 never vested in the son. *Smith* v. *Rockefeller*, 3 Hun, 295.

23. WHEN WORD "THEN" REFERS TO THE HAPPENNING OF THE CONTINGENCY.

Hennessy v. *Patterson*, 85 N. Y. 103, 104, digested, p. 300.

24. WHEN PROVISION "AT THE DEATH OF MY WIFE, I GIVE AND DEVISE" INTENDS VESTING AT WIFE'S DEATH. See p. 299.

A testator may so dispose of his real estate that it will, upon his death, vest in his heirs by operation of law, subject to be divested upon the happening thereafter of a contingency provided for in the will.

The will of D., after a devise to his wife of a life estate in all his real estate, contained a devise of certain lands, commencing as follows: "At the death of my wife, I give and devise," etc. The devise was to

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a religious society, the land to be used as a parsonage; the devise provided that whenever the society ceased to so use it, it should revert to the testator's heirs. The society was unincorporated at the time of the testator's death, but was incorporated during the life of his widow.

Construction:

The terms of the will showed the intent of the testator to be to vest the estate in the devisee at the time of, and not before the death of the wife, and if the devisees should at that time be able to take, the devise was valid, the title to the remainder being in the heirs from the time of the testator's death to that of his widow, subject to be divested if the devisee at the time of her death was an existing corporation capable of taking, in which event the title would vest in it. *Lougheed* v. *The Dykeman's Baptist Church*, 129 N. Y. 211, aff'g 58 Hun, 364.

Citing, Burrill v. Boardman, 43 N. Y. 254; Shipman v. Rollins, 98 id. 311; Leonard v. Burr, 18 id. 96. See Plymouth Soc. of Milford v. Hepburn, 57 Hun, 161. See p. 299.

19. DEATH—ESTATES ON CONTINGENCY OF.

1. When there is a devise or bequest *simpliciter* to one person, and in case of his death, to another, death in lifetime of the testator is intended.

Vanderzee v. Slingerland, 103 N. Y. 47; Kelly v. Kelly, 61 id. 47; Fowler v. Ingersoll, 127 id. 472; N. Y., L. & W. R. Co. v. Van Zandt, 105 id. 92; Nelson v. Russell, 135 id. 137; Mullarky v. Sullivan, 136 id. 227; Stokes v. Weston, 142 id. 433; Newcomb v. Lush, 84 Hun, 254.

2. Where there is a devise or bequest *simpliciter* to one person absolutely, and devise over dependent not upon the event of death simply, but upon death in connection with some collateral event, as death without issue or without children, the words of contingency refer to death in the lifetime of the testator.

Vanderzee v. Slingerland, 103 N. Y. 47; Livingston v. Greene, 52 id. 118; Embury v. Sheldon, 68 id. 227; Quackenbos v. Kingsland, 102 id. 128; Matter of N. Y., L. & W. R. Co. v. Van Zandt, 105 id. 89; Fowler v. Ingersoll, 127 id. 472; Mead v. Mabin, 131 id. 255; Benson v. Corbin, 145 id. 351.

3. The last two rules have no application, when the first devisee or legatee takes a life estate, but is applied only when the prior gift is absolute and unrestricted.

Fowler v. Ingersoll, 127 N. Y. 472; Buel v. Southwick, 70 id. 581; Nellis v. Nellis, 99 id. 505; Matter of N. Y., L. & W. R. Co. v. Van Zandt, 105 id. 89; Mullarky v. Sullivan, 136 id. 227; Matter of Denton, 137 id. 428; Matter of Baer, 147 id. 348.

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4. Rule two does not apply, when a point of time other than the death of the testator is mentioned, to which the contingency can be referred, or when a life estate intervenes, or the will indicates a contrary intent.

Matter of Denton, 137 N. Y. 428, and cases cited. See Vanderzee v. Slingerland, 103 id. 47; Matter of N. Y., L. & W. R. Co., 105 id. 89; Fowler v. Ingersoll, 127 id. 472; Mead v. Maben, 131 id. 255; Mullarky v Sullivan, 136 id. 227.

5. Words of survivorship and gifts over on the death of the primary beneficiary, in absence of contrary intent, refer to death before the testator.

Stevenson v. Lesley, 70 N. Y. 512; Van Brunt v. Van Brunt, 111 id. 178; Nelson v. Russell, 135 id. 137; Mullarky v. Sullivan, 136 id. 227. But see Nellis v. Nellis, 99 id. 505; Matter of N. Y., L. & W. R. Co., 105 id. 89.

6. Devise and bequest to children and survivor, in case of death of both, over, referred to death in lifetime of testator.

Kelly v. Kelly, 61 N. Y. 47. But see Nellis v. Nellis, 99 id. 505.

7. Devise of remainder in fee, after particular estates, with executory limitations to issue of devisee, in case of his death, refers to time when remainder takes effect in possession.

Champlin v. Haight, 10 Paige, 274.

8. Intent of testator and not technical words or rules should control.

Buel v. Southwick, 70 N. Y. 581; Hennessy v. Patterson, 85 id. 91, 92; Nellis v. Nellis, 99 id. 505; Vanderzee v. Slingerland, 103 id. 47; Matter of N. Y., L. & W. R. Co. v. Van Zandt, 105 id. 89; Fowler v. Ingersoll, 127 id. 472.

9. Death without having married, or without leaving child, then over.

Wolfe v. Van Nostrand, 2 N. Y. 436; Livingston v. Green, 52 id. 118; Lytle v. Beveridge, 58 id. 593; Embury v. Sheldon, 68 id. 227; Nellis v. Nellis, 99 id. 505; Matter of N. Y., L. & W. R. Co. v. Van Zandt, 105 id. 89; Mead v. Maben, 131 id. 255; Stokes v. Weston, 142 id. 433; Wasbon v. Cope, 144 id. 287; Benson v. Corbin, 145 id. 351.

10. Death in lifetime of life tenant intended.

Wolfe v. Van Nostrand, 2 N. Y. 436.

See Matter of Mahan, 98 N. Y. 372; Goerlitz v. Malawista, 56 Hun, 120, aff'd 130 N. Y. 688.

11. Death in lifetime of testator intended.

Gibson v. Walker, 20 N. Y. 476; Livingston v. Green, 52 id. 118; Kelly v. Kelly, 61 id. 47; Embury v. Sheldon, 68 id. 227; Stevenson v. Lesley, 70 id. 512; Matter of Mahan, 98 id. 372; Vanderzee v. Slingerland, 103 id. 47; Matter of N. Y., L. & W. R. Co. v. Van Zandt, 105 id. 89; Van Brunt v. Van Brunt, 111 id. 178; Kerr v. Bryan, 32 Hun, 51; McLoughlin v. Maher, 17 id. 215.

12. Death before or after the death of the testator intended.

Downing v. Marshall, 23 N. Y. 366; Buel v. Southwick, 70 id. 581; Nellis v. Nellis, 99 id. 505; Matter of N. Y., L. & W. R. Co. Van Zandt, 105 id. 89; Fowler v. Ingersoll, 127 id. 472; Mead v. Maben, 131 id. 255.

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13. Devise in trust, and provisions in case of the death of a beneficiary, referred to death before the testator.

Gibson v. Walker, 20 N. Y. 476; Embury v. Sheldon, 68 id. 227.

14. Death before full payment, refers to time of payment.

Finley v. Bent, 95 N. Y. 364. See p. 934.

15. Primary devise charged with legacies, effect on construction.

Nellis v. Nellis, 99 N. Y. 505.

16. Gift over in case of death, without leaving husband or wife surviving, referred to death before the testator.

Van Brunt v. Van Brunt, 111 N. Y. 178.

In case testator's child should die without having married, or without leaving child, the estate went to another; reference was to death in lifetime of life tenant. *Wolfe* v. *Van Nostrand*, 2 N. Y. 436, digested p. 318.

By will taking effect before the Revised Statutes, the testator left all his estate, real and personal, to sons, subject to payment of debts and legacies, and made a pecuniary legacy to his daughters, to be "paid by the sons of them, or in case of the death of any of them, to the children of the deceased within ten years after my decease without interest." One of the daughters survived the testator, but died before the expiration of the ten years, leaving children; *held*, that the right to the legacy passed to the personal representatives of the daughter, and not to her children.

The provision in regard to the time of payment is to be regarded as an extension by the testator of the legal period, for the convenience of the devisees, of the land and as not affecting the construction of the other terms of the will.

The will fixing no other period to which the condition of the death of the primary legatees can be referred, it requires the death of such legatee in the lifetime of the testator. *Traver* v. *Schell*, 20 N. Y. 89.

Devise in 1810 to trustees in fee for the use of the testator's married daughter, her heirs and assigns forever, exempt from the control or debts of her husband. If he should die before his wife, then in trust to convey the legal estate to the latter in fee; in case the daughter should die before the testator, then in trust for the use of such children as she might leave at her decease, their heirs and assigns forever, and if the said daughter should die childless, then in trust for another son and daughter; and in case of their deaths then for the right heirs of the testator forever.

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Construction:

The contingency of the daughter's dying childless and the subsequent limitations refer to her death in lifetime of the testator.

The remainder in fee devised to the daughter, after the death of her mother, became indefeasible upon her surviving her father. *Gibson* v. *Walker*, 20 N. Y. 476, distinguishing, Chrystie v. Phyfe, 19 id. 344.

Death did not refer to death *only* after death of testator. *Downing* v. *Marshall*, 23 N. Y. 366 digested, p. 328.

Limitations in case of death of sons or daughters, "prior to the time of such distribution," or "prior to such division," or "previous to the time of distribution," referred to the time appointed for the division, viz.: the death of the widow, life taker. *Manice* v. *Manice*, 43 N. Y. 303 (304).

The will of S., after a devise of certain premises to his daughter, P. G., during her life, contained the following clause: "Then to be equally divided amongst her now surviving children, or any of them that may be alive at her decease, or the heirs of any that may be dead at the time of executing this my last will." *Held*, that the time referred to was the time the will took effect, by vesting the estate in possession upon the death of P. G.; that the word "heirs" was used in the sense of children, and that the intent of the testator was that the children of P. G. should take, if living at her decease, or if any were then dead, leaving children surviving, that the children should take, in place of the parent. *Scott* v. *Guernsey*, 48 N. Y. 106.

Life estate to wife in real estate and then "from and after the decease and death of my * * * wife, I give and bequeath all my real estate * * * to all my children and to their heirs and assigns to be equally divided, share and share alike: and should any of my children die and leave lawful heirs, such heirs to receive" the parent's portion. By a subsequent clause the testator declared that upon the death of his wife and a division of the estate, as provided among his children, their shares should be an estate in fee, and they were empowered to convey, etc.

Wife and eleven children survived testator. Three subsequently died intestate and without issue. A son then died without issue, devising his interest in the real estate; thereafter testator's widow died.

Construction:

1. The words "should any of my children die and leave lawful heirs" referred to death during testator's life. Moore v. Lyons, 25 Wend. 119; Rose v. Hill, 3 Burr. 1881; Converse v. Kellogg, 7 Barb. 590.

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2. The last clause referred to an absolute fee, of which a conveyance could only be made by the children after the death of the widow.

3. The words "after" and "upon the death of my wife" did not make a contingency, but simply indicated when the estate of children took effect in possession.

4. Children took vested remainder, not defeated by their death prior to the widow.

5. If words "should any of my children die" could refer to death after the testator and before that of his widow, it only applied to the case of a child dying leaving children, and did not affect A.'s devise, as no such contingency happened. Bundy v. Bundy, 38 N. Y. 410; Jenkins v. Van Schaak, 3 Paige, 242; 2 Jar. on Wills, 783; Clarke v. Johnston, 8 Blatch. 557. *Livingston* v. *Green*, 52 N. Y. 118.

T. devised certain real estate to his executors in trust to receive and apply the rents and profits to the use of his son W. during his life, then to sell and to divide the proceeds among the living children of W. and the issue of those deceased. If W. died without issue surviving, then to divide the same among the testator's "surviving children and the issue of such of them as may have died leaving issue." At the time of making the will and of the testator's death there were five children, and the issue of five deceased children living. W. died without issue. *Held*, that the gift over was not to the children of the testator surviving him and to their issue exclusively, but that the issue of his deceased children also took without distinction between those whose parents died before and those who died after the making of the will. *Teed* v. *Morton*, 60 N. Y. 502.

Devise and bequest of property to two children, in case of death of one to surviving child; in case of death of both to nephews. By subsequent clause testator expressed desire that property should not be sold or mortgaged until his youngest child was of age. No power of sale was given to executors. Both children died under age and unmarried.

Construction:

The death referred to was one happening in the lifetime of the testator; at his death his children took the fee. *Kelly* v. *Kelly*, 61 N. Y. 47; 5 Lans. 443.

Citing Clarke v. Lubbock, 1 Y. & C. 492; Crigan v. Baines, 7 Sim. 40; Rose v. Hill, 3 Burr. 1881; Moore v. Lyons, 25 Wend. 119; Converse v. Kellogg, 7 Barb. 590; Livingston v. Greene, 52 N. Y. 124; 2 Jar. on Wills, 3d Lond. ed., 707; 2d Am. ed., 468, 469; Whitney v. Whitney, 45 N. H. 311; Briggs v. Shaw, 9 Allen, 516.

A clause making provision in case of the death of one of the bene-

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ficiaries referred to a death before the division. *Woodgate* v. *Fleet*, 64 N. Y. 566, digested p. 425.

Devise to trustees to receive rents, issues, etc., during life of J., son, and pay same to J., A., D., and P., children of testator: devise upon death of J. as follows: One-fourth to J.'s children, one-fourth to A., D., and P., severally. In case A., D., or P. die leaving lawful issue surviving them, such issue shall take the share of principal and income given to the parent; and should no issue survive A., D., or P., so dying, the share of the one so dying should go *per stirpes* to the survivors of A., D., or P. and children of J. equally.

Testator died in 1864; P. died before testator without issue; D. died in 1869, leaving son born in 1867, who died in 1873, and wife, plaintiff, to whom he devised his estate.

Construction:

(1) D. took vested remainder on death of testator, subject to trust for life of J., inasmuch as the provision for the issue of A., D., or P. taking in case either died, referred to such person dying before the testator. Citing Moore v. Lyon, 25 Wend. 119.

(2) If death of such person were referable to a time subsequent to death of testator, the only limitation in D.'s estate was his dying without issue surviving him, and as he did leave a son surviving, the son, under such construction, would take D.'s share, and as the son had also died, the plaintiff took his share.

(3) Plaintiff took son's share of income during continuance of trust, either under the will as above, or as the one "presumptively entitled to the next eventual trust estate." *Embury* v. *Sheldon*, 68 N. Y. 227.

Words of survivorship referred to death of the testator. *Stevenson* v. *Lesley*, 70 N. Y. 512, digested p. 285.

Death referred to was not a death during the lifetime of the testator. *Buel* v. *Southwick*, 70 N. Y. 581, digested p. 320.

Testator's "next of kin" were those who were such at the death of a life taker. *Delaney* v. *McCormack*, 88 N. Y. 174, digested p. 339.

Words "die before full payment" mean not before actual payment but before the time when payable. *Finley* v. *Bent*, 95 N. Y. 364, digested p. 934.

Words of survivorship referred to death of the testatrix. *Matter of Accounts of Mahan*, 98 N. Y. 372, digested p. 266.

The will of N. devised to two grandsons, the parties hereto, certain real estate "jointly and in equal proportions * * * subject to the provisions hereinafter made and the bequests." After various bequests,

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which were made charges upon the real estate, the will provided in substance that in case of the death of either of the devisees without lawful issue the surviving devisee should take the whole; upon his death, if without issue, the estate to go to the testator's grandchildren, the children of his son H.

Construction:

By the provision in reference to the two devisees named dying without issue, a death prior to that of the testator was not alone intended, but it related as well to a death occurring after his decease; the two devises named took a contingent estate in fee, subject to be reduced to a life estate by his death without issue, and in case of the death of both without issue, the devise to the children of testator's son H. would take effect and vest in them an absolute fee; such devise was valid as a contingent limitation upon a fee, and said grandchildren living at the time of the testator's death were proper and necessary parties to the action.

The rule was not changed by the fact that the primary devise was chargeable with legacies and other burdens; a gift of an absolute fee could in no case be implied from the fact that a legacy is charged simply upon the lands, not upon the devisee personally; and when the language of the will is explicit and unambiguous and gives an estate less than a fee, although it charges the devisee personally with the payment of legacies, the payment thereof will not enlarge the estate to an absolute fee. Livingston v. Greene, 52 N. Y. 118; Embury v. Sheldon, 68 id. 227; Kelly v. Kelly, 5 Lans. 443, aff'd 61 N. Y. 47.

There was no unlawful suspension of the power of alienation. Only the children of the testator's son H. living at the time of the testator's death, were entitled to take; the devise would not let in afterborn children. *Nellis* v. *Nellis*, 99 N. Y. 505.

From opinion.—"The intention here is quite as manifest as in Buel v. Southwick, 70 N. Y. 581, as to who should take upon the happening of the contingency named. The use of the words 'provisions and bequests' instead of the words 'condition and contingency,' makes no such distinction between the two cases as authorizes a holding that they are not analogous. The language is clearly comprehensive in both cases, and the former includes the condition and contingency referred to in the latter. See, also Sherman v. Sherman, 3 Barb. 385; Dumond v. Stringham, 26 id. 105. The authorities in reference to the construction of devises which are subject to contingencies and conditions, embracing the same general characteristics as the ones contained in the testator's will, uniformly hold that the death referred to is that of the one dying without issue whenever it shall happen without regard to that of the testator. * * * Numerous cases are cited by the appellant's counsel to sustain a position adverse to the views already expressed, but they are all clearly distinguishable from the case at bar as is manifest by an examination of the same. It will be well to refer to some of the leading decisions which are relied upon. In Livingston v. Greene, 52

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N. Y. 118, the devise in the will, which was the subject of discussion, was not made subject to any provision or any condition contained in the same, and hence the case is not analogous. The devise was to testator's wife for life, then to his children, and should any of them die leaving lawful heirs they to take the parent's portion. It was decided there was no occasion to apply the rule laid down in Moore v. Lyons, 25 Wend. 119. Embury v. Sheldon, 68 N.Y. 527, was somewhat similar in its features to the case last cited, and the question involved was as to the intention of the testator under all the circumstances presented. Both these cases are cited in Buel v. Southwick (*supra*) and referred to as not being in point. They, therefore, have no application to the case at bar. In Kelly v. Kelly, 5 Lans. 443, affirmed 61 N. Y. 47, the devise was not subject to any contingency and the question there was also as to the intention of the testator in view of a peculiar state of facts which are not in any way analogous to the present case. Some other cases are cited, but none of them present the features which distinctly mark the case under consideration.

In view of the decisions of this court already cited, the question we have discussed must be considered as distinctly settled and disposed of adversely to the appellant's contention. * * * The appellant's counsel claims that the devise, having imposed upon the devisees, and they having accepted therewith, a personal liability to pay such certain legacies, and having paid them, in consequence of their doing so, they took a fee in the land devised, even though they would otherwise have taken only a life estate, and cites numerous authorities to sustain this position. The cases referred to have no application where the language devising the estate is explicit and without ambiguity. Where the will gives a less estate than a fee, it is good consideration for charging the devisee personally with the payment of the legacies if he accepts the devise. Such payment, however, will not enlarge the estate to an absolute fee; when it is apparent that there was no intention to devise such estate. In Mesick v. New, 7 N. Y. 163, it was held that in order to enlarge a devise, without words of inheritance, into a fee, by implication, by a legacy charged upon the devise, it was necessary that the payment of the legacy should be imposed upon the devisee as a personal duty in respect to the devise, and the devisee took an estate for life only.

The will of K., after certain specific devises and bequests, gave the residue of his estate to his son Daniel "and to his heirs;" then followed these words, "but in case my son Daniel should die without lawful issue, I give and bequeath it to my remaining children, share and share alike." Daniel survived the testator.

Construction:

In the absence of other words in the will showing a contrary intent, the death referred to was a death of the beneficiary during the lifetime of the testator; and upon the death of the latter, Daniel took an absolute estate.

Same will:

By a codicil the testator gave a specific bequest out of the residuary estate to his son James.

Construction:

This did not indicate an intent contrary to the construction above

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given. Douglass v. Chalmer, 2 Ves. Jr. 501, distinguished. *Quackenbos* v. *Kingsland*, 102 N. Y. 128.

Citing, Embury v. Sheldon, 68 N. Y. 227; Livingston v. Greene, 52 id. 118.

Where there is a devise or bequest *simpliciter* to one person absolutely, and in case of his death to another, it is a settled rule of construction that the words of contingency refer to a death in the lifetime of the testator. Moore v. Lyons, 25 Wend. 119; Kelly v. Kelly, 61 N. Y. 47; Briggs v. Shaw, 9 Allen, 516; Whitney v. Whitney, 45 N. H. 311; Edwards v. Edwards, 15 Beav. 357.

The same rule applies where the devise over is not dependent upon the event of death simply, but upon death in connection with some collateral event, as death without issue or without children, etc. Clayton v. Lowe, 5 Barn. & Ald. 636; Gee v. Mayor of Manchester, 17 Adol. & Ell., N. S., 737; Woodbourne v. Woodbourne, 23 L. J. Ch. 336; Doe v. Sparrow, 13 East, 359; Quackenbos v. Kingsland, 102 N. Y. 128; Livingston v. Greene, 52 id. 118; Embury v. Sheldon, 68 id. 227; Waugh's Appeal, 78 Pa. St. 436; Mickley's Appeal, 92 id. 514; but see, Britton v. Thornton, 112 U. S. 526.

The rule in the latter case stands more upon authority than reason, and the tendency of courts is to lay hold of slight circumstances to vary the construction, and give effect to the language according to its natural import, as referring to a death under the circumstances mentioned, happening either before or after the death of the testator. Buel v. Southwick, 70 N. Y. 581; Nellis v. Nellis, 99 id. 505; Hennessy v. Patterson, 85 id. 91, 92.

The will of V. devised his real estate to his son Cornelius, "subject to the proviso hereinafter contained." After various legacies, which were in consideration of the devise directed to be paid by C. within two years after the testator's death, the will contained a proviso to the effect that if Cornelius died without issue then the estate devised to him should go to four grandchildren of the testator. The concluding portion of the clause is as follows: "In case my son Cornelius should die before the provisions of this will become an act the devisees last named shall perform and fullfil all the conditions required of my son Cornelius to the legatees named." Cornelius survived the testator but died without issue. Action for partition.

Construction:

The words "died without issue" referred to a death at any time, whether before or after the death of the testator; Cornelius took a conditional fee, and the grandchildren a contingent interest by way of

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executory devise, which, upon the happening of the contingency provided for, was converted into a fee, thereby displacing the conditional fee. *Vanderzee* v. *Slingerland*, 103 N. Y. 47.

Notes from opinion.—1. "It is said by Mr. Jarman, 2 Jarm. 783, to be the general rule that where the context is silent, words referring to the death of the prior legatee, in connection with some collateral event, apply to the contingency happening as well after as before the death of the testator. It will be observed that the rule as stated by the learned author relates to personal property and is deduced from the later English cases upon the construction of bequests of personalty, coupled with a contingency, which seems to have modified the earlier decisions. But where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, followed by a devise over in case of his death without issue, it has, I think, been uniformly held in England, and it is the rule supported by the preponderance of judicial authority in this country, that the words refer to a death without issue, in the lifetime of the testator, and that the primary devisee surviving the testator, takes an absolute estate in fee simple.

2. "The legacies were an equitable charge upon the land (58). Harris v. Fly, 7 Paige, 421, 422."

Survivorship referred to in a deed of trust was that existing at the death of the settlor. *Van Cott* v. *Prentice*, 104 N. Y. 45.

The rule that where there is a devise to one person absolutely, and in case of his death to another, the contingency referred to is the death in the lifetime of the testator, applies only where the context of the will is silent, and affords no indication of a different intention.

Where the devise over is dependent upon a death without issue, the tendency of the court is to lay hold of slight circumstances in the will to vary the construction, and give effect to the language according to its natural import.

The will of E. devised and bequeathed to her daughter, Minnie, all her real and personal estate, subject to the payment of certain legacies, which were made a charge thereon. In case of the death of M. "without issue," the property was given to the husband and a sister of the testatrix during life, and after their deaths to four brothers. The clause ended as follows: "The devise over to my husband, sister and brothers to depend upon the contingency of my daughter Minnie dying without issue." The daughter named survived the testatrix.

Construction:

She (the daughter) took under the will a base or conditional fee, defeasible by her dying without leaving issue living at the time of her death; her children, should she leave any, would take by inheritance from her, but a conveyance by her in her lifetime would be effectual as against them, and an indefeasible title in fee could be conveyed and the

contingent expectant estates, limited to the husband, sister and brothers, cut off by their joining with her in the conveyance. *Matter of N. Y., L. & W. R. Co.* v. *Van Zandt*, 105 N. Y. 89.

From opinion.—"It may be regarded as a settled rule of construction that where there is a devise to one person 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 that if such devisee survives the testator, he takes an absolute fee; that the words of contingency do not create a remainder over, to take effect upon the death, at any time, of the first taker, nor an executory devise, but are merely substitutionary, and used for the purpose of preventing a lapse in case the devisee first named should not be living at the time of the death of the testator. This construction is uniformly adopted unless there is some language in the will indicative of a different intention on the part of the testator.

"The reason assigned for this construction has been that, as death is a certain event, and the time only is contingent, the words of contingency in a devise of this description can only be satisfied by referring them to a death before some particular period, and no other being mentioned, the time referred to must be presumed to have been the testator's own death. It is also founded upon the principle that in construing wills, effect should be given, if possible, to all the words used by the testator, and that any other construction than the one which has been adopted would in every case reduce the estate of the first named devisee to an estate for life; for his death at some time is certain, and the words of inheritance attached to the devise to him would in every case be inoperative.

"Nevertheless, it has been held that the same rule of construction is to be applied where the alternative devise is made to depend upon the death of the first named devisee 'without issue,' or 'without children,' etc. This question is thoroughly discussed in the opinion of Andrews, J., in the case of Vanderzee v. Slingerland, 103 N. Y. 47, and the learned judge comes to the conclusion that, although the reason upon which the rule adopted in the first mentioned class of cases was founded, does not exist in the second, yet that it is established by precedent. It would be useless now to go through the cases. They are very numerous, and not all reconcilable, and many of them contain special features. It is sufficient, for present purposes, to refer to a few of the cases. In Gee v. Mayor, etc., of Manchester, 17 Adol. & El., N. S., 737, the testator devised and bequeathed his real and personal estate to be divided equally among his children as follows, viz.: 'I will and bequeath to my eldest son, A. one-seventh share of my property, to his heirs, executors and administrators.' Then followed similar devises and bequests to each of the testator's six other children, and afterward a general provision in these words: 'And in case any of my sons and daughters die without issue, that their share returns to my sons and daughters equally amongst them, and in case any of my sons and daughters die and leaving issue, that they take their deceased parent's share.'

"It was held that the death referred to was a death in the lifetime of the testator, and that all his children having survived him, they each took a fee simple in one-seventh of his realty.

"It must be observed that unless that construction was adopted, the words of inheritance attached to the devise to each of the testator's children must in every event be rejected.

"It was certain that each of the children would die, either with or without issue. Construing the death referred to by the testator as a death at any time, the result

would be that upon the death of either of the testator's sons, for instance, without issue, his share would go to his brothers and sisters, not as his heirs, but as purchasers by virtue of the limitation over to them. If he died leaving issue, such issue would take in like manner, not as his heirs, but as purchasers. He would have no estate of inheritance in any event, and could make no disposition of the fee in the realty, in his lifetime, or by will. The words of the testator, purporting to give him an estate in fee, would thus be wholly rejected, and his estate, under all circumstances, cut down to a life estate.

"It was on these grounds that Lord Campbell, in delivering the judgment of the court, held that the only mode of giving effect to all the words of the testator was by treating the words in the last clause of the will as words of substitution only, in case of a lapse, and referring the death there contemplated, to a death in the lifetime of the testator.

"In Clayton v. Lowe, 5 Barn. & Ald. 636, the devise was in the same form as in case last cited. The estate was given to the testator's three grandchildren, forever. If either of them should die without lawful child or children, the share of the one so dying was to be divided among the survivors, but if either should die leaving lawful child or children, such child or children should take the share of the parent. It is obvious, that unless the death referred to was a death in the lifetime of the testator, the first named devisees could in no event take a fee.

"Doe v. Sparrow, 13 East, 359, was a case of the same description, with additional significant words expressly referring to the testator's own death.

"Woodburne v. Woodburne, 23 L. J. Ch. 336, was the same as Gee v. Mayor of Manchester, and was decided the same way.

"The cases I have referred to rest on principles, and are founded on reasons which are easily comprehended; but there are other cases in which the words 'die without issue' are construed as referring to a death in the lifetime of the testator, where those principles are inapplicable and the reasons do not exist, and of such cases Andrews, J., in the case of Vanderzee v. Slingerland, says that they stand more upon authority than upon reason.

"It is stated in Jarman on Wills, 5th Am. ed. ,783, that the general rule is, that where the context is silent, the words referring to the death of the prior legatee in connection with some collateral event, apply to the contingency happening, as well after as before, the death of the testator.

"In O'Mahoney v. Burdell, L. R. 7 H. L., 388, 393, it was held that a bequest to A., and if she should die *unmarried* or *without children*, to B., was an absolute gift to A., defeasible by an executory gift over in the event of A. dying at any time, *unmarried* or without children, and that this construction could only be affected by a context which rendered a different meaning necessary. And in Britton v. Thornton, 112 U. S. 526, it was held that under a devise to one person in fee and in case he shall die *under age* and without children, to another in fee, the devise over would take effect upon the death, at any time, of the first devisee under age and without children. To the same effect is Edwards v. Edwards, 15 Beav. 357, and see Doe v. Webber, 1 Barn. & Ald. 713, and Anderson v. Jackson, 16 Johns. 382. But it can not be disputed that there are several cases holding that where there is simply a devise to A., in fee, and in the event of his dying without issue, then to B., the death referred to is a death in the lifetime of the testator, and if A. survives him he takes an absolute and indefeasible estate in fee. Home v. Pillian, 2 My. & K. 15, 19, and cases cited; Ware v. Watson, 7 DeG., M. & G. 248. Such appears to be the rule in Pennsylvania, Mickley's Appeals, 92 Penn. 514, and the same rule has been

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adopted in this court, Quackenbos v. Kingsland, 102 N. Y. 128, and was recognized in Vanderzee v. Slingerland, 103 id. 47, before referred to."

"If any one of my children should die without leaving a husband or wife him or her surviving, then I give, devise and bequeath his or her share to the survivor or survivors of them," referred to those living at the death of the testatrix. *Van Brunt* v. *Van Brunt*, 111 N. Y. 178, digested p. 452.

A. gave the use of his property to his wife for life, with remainder to his children and grandchildren, in such shares as the wife "may, by her last will * * * appoint." In default of appointment the estate should go to children and grandchildren, the latter taking one share, with substituted remainders to their issue. C., grandchild, died before the widow and without issue. The codicil directed that on the death of the wife, the share of the estate to go to C. should be held in trust for him during life and upon his death the principal should go to his issue; if none, then his share to fall into the general estate, or as his wife should by will direct. The provision was confined to the contingency of C.'s death after the widow, and as he died before her, the secondary power of appointment became inoperative. *Austin* v. *Oakes*, 117 N. Y. 577, digested p. 997.

The rule that where a will contains a devise or bequest *simpliciter* to one person, and, in case of his death, to another, the contingency referred to is a death in the lifetime of the testator, is not applicable when the first devisee or legatee simply takes a life estate; it applies only when the prior gift is absolute and unrestricted.

The will of M. gave to her husband the use of her whole estate during life, subject to the payment of certain legacies and to annuities to three cousins of the testatrix. In case of the death of either cousin, the annuity of that one was to go to the survivors. In case of the death of the husband before the testatrix, the will provided, as to certain specified real estate, as follows: that A., one of the cousins and an executrix, should have the sole supervision and management thereof, she to receive one-tenth of the net income for her services, and one-fourth of the residue in lieu of commissions; three-eighths of the remainder was directed to be paid to each of the other cousins; in case of the death of either, the share of that one to be paid to the survivors. Upon the death of the cousins, the will provided that one-third of said real estate should go to the children of each of her cousins, in case of the death of either without children, the share of that one to go to the children of the survivors. The executors were empowered to sell said real estate during the existence of the life estate, provided the supreme

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court on petition should permit and direct it, the proceeds of sale to be invested, and the income and principal to be disposed of in the same manner as before provided as to the land. The testatrix survived her husband.

Construction:

The title vested in A., in trust, said trust to continue during the lives of the three cousins; and so, the provision was void, as it suspended the power of alienation and the absolute ownership of the proceeds of a sale for more than two lives in being at the death of the testatrix; and, upon the death of M., the title to the land vested in her father, who was her only heir at law.

Fowler v. *Ingersoll*, 127 N. Y. 472.

From opinion.—"The rule is well settled by authority and precedent that when there is a devise or bequest *simpliciter* to one person and in case of his death to another, the contingency referred to is a death in the lifetime of the testator.

"So when there is a devise to A., and in case of his death without issue or without children then to B., the weight of authority is that the words refer to a death without issue in the lifetime of the testator, and the primary devisee surviving the testator takes an absolute estate in fee simple.

"The words of contingency are substitutionary merely, and are intended to prevent a lapse in case the first devisee is not living at the death of the testator and do not create an executory devise or a remainder over upon the death, at any time, of the first taker.

"But this rule has no application when the first devisee or legatee takes a life estate and is applied only when the prior gift is absolute and unrestricted.

"The reason assigned for the rule is that as death is the certain event and time only is contingent, the words of contingency can only be satisfied by referring them to a death before some particular period, and none being mentioned, the time referred to must be presumed to be the testator's own death. Matter of N. Y., L. & W. R. R. Co., 105 N. Y. 89; Vanderzee v. Slingerland, 103 id. 47.

"But this reason fails in the case of a life estate as in such case the presumption would be that words of contingency referred to the event which would determine the life estate. The rule is so stated in Jarman on Wills, vol. 2, p. 759, 5th ed.

"And many cases could be cited where the courts, having construed the prior estate to be less than an absolute fee, have held that the words of contingency referred to a death whenever it may happen. Matter of N. Y., L. & W. R. R. Co., *supra;* Buel v. Southwick, 70 N. Y. 581; Nellis v. Nellis, 99 id. 505.

"Moreover the construction contended for by the appellants is only given to the words when the context of the will affords no indication of an intent on the part of the testator other than indicated by the words of absolute gift followed by a gift over in case of the death of the first named devisee. Vanderzee v. Slingerland, *supra;* Matter of N. Y., L. & W. R. R. Co., *supra;* Nellis v. Nellis, *supra;* O'Mahoney v. Burdett, L. R. 7 Eng. & Ir. App. 388.

"The rule is an arbitrary one and has often been said to rest more upon precedent than upon reason, and in Vanderzee v. Slingerland, Judge Andrews said that 'the tendency is to lay hold of slight circumstances in the will to vary the construction and give effect to the language according to its natural import.'"

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The rule that where a testamentary gift is to one or more persons, and in case of the death of any of them without issue to the survivors, the death referred to is one in the lifetime of the testator, and that any one of said persons surviving the testator takes absolutely, applies only where the context of the will contains nothing showing a contrary intent. Vanderzee v. Slingerland, 103 N. Y. 47. Where the scheme of the will and the context show the testator intended a death occurring at any time, this must prevail.

The will of M. gave his residuary estate to his executors with power to sell the realty in their discretion, to make division into seven equal parts, one of which was given to each of his seven children, and until a sale of the realty, the income to be paid over to them in the same proportions. After providing for the disposition of "the share of interest remaining" of one child in case she die intestate, the will provided that in case any other child "shall die without leaving surviving child or children or heirs of the body, then" the share of the one so dying shall go equally to the other children. A., a daughter of the testator, died childless after his death.

Construction:

The death referred to in the will was not a death in the lifetime of the testator, but one occurring at any time; the purpose of the testator was to prevent a sharing in his estate by others than his children and their issue; while each child took a vested interest in the seventh part of the estate upon the testator's death, it was not absolute, and upon the death of A., without issue, her share went to the testator's surviving children. *Mead* v. *Maben*, 131 N. Y. 255, rev'g 60 Hun, 268.

"Whereas in this will is mentioned and described gifts, devises and bequests to my children, if any of them should be dead leaving issue surviving, I do direct that the issue of any of my children, deceased, shall take the same share their parent would have received had such parent remained living." *Held*, that the death referred to was a death in the lifetime of the testator; that although the clause was unnecessary in view of the protection afforded by the statute (2 R. S. 66, sec. 52), this would not alter its construction unless some other, making a clause necessary and effective, should be found to be both a possible one and within the testamentary intention. *Matter of Tienken*, 131 N. Y. 391–2.

Words of survivorship and gifts over on the death of the primary beneficiary are to be construed, unless a contrary intention appears, as relating to the death of the testator. Vanderzee v. Slingerland, 103

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N. Y. 55; Matter of N. Y., L. & W. R. Co., 105 id. 92. *Nelson* v. *Russell*, 135 id. 137, digested p. 303.

The rule that words of survivorship in a will refer to the time of the testator's death applies only to an absolute gift to one and in the case of his death to another; it has no application in a case where the first devisee or legatee takes a life estate. Vanderzee v. Slingerland, 103 N. Y. 47; in the matter N. Y., L. & W. R. Co., 105 id. 89; Fowler v. Ingersoll, 127 id. 472; Mead v. Maben, 131 id. 255. *Mullarky* v. *Sullivan*, 136 id. 227, digested p. 312.

The rule that where there is a bequest to one person, absolutely, and in case of his death without issue, to another, the contingency referred to is a death in the lifetime of the testator, does not apply when a point of time other than the death of the testator is mentioned, to which the contingency can be referred, or to a case where a life estate intervenes, or where the language of the will evinces a contrary intent. Vanderzee v. Slingerland, 103 N. Y. 47; Matter of N. Y., L. & W. R. Co., 105 id. 89; Fowler v. Ingersoll, 127 id. 472; Mead v. Maben, 131 id. 255; Mullarky v. Sullivan, 136 id. 227.

D. died leaving his wife and five children him surviving; by his will he gave to his widow the use of his homestead during life; upon her death, the executors were directed to sell and dispose of the same; he also gave to her and to H., a daughter, the use of $8,500 during the life of his widow. In case H. died before the widow, the latter to have the use of $7,500 during her life. In case H. survived the widow, to the former was given, after the death of her mother, the use of $4,500 during her life. The residuary estate was given to the four other children, with this proviso, "that in case of the death of either of them, leaving issue, before either of the different parts thereof * * * can be divided, then such issue to take the share or part the parent would have been entitled to, if living; if without issue, then the survivors to take." E., a son, died first, leaving a wife surviving; he had issue, but left none surviving him. H. died next and then the testator's widow. Proceedings for final settlement of the accounts of the executors.

Construction:

The death referred to in the residuary clause, was not a death during the lifetime of the testator; the words "leaving issue" could not be construed as reading "without having had issue;" the scheme of the will contemplated a residue divisible into at least three parts, distributable at different times, and if prior to the time any one part could be distributed, either of the four beneficiaries named had died, and there

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was at that time issue of such decedent surviving, the issue would take the share such beneficiary would have taken if living; if not, then the surviving beneficiaries would take; therefore, the gift to E. as to so much of the residuary estate as was not distributable at his death, was defeated by his death without issue surviving, and his share went to the three surviving beneficiaries. *Matter of Denton*, 137 N. Y. 428.

The law favors equality among children in the distribution of estates, and in case of doubtful construction of the language of a will it selects that which leads to such a result.

So, also, the law favors the vesting of estates, and in case a will contains apt words to dispose of the testator's entire estate that construction will be given to it.

The will of S. gave to his wife the use of all of his property for life, the remainder to his three children, two sons who were unmarried, and a daughter who was married and had two children. The will then provided that in case of the death of the sons, or either of them, without issue then living, the share of the one so dying should be divided equally between the two grandchildren. Action for the partition of lands of which the testator died seized, and for a construction of the will.

Construction:

The death referred to was that of a son during the lifetime of the testator, and as they both survived him, they, with their sister, took the entire estate, subject to the life estate of the widow. *Stokes* v. *Weston*, 142 N. Y. 433, rev'g 69 Hun, 608; distinguishing Mead v. Maben, 131 N. Y. 255.

From opinion.—"In the Matter of the N. Y., L. & W. R. Co., 105 N. Y. 92, Judge Rapallo said: 'It may be regarded as a settled rule of construction that where there is a devise to one person 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 that if such devisee survives the testator he takes an absolute fee; that the words of contingency do not create a remainder over to take effect upon the death, at any time, of the first taker, nor an executory devise, but are merely substitutionary and used for the purpose of preventing a lapse in case the devisee first named should not be living at the time of the death of the testator. This construction is uniformly adopted unless there is some language in the will indicative of a different intention on the part of the testator. The reason assigned for this construction has been that, as death is a certain event and the time only is contingent, the words of contingency in a devise of this description can only be satisfied by referring them to a death before some particular period, and no other being mentioned, the time referred to must be presumed to have been the testator's own death. It is also founded upon the principle that, in construing wills, effect should be given, if possible, to all the words used by the testator, and that any other construction than the one which has been adopted would in every case reduce the estate of the first-named devisee to an estate for life

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for his death at some time is certain, and the words of inheritance attached to the devise to him would in every case be inoperative.' The rule and its reasons thus stated have been recognized by the courts of England and this state for many years. In case of Doe, Lessee of Lifford v. Sparrow, 13 East, 359, Lord Ellenborough laid down the rule after elaborate reasoning, and in Gee v. The Mayor, etc., of Manchester, 17 Adol. & Ell. 737, Lord Campbell further discussed the rule and approved the reasoning of Lord Ellenborough in the case cited. See, also, Clayton v. Lowe, 5 Barn. & Ald. 636; Woodburne v. Woodburne, 23 L. J. Ch. 336; Moore v. Lyons, 25 Wend. 118; Livingston v. Greene, 52 N. Y. 118; Kelly v. Kelly, 61 id. 47; Embury v. Sheldon, 68 id. 227; Vanderzee v. Slingerland, 103 id. 47; Nelson v. Russell, 135 id. 137.

"An examination of the cases in this court where the rule has not been applied will disclose the fact that there was some language of the testator indicating a different intention. Such a case was Mead v. Maben, 131 N. Y. 255. Judge Gray expressly rested the decision of the court, which refused to apply the rule in that case, on the special language of the testator."

Where a devise or bequest over is not dependent upon the death simply of the original beneficiary, but upon the death without issue or without children, the death referred to, in the absence of anything in other portions of the will tending to show a contrary intent, will be considered as a death in the lifetime of the testator. *Washbon* v. *Cope*, 144 N. Y. 287, rev'g 67 Hun, 272.

Citing, Quackenbos v. Kingsland, 102 N. Y. 128; Vanderzee v. Slingerland, 103 id. 47; Mead v. Maben, 131 id. 255; Stokes v. Weston, 142 id. 433; see also, Matter of Tienken, 131 id. 391, 403.

The will of B. gave to his wife the use and occupation of two dwelling houses during her life, and provided that "in case of the sale of either or both with her consent the income of the principal shall be paid to her; he then devised said dwelling houses to two children, subject to the life occupancy of their mother, and also devised to them all his other real estate subject to her dower right. By a subsequent clause it was provided that in case of the death of both of the children without issue the property devised to them "and their issue" shall not pass to the branches of his own or his wife's family, but is "given, devised," etc., to a beneficiary named. It appeared that aside from the two dwelling houses, that testator's real estate consisted principally of a large tract of sandy and barren land on the sea shore from which he had been selling lots for summer homes, and which was only valuable for such purposes. *Held*, that the death without issue referred to in the devise over meant a death in the lifetime of the testator, and as the two children named survived the testator they took an absolute fee in all the lands subject to their mother's life estate and dower right. *Benson* v. *Corbin*, 145 N. Y. 351.

The rule that in case of a devise to one person in fee, but in case of his death to another, the death referred to will be construed to be a

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death in the testator's lifetime, has no application to this case. The rule is never permitted to operate in a case where, as here, a point of time for distribution is mentioned other than the death of the testator, or where a life estate intervenes, or where the context of the will contains language indicating a contrary intent. In re Denton, 137 N. Y. 428; Washbon v. Cope, 144 id. 297; Benson v. Corbin, 145 id. 351; Stokes v. Weston, 142 id. 433; Vanderzee v. Slingerland, 103 id. 47; Mullarky v. Sullivan, 136 id. 227; Fowler v. Ingersoll, 127 id. 472. *Matter of Baer*, 147 id. 348.

When a gift over, in case of the decease of the first devisee, refers to his death in the lifetime of the testator. Kerr v. Bryan, 32 Hun, 51; McLoughlin v. Maher, 17 id. 215.

When the estate of a remainderman, dependent upon a life estate, vests on the testator's death—when a contingency, based upon the death of a devisee, refers to a death before that of the testator. *Black* v. *Williams*, 51 Hun. 280.

Construction of a provision giving a remainder over to the next of kin of such beneficiaries, entitled to estates in remainder, as should die—effect of a death before that of a testatrix. *Palmer* v. *Dunham*, 52 Hun, 468.

Fee to a son or his issue, subject to a life estate—when the contingency relates to the death of the testator, and when to that of the life tenant. *Goerlitz* v. *Malawista*, 56 Hun, 120, aff'd 130 N. Y. 688.

Where there is a devise to one person 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 first-named devisee survives the testator he takes an absolute fee.

The words of contingency do not create a remainder over, to take effect upon the death at any time of the first taker, nor an executory devise, but are merely substitutionary and used for the purpose of preventing a lapse in case the devisee first named should not be living at the time of the death of the testator. *Newcomb* v. *Lush*, 84 Hun, 254.

The rule is well settled that where there is a devise to one and a bequest over to a third person, depending not upon the event of death simply, but upon death without issue, the death referred to is one occurring in the lifetime of the testator.[1] But this rule applies only where the context of the will contains nothing to show a contrary intention upon the part of the testator; and where it appears, from the language and provisions of the instrument, that the testator referred to a death either before or after his own, his intention will prevail, and such intention may be inferred from slight circumstances.[2]

A testator provided: "I give, devise and bequeath to my son, G. W. H. subject to the provisions contained herein, my farm heretofore occupied by him, situate in the town of North Norwich, and consisting of about 160 acres of land, with the appur-

[1]Washbon et al. v. Cope, 144 N. Y. 287; Stokes v. Weston et al., 142 id. 433; Quackenbos v. Kingsland, 102 id. 129; Livingston et al. v. Greene et al., 52 id. 118; Matter of Tienkin, 131 id. 291; Benson et al. v. Corbin et al., 145 id. 351.

[2]Mead v. Maben et al., 131 N. Y. 255; Vanderzee v. Slingerland, 103 id. 47; Avery v. Everett, 110 id. 317; Matter of N. Y., L. & W. R. Co., 105 id. 89. And it is held that such intention may be inferred from slight circumstances. Washbon et al. v. Cope, 114 N. Y. 297.

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tenances; but in case of the death of my said son G. without leaving lawful issue him surviving, then my said farm to go to my grandchildren, who are the children of my deceased son, H., namely, M. E. H. and C. H. and H. C. H., share and share alike therein.

Construction:

The son G. W. H. took a conditional estate in fee in the farm which was subject to be reduced to a life estate if he died without leaving lawful issue him surviving.

The contingency mentioned in the will was that of the testator's sons surviving him and afterwards dying without issue;

The grandchildren, children of H. C. H., would become entitled to an estate in fee in the event of the death of G. W. H. without leaving lawful issue him surviving. *Chapman* v. *Moulton*, 8 App. Div. 64.

Where an estate is devised in fee, in remainder after the termination of a particular estate in the premises, with an executory limitation over to the issue of the devisee in case of the death of such devisee, such dying is to be construed to apply to the time when the remainder is limited to take effect in possession, and not to the time of the death of the testator. *Champlin* v. *Haight*, 10 Paige, 274.

20. LIMITATION OF SUCCESSIVE LIFE ESTATES.

Real Prop. L., sec. 33 (L. 1896, ch. 547, took effect Oct. 1st, 1896). 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 death of those persons, the remainder shall take effect, in the same manner as if no other life estates had been created."

1 R. S. 723, sec. 17, Banks's 9th ed. 1790, repealed by Real Property Law, substantially the same.

EXPLANATORY NOTE TO SEC. 33.—Devise to A. for life, B. for life, C. for life, remainder to D. The remainder takes effect on the death of B., and the estate of A. and B. are valid, and that of C. is void, and the remainder, being vested, is good. If the devise be to E. for the lives of A., B. and C., with remainder to D., there is one life estate for three lives; the remainder is vested and hence valid under section 35, and takes effect on the death of A. and B., the persons first named. Sections 33 and 35 relate only to vested remainders, and hence have no relation to the rule against perpetuities. Amory v. Lord, 9 N. Y. 403; Woodruff v. Cook, 61 id. 638; Purdy v. Hayt, 92 id. 446; Dana v. Murray, 122 id. 604, 618.

See this further discussed, *post*, p. 89, and see pp. 336, 367, 385.

21. REMAINDER ON ESTATES FOR LIFE OF THIRD PERSON.

Real Prop. L., sec. 34 (L. 1896, ch. 547, took effect Oct. 1, 1896). Remainder on estates for life of third person. "A remainder shall not

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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."

1 R. S. 724, sec. 18, Banks's 9th ed., 1791, repealed by Real Prop. Law, substantially the same.

EXPLANATORY NOTE TO SEC. 34.—The first clause of this section intends that a remainder less than a fee shall not be limited upon a life estate for the life of another than the taker of such life estate. The second clause intends that when such a life estate (life estate for the life of a third person) is created in a term of years, no remainder for less than the residue of the term shall be limited thereon. It would follow that, if the life estate were for the life of the taker thereof, a remainder of less than the fee might be created under the first clause, and a remainder for less than the residue of the term might be limited on a life estate for the life of the taker in a term of years. This section, as well as the other sections preceding section 40, should be read in connection with the latter section, which provides that, "subject to the provisions of this article," an estate for life may be created in a term of years, and a remainder limited thereon.

At common law, if a man possessed of a term, say for 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. Reviser's Notes, 3 R. S. 573.

Such a limitation in a *will* would have been valid. The statute effects uniformity in *conveyances* and wills.

The following are illustrations under this section:

Grant or devise to A. for life of B., remainder to C. in fee, is a valid remainder.

Grant or devise to A. for life of B., remainder to C. for life, remainder to D. in fee, is an invalid remainder to C.

Grant to A. for A.'s life, remainder to C. for life, remainder to D. in fee, is valid.

Grant out of a term of 100 years to A. for life of B., remainder to C. for residue of the term, is a valid remainder.

Grant out of a term of 100 years to A. for life of B., estate to C. for less than the residue of years remaining of the term after B.'s death, is an invalid estate.

Grant out of a term of 100 years to A. for A.'s life, then an estate to B. for less than the residue of the term after B.'s death, is a valid estate.

22. WHEN REMAINDERS TO TAKE EFFECT IF ESTATE BE FOR LIVES OF MORE THAN TWO PERSONS.

Real Prop. L., sec. 35 (L. 1896, ch. 547, took effect Oct. 1st, 1896). 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."

1 R. S. 724, sec. 19, Banks's 9th ed. 1791, repealed by Real Property Law, substantially the same.

EXPLANATORY NOTE TO SEC. 35.—This section has reference to an attempt to create a remainder limited on the lives of more than two third persons, thus, estate to A. for the lives of B., C., and D., remainder to E. The remainder takes effect upon the deaths of B. and C. and the life of D. is ignored. The reading of the section shows that the lives upon whose termination the remainder is to take effect, are the lives of third persons and not of the grantees of the life estate. The sentence is, "when a remainder is created on any *such* life estate," etc., "such" refers to the life estates treated in section 34, and they are estates for the life of a third person.

Suppose, then, the estate were to A., B., C. and D. as joint tenants for their lives and the life or lives of the survivors, remainder to E. Here is an estate given jointly to A. for his life, to B. for his life, to C. for his life, to D. for his life. If they were successive estates the last two would fail, but they are concurrent estates in this respect, that each person enjoys the property for his life concurrently with his co-tenant, and the remainder can not take effect until all shall have died. It is not apparent that such an estate offends any statutory provision. See Chaplin's Suspension, secs. 360–366.

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

1. STATUTES RELATING TO SUSPENSION OF THE POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP—EXPLANATORY NOTE, p. 383.

Section 32 *relating to Real Property, p.* 382.

Statute relating to Personal Property, pp. 383, 390.

Effect of the changed phraseology of sec. 32, *p.* 383.

Section 32 *primarily relates to contingent estates, p.* 384.

Williams v. Williams, 8 N. Y. 536; Wetmore v. Parker, 52 id. 450; Kane v. Gott, 24 Wend. 662.

Section 32 *and section* 76 *relate to estates created by means of a trust, pp.* 383, 392.

Downing v. Marshall, 23 N. Y. 366; Everitt v. Everitt, 29 id. 39; Schettler v. Smith, 40 id. 328; Robert v. Corning, 89 id. 225.

Sections 33 *to* 35 *relate to vested estates, pp.* 338, 385.

Amory v. Lord, 9 N. Y. 403; Purdy v. Hayt, 92 id. 446; Dana v. Murray, 122 id. 604, 618; Woodruff v. Cook, 61 id. 638.

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

1. STATUTES RELATING TO SUSPENSION OF THE POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP—THEIR MEANING AND RELATION.

Former section 16 (*now part of section* 32) *does not relate to personal property, p.* 386.

Manice v. Manice, 43 N. Y. 305; Mott v. Ackerman, 92 id. 459.

2. SUSPENSION—HOW DETERMINED.

Personal disabilities, suspension is not determined by.

Everitt v. Everitt, 29 N. Y. 39–97; Beardsley v. Hotchkiss, 96 id. 201, 214; Livingston v. Tucker, 107 id. 549–553; Craig v. Craig, 3 Barb. Ch. 76; Chaplin Suspension, sec. 316.

If, by the terms of the instrument, suspension may occur, actual events are immaterial, p. 398.

Schettler v. Smith, 41 N. Y. 308; Knox v. Jones, 47 id. 389; Purdy v. Hayt, 92 id. 446; Henderson v. Henderson, 113 id. 1, 14; Haynes v. Sherman, 117 id. 433; Dana v. Murray, 122 id. 604; Hawley v. James, 16 Wend. 121.

Suspension ascertainable only after one life has run, p. 398.

Purdy v. Hayt, 92 N. Y. 446; Dana v. Murray, 122 id. 604.

Suspension only exists if there be not persons in being who can transfer the absolute title, pp. 387–8.

Norris v. Beyea, 13 N. Y. 273, 289: Everitt v. Everitt, 29 id. 39; Moore v. Littel, 41 id. 66, 83; Garvey v. McDevitt, 72 id. 563; Hennessy v. Patterson, 80 id. 91; Smith v. Edwards, 88 id. 104; Farrar v. McCue, 89 id. 139; Mott v. Ackerman, 92 id. 550; Beardsley v. Hotchkiss, 96 id. 201; Robert v. Corning, 89 id. 225; Nellis v. Nellis, 99 id. 505; Matter of N. Y., L. & W. R. Co., 100 id. 96; Genet v. Hunt, 113 id. 158–172; Greenland v. Waddell, 116 id. 234; Murphy v. Whitney, 140 id 541; Sawyer v. Cubby, 146 id. 192; Williams v. Montgomery, 148 id. 579; Haynes v. Sherman, 117 id. 443, 439; Emmons v. Cairns, 3 Barb. 248; Gott v. Cook, 7 Paige, 521; 24 Wend. 641; Eels v. Lynch, 8 Bosw. 465.

Alienability.

Roome v. Phillips, 24 N. Y. 463; Manice v. Manice, 43 id. 303; Ham v. VanOrden, 84 id. 257, 270; 54 Hun, 322; Hennessy v. Patterson, 85 N. Y. 91; Nellis v. Nellis, 99 id. 505, 516.

3. VESTING OF REMAINDERS.

Remainders must not only be alienable but vest during the statutory period, p. 389.

Contingent remainder limited on a term of years, p. 389.

Estate for life as a remainder on a term of years, pp. 240, 389.

Fee limited on a fee, pp. 241, 389.

Contingent remainder in fee limited on a prior remainder in fee, pp. 386, 389.

Contingent remainder limited on more than two successive lives, pp. 390.

4. PERSONAL PROPERTY—VESTING OF OWNERSHIP OF, p. 390.

5. IN WHAT MANNER SUSPENSION MAY BE UNDULY EFFECTED, p. 392

6. SUSPENSION BY THE CREATION OF CONTINGENT EXPECTANT ESTATES, p. 392.

7. TRUSTS—SUSPENSION BY MEANS OF A TRUST, pp. 392–6.

Trust dependent on lives of others than beneficiary.

Downing v. Marshall, 23 N. Y. 366.

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

7. TRUSTS—SUSPENSION BY MEANS OF A TRUST.

Different lives for different contingencies in the trust.

Schermerhorn v. Cotting, 131 N. Y. 48.

Distribution of income of trust estate among different persons for several successive lives

Phelps v. Pond, 23 N. Y. 69; Crooke v. County of Kings, 97 id. 421; Schermerhorn v. Cotting, 131 id. 48; Bird v. Pickford, 141 id. 18.

Trust for the benefit of unborn beneficiaries.

Gilman v. Reddington, 24 N. Y. 9; Harrison v. Harrison, 36 id. 546; Woodgate v. Fleet, 64 id. 566.

More than two beneficiaries, yet trust limited to one life, and as to each beneficiary the beneficial interest for no longer than his life.

Savage v. Burnham, 17 N. Y. 560; Gilman v. Reddington, 24 id. 19; Harrison v. Harrison, 36 id. 543; Manice v. Manice, 43 id. 386; Rogers v. Tilley, 20 Barb. 639.

Trust for more than two lives expiring during testator's life.

Odell v. Youngs, 64 How. Pr. 56.

Trustees retaining possession of property and paying income to beneficiary after expiration of trust term.

Gilman v. Reddington, 24 N. Y. 29.

Trustees receiving and paying income to beneficiary after his maturity until the expiration of designated lives.

Roe v. Vingut, 117 N. Y. 204; Hopkins v. Kent, 145 id. 363.

When trustee could not alienate lands during trust term nor cestui que trust dispose of his interest.

Garvey v. McDevitt, 72 N. Y. 556; Robert v. Corning, 89 id. 225; Radley v. Kuhn, 97 id. 26; Crooke v. County of Kings, id. 421.

When trust estate is alienable.

Radley v. Kuhn, 97 N. Y. 26.

Proceeds of sale continuing under the trust.

Heermans v. Robertson, 64 N. Y. 332; Brewer v. Penniman, 72 id. 603; Robert v. Corning, 89 id. 225; Hobson v. Hale, 95 id. 588; Cruikshank v. Home, etc., 113 id. 337; Haynes v. Sherman, 117 id. 433; Fowler v. Ingersoll, 127 id. 472; Allen v. Allen, 149 id. 280.

Discretion in trustees to accelerate distribution.

Smith v. Edwards, 88 N. Y. 92.

When trustee has discretion to sell.

Robert v. Corning, 89 N. Y. 225; Henderson v. Henderson, 113 id. 1, 12.

Trusts by implication.

Tobias v. Ketchum, 32 N. Y. 319; Robert v. Corning, 89 id. 225; Purdy v. Hayt, 92 id. 446; Ward v. Ward, 105 id. 68.

Effect of a power in trust in creating suspension, pp. 392, 396.

Trust will not be implied where it will create unlawful suspension.

Tucker v. Tucker, 5 N. Y. 408; Smith v. Edwards, 88 id. 92; Robert v. Corning, 89 id. 225; Green v. Green, 125 id. 506, 512; Bean v. Bowen, 47 How. Pr. 306.

Trust—when property is alienable.

Everitt v. Everitt, 29 N. Y. 39; Robert v. Corning, 89 id. 235; Radley v. Kuhn, 97 id. 31

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

7. TRUSTS—SUSPENSION BY MEANS OF A TRUST.

Trusts—when by their terms or nature the property is alienable.

Robert v. Corning, 89 N. Y. 225, 235, 239; Harrison v. Harrison, 113 id. 1, 12; Stewart v. Hamilton, 37 Hun, 19.

Where cestui que trust of an express trust may be empowered to sell in contravention of a statute.

Coster v. Lorillard, 14 Wend. 333.

Whether trustees may be empowered to sell.

Belmont v. O'Brien, 12 N. Y. 394; Rogers v. Rogers, 111 id. 228, 238; McArthur v. Gordon, 51 Hun, 511; 126 N. Y. 597.

Trusts limited to begin in the future may cause suspension.

Manice v. Manice, 43 N. Y. 303, 365; Mason v. Mason's exrs., 2 Sandf. Ch. 432, affirmed 2 Barb. 229.

Secret trusts.

Matter of O'Hara, 95 N. Y. 403; Matter of Kelemen, 57 Hun, 165; Bache v. Tomlinson, 24 N. Y. Weekly Dig. 92.

Trusts void, whether valid as a power in trust.

N. Y. Dock Co. v. Stillman, 30 N. Y. 174; Adams v. Perry, 43 id. 487; Cooke v. Platt, 98 id. 35; Hagerty v. Hagerty, 9 Hun, 175; Hawley v. James, 16 Wend. 174, 175; Lange v. Ropke, 5 Sandf. 363.

8. LIVES IN BEING, pp. 399–400.

Suspension can be for no more than two lives in being.

Knox v. Onativia, 47 N. Y. 389; Rice v. Barrett, 102 id. 161; Ward v. Ward, 105 id. 68; Genet v. Hunt, 113 id. 158; Dana v. Murray, 122 id. 604; Coster v. Lorillard, 14 Wend. 265; Parks v. Parks, 9 Paige, 106; Thorn v. Coles, 3 Edw. Ch. 330; Geraud v. Geraud, 58 How. Pr. 175; VanVechten v. VauVeghten, 8 Paige, 103.

Successive life estates, remainder limited on more than two, pp. 385, 390.

Amory v. Lord, 9 N. Y. 403; Woodruff v. Cook, 61 id. 638; Purdy v. Hayt, 92 id. 446; Crooke v. County of Kings, 97 id. 421; Benedict v. Webb, 98 id. 460; Genet v. Hunt, 113 id. 158; Dana v. Murray, 122 id. 604.

See Van Schuyver v. Mulford, 59 N. Y. 426.

See Salmon v. Stuyvesant, 16 Wend. 320; Root v. Stuyvesant, 18 id. 256; Emmons v. Cairns, 2 Sandf. Ch. 369.

Lives, how they may be designated, p. 399.

Jennings v. Jennings, 7 N. Y. 547; Hawley v. James, 16 Wend. 61.

Designated lives may be strangers or beneficiaries, p. 399.

Crooke v. County of Kings, 97 N. Y. 421; Bailey v. Bailey, id. 460.

Suspension for more than two lives.

Amory v. Lord, 9 N. Y. 403; Chipman v. Montgomery, 63 id. 221; Ward v. Ward, 105 id. 68; Shipman v. Rollins, 98 id. 311; Genet v. Hunt, 113 id. 158; Dana v. Murray, 122 id. 604; Morris v. Porter, 52 How. Pr. 1; Thomson v. Thomson, 55 id. 494.

See Mulry v. Mulry, 89 Hun, 531.

Trust to pay income for more than two lives.

Knox v. Onativia, 47 N. Y. 389; Van Schuyver v. Mulford, 59 id. 426; Genet v. Hunt, 113 id. 158; Harris v. Clark, 7 id. 242.

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

8. LIVES IN BEING.

Suspension for joint lives.

Colton v. Fox, 67 N. Y. 348.

After two lives share given upon the same contingency as formerly.

Savage v. Burnham, 17 N. Y. 561.

9. MINORITIES, p. 400.

A minority counts for a life, pp. 382, 401.

Suspension for more than two minorities and lives.

Roome v. Phillips, 24 N. Y. 463; Manice v. Manice, 43 id. 380; Savage v. Burnham, 17 id. 561; Radley v. Kuhn, 97 id. 26; Vail v. Vail, 7 Barb. 226; Tayloe v. Gould, 10 id. 388; Hawley v. James, 16 Wend. 61; Lange v. Ropke, 5 Sandf. S. C. 363; Scott v. Monell, 1 Redf. 431.

Suspension during two minorities, further suspension of a share during the life of one of the minors, and a share during the life of another child.

Benedict v. Webb, 98 N. Y. 460.

Trust to receive and pay rents to a person named during several minorities.

Provoost v. Provoost, 70 N. Y. 141.

10. SUSPENSION FOR A DEFINITE OR INDEFINITE TIME, p. 401.

Tucker v. Tucker, 5 N. Y. 403; Dodge v. Pond, 23 id. 69; Beekman v. Bonsor, id. 298; Smith v. Edwards, 88 id. 92; Converse v. Kellogg, 7 Barb. 590; Hone's Exrs. v. Van Schaick, 20 Wend. 564; Butler v. Butler, 1 Hoff. Ch. 344, aff'd 3 Barb. Ch. 304; Morgan v. Masterton, 4 Sandf. 442; Trowbridge v. Metcalf, 5 App. Div. 318.

Trust for lives or for a term in gross.

Dodge v. Pond, 23 N. Y. 69.

Devise for a term of years.

Blanchard v. Blanchard, 70 N. Y. 615.

Suspension to a particular time.

DeKay v. Irving, 5 Denio, 646.

Bequest to a child born within a certain number of years after testator's death.

Smith v. Edwards, 88 N. Y. 92.

Gift to issue, living at the time of partition, postpones for a term of years.

Henderson v. Henderson, 113 N. Y. 1.

Devise to B. until a village be incorporated, then to the trustees of the village.

Leonard v. Burr, 18 N. Y. 96.

Trust for a term in gross.

Garvey v. McDevitt, 72 N. Y. 556; Rice v. Barrett, 102 id. 161; Cruikshank v. Home, etc., 113 id. 337; Coster v. Lorillard, 14 Wend. 265; Hone's Exrs. v. Van Schaick, 20 id. 563, aff'g 7 Paige, 221; Boynton v. Hoyt, 1 Denio 53; Craig v. Hone, 2 Edw. Ch. 528; Bean v. Bowen, 47 How. Pr. 306; Gano v. McCunn, 56 id. 337.

Trust until a person arrives at a certain age, with remainders.

Radley v. Kuhn, 97 N. Y. 26.

Principal not payable until children attain a certain age.

Fowler v. Depau, 26 Barb. 224; Doubleday v. Newton, 27 id. 431.

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

10. SUSPENSION FOR A DEFINITE OR INDEFINITE TIME.

Powers to be exercised after a time certain, pp. 396–7.

Incidental delays.

Robert v. Corning, 89 N. Y. 225; Cruikshank v. Home, etc., 113 id. 337; People v. Simonson, 125 id. 299.

Estates limited for an arbitrary period, but expiring during two designated lives.

Phelps v. Pond, 23 N. Y. 69; Oxley v. Lane, 35 id. 340, 345; Bailey v. Bailey, 97 id. 460; Genet v. Hunt, 113 id. 158; Schermerhorn v. Cotting, 131 id. 48; Montignani v. Blade, 145 id. 111; Prichard v. Thompson, 29 Hun, 295; Levy v. Hart, 54 Barb. 248; Thompson v. Clendening, 1 Sandf. Ch. 387, 395; Clancey v. O'Gara, 4 Abb. N. C. 268; DeKay v. Irving, 5 Denio, 646.

Estates for a life or a shorter period measured by years within that life.

Montignani v. Blade, 145 N. Y. 111; Sawyer v. Cubby, 146 id. 192.

Suspension for more than two lives absolutely bounded by two lives, p. 402.

Purdy v. Hayt, 92 N. Y. 446; Crooke v. County of Kings, 97 id. 421; Bailey v. Bailey, id. 460; Bird v. Pickford, 141 id. 18; Rogers v. Tilley, 20 Barb. 639.

Suspension until a mortgage shall have been paid from rents.

Killam v. Allen, 52 Barb. 605. See *post*, p. 402.

Suspension until partition shall have been made.

Henderson v. Henderson, 113 N. Y. 1; see Home's Exrs. v. Van Schaick, 2 Wend. 563.

Bequest for an object if another sum be also contributed to it or raised.

Dodge v. Pond, 23 N. Y. 69; Booth v. Baptist Church, 126 id. 215.

Gift to trustees for three years, and if money is not applied to a statue, or if it be inadequate, over.

Morgan v. Masterton, 4 Sandf. 442.

Suspension until the legislature shall pass an act, is not good, unless limited to two lives.

Phelps v. Pond, 23 N. Y. 9; Beekman v. Bonsor, id. 306; Levy v. Levy, 33 id. 97; Burrill v. Boardman, 43 id. 254; Holmes v. Mead, 52 id. 332; Shipman v. Rollins, 98 id. 311; Cruikshank v. Home, etc., 113 id. 337; Booth v. Baptist Church, 126 id. 215; People v. Simonson, id. 299; Tilden v. Green, 130 id. 29; Rose v. Rose, 4 Abb. Ct. App. Dec. 108.

Bequest to such persons as judges may appoint to receive it.

Bascom v. Albertson, 34 N. Y. 584; see Prichard v. Thompson, 29 How. Pr. 295.

11. CORPORATIONS, GIFTS TO, p. 409.

Gift to a corporation incorporated under a general law.

Cruikshank v. Home, etc., 113 N. Y. 337; People v. Simonson, 126 id. 299.

Gift to a charitable corporation, with direction that the principal be kept inviolate and income only expended.

Williams v. Williams, 8 N. Y. 524; Wetmore v. Parker, 52 id. 450; Robert v. Corning, 89 id. 225; Prichard v. Thompson, 29 Hun, 295; Wilson v. Lynt, 30 Barb. 124.

Gift to charitable and educational institutions.

Adams v. Perry, 43 N. Y. 487; Stevenson v. Lesley, 70 id. 512; Cottman v. Grace, 112 id. 299.

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

11. CORPORATIONS, GIFT TO.

Gift to an incorporated association.

Banks v. Phelan, 4 Barb. 80.

Gift to a Lodge of Free Masons.

Iseman v. Myres, 26 Hun, 651.

Gift to a town.

Iseman v. Myres, 26 Hun, 651.

Devise to a town to pay income to the poor.

Fosdick v. Hempstead, 125 N. Y. 581; Inman v. Myres, 26 Hun, 651 (see cases cited); Matteson v. Matteson, 51 How. Pr. 276.

Bequests to trustees for the benefit of the rector of a church for the time being.

Holmes v. Mead, 52 N. Y., 332; Wilson v. Lynt, 30 Barb. 124.

Devise to a church to buy coal for the poor of the church.

Bird v. Merklee, 144 N. Y. 544.

Gift to the officers of a corporation.

Williams v. Williams, 8 N. Y. 525; Manice v. Manice, 43 id. 314, 387; Adams v. Perry, id. 487; Cottman v. Grace, 112 id. 299; Inman v. Myres, 26 Hun, 651.

Trusts for cemetery purposes.

Reed v. Williams, 125 N. Y. 560.

Charitable uses, p. 409.

Holmes v. Mead, 52 N. Y. 332; Cottman v. Grace, 112 id. 299.

12. SUSPENSION FOR LIVES OF PERSONS NOT IN BEING, p. 399.

Woodgate v. Fleet, 44 N. Y. 1; 64 id. 566; Genet v. Hunt, 113 id. 158.

Trust for life of widow or wife; when for life of person not in being, p. 400.

Schettler v. Smith, 41 N. Y. 328; Tiers v. Tiers, 98 id. 568; Van Brunt v. Van Brunt, 111 id. 178; Stevens v. Miller, 2 Duer, 597; Durfee v. Pomeroy, 7 App. Div. 431; see Burrill v. Boardman, 43 N. Y. 259; Knox v. Jones, 47 id. 397; Smith v. Edwards, 88 id. 104; Haynes v. Sherman, 117 id. 437; Underwood v. Curtis, 127 id. 540.

Bequest to children in esse, whether affected by failure as to those born at a period too remote.

Smith v. Edwards, 88 N. Y. 92.

Trust in favor of unborn children not outrunning a designated life.

Rogers v. Tilley, 20 Barb. 639.

13. POWERS, pp. 392, 396.

Perpetuity can not be created by means of a power any more than by any other limitation.

Booth v. Baptist Church, 126 N. Y. 215.

Whether power effected an undue suspension.

Schettler v. Smith, 41 N. Y. 328; Van Brunt v. Van Brunt, 111 id. 178; Persons v. Snook, 40 Barb. 44.

Power of sale suspending vesting of fee.

Delaney v. McCormack, 88 N. Y. 174; Delafield v. Shipman, 103 id. 463; Dana v. Murray, 122 id. 604.

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

13. POWERS.

Direction to executors to sell after a certain time.

Beekman v. Bonsor, 23 N. Y. 317; Blanchard v. Blanchard, 70 id. 615; Garvey v. McDevitt, 72 id. 556; Robert v. Corning, 89 id. 225; Weeks v. Cornell, 104 id. 325; Henderson v. Henderson, 113 id. 1; Dana v. Murray, 122 id. 604; Deegan v. Wade, 144 id. 573; Stewart v. Hamilton, 37 Hun, 19; Persons v. Snook, 40 Barb. 144; Trowbridge v. Metcalf, 5 App. Div. 318.

Power of appointment of successive life estates to persons not in being.

Salmon v. Stuyvesant, 16 Wend. 320; Root v. Stuyvesant, 18 id. 256.

Power in trust to appoint remainders, and limitations over—when void.

Root v. Stuyvesant, 18 Wend. 256.

Power to make leases for sixty-three years.

Root v. Stuyvesant, 18 Wend. 256.

Power to make partition after a gross term of years.

Hone's Exrs. v. Van Schaick, 20 Wend. 563; see, Henderson v. Henderson, 113 N. Y. 1.

Power to lease for more than two lives.

Van Vechten v. Van Veghten, 8 Paige, 103.

Power to lease land until it can be sold may be void and yet power to sell valid.

Haxtun v. Corse, 2 Barb. Ch. 506.

Power to receive rents and to divide when youngest surviving of four children become of age.

McSorley v. Leary, 4 Sandf. Ch. 414.

Power of appointment by will causing undue suspension.

Thomson v. Livingston, 4 Sandf. 539.

Power to hold possession of land and pay net income to owner.

Tucker v. Tucker, 5 N. Y. 408; Everitt v. Everitt, 29 id. 39; Post v. Hover, 33 id. 593; Vanderpoel v. Loew, 112 id. 167; Hawley v. James, 16 Wend. 61; Gilman v. Reddington, 24 N. Y. 5; Roe v. Vingut, 117 id. 204; Hopkins v. Kent, 145 id. 363.

Gifts to such corporations as executors should select.

Prichard v. Thompson, 29 How. Pr. 295; see Bascom v. Albertson, 34 N. Y. 584.

Whether execution of power created perpetuity.

Downing v. Marshall, 23 N. Y. 366; Mott v. Ackerman, 92 id. 539; Beardsley v. Hotchkiss, 96 id. 201.

Possibility that donee of power may execute estate too remote, pp. 397–8.

Baker v. Lorillard, 4 N. Y. 257; Radley v. Kuhn, 97 id. 26; Crooke v. County of Kings, id. 421, 445; Salmon v. Stuyvesant, 16 Wend. 320; Root v. Stuyvesant, 18 id. 256; Hone's Exrs. v. Van Schaick, 20 id. 569.

Power to sell at termination of void estate.

Dana v. Murray, 122 N. Y. 604.

When power to sell fell with void trust.

Benedict v. Webb, 98 N. Y. 460.

Whether void limitation of interest in trustees of sale avoids the power of sale.

Robert v. Corning, 89 N. Y. 225; Fowler v. Ingersoll, 127 id. 472.

Gift of income for a term of years.

Matteson v. Matteson, 51 How. Pr. 276.

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

13. POWERS.

Gift payable or division to be made at a certain age—over twenty-one.

Thomson v. Livingston, 4 Sandf. 539; American Bible Society v. Stark, 45 How. Pr. 160.

Trust to invest and from interest accruing during a certain number of years to pay the legacies.

Matter of Starr, 2 Duer, 141.

Estates created in execution of a power, pp. 397–8.

Crooke v. County of Kings, 97 N. Y. 421.

Whether qualified power of alienation created legal suspension

Amory v. Lord, 9 N. Y. 403; Allen v Allen, 149 id. 280.

Whether power of sale effected suspension when beneficiaries could alienate, pp. 396-7.

Heermans v. Robertson, 64 N. Y. 532; Hetzel v. Barber, 69 id. 1.

Whether power of sale created undue suspension.

Beaumont v. Beaumont, 91 N. Y. 464; Wager v. Wager, 96 id. 164; Crain v. Wright, 114 id. 307; Haynes v. Sherman, 117 id. 433.

Whether power may prevent an undue suspension.

Fitzgerald v. Topping, 48 N. Y. 438; Heermans v. Robertson, 64 id. 332, 352; Robert v. Corning, 89 id. 225; Brewer v. Penninam, 72 id. 603, aff'g 11 Hun, 147; Hobson v. Hale, 95 N. Y. 609; Haynes v. Sherman, 117 id. 433.

Whether void power in trust defeats beneficial interests.

Lange v. Ropke, 5 Sandf. 363; Lange v. Wilbraham, 2 Duer, 171.

Period of suspension dates from the creation of the power.

Crooke v. County of Kings, 97 N. Y. 421; Genet v. Hunt, 113 id. 158; Dana v. Murray, 122 id. 604.

14. SUSPENSION UNTIL ONE OF A CLASS ARRIVES AT A DESIGNATED AGE, pp. 399, 402.

Suspension until majority of youngest child.

Everitt v. Everitt, 29 N. Y. 39; Will of Butterfield, 133 id. 473; Levy v. Hart, 54 Barb. 248; Thompson v. Clendening, 1 Sandf. Ch. 387; Est. of Ruppert, Tucker, 480; Dorland v. Dorland, 2 Barb. 63.

Suspension until youngest child, naming him, becomes of age.

McGowan v. McGowan, 2 Duer, 57.

Suspension until youngest grandchild now born or that may be hereafter born, becomes of age.

Smith v. Edwards, 88 N. Y. 92.

Division on arrival of a designated living youngest grandchild at the age of twenty-one and on death of G.

Roe v. Vingut, 117 N. Y. 204.

Suspension until the youngest child now living shall arrive at the age of twenty-one years, or would arrive at that age if living.

Haynes v. Sherman, 117 N. Y. 433; Hunter v. Hunter, 17 Barb. 25.

Suspension until youngest grandchild that may be born within twenty years shall arrive of age.

Smith v. Edwards, 88 N. Y. 92.

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

14. SUSPENSION UNTIL ONE OF A CLASS ARRIVES AT A DESIGNATED AGE.

Suspension until the eldest surviving child shall be of age.

Jennings v. Jenniugs, 7 N. Y. 547.

Trust for lives and to pay income to other children and as soon as the youngest child or any of them shall become of age to sell and divide.

O'Brien v. Mooney, 5 Duer. 57.

Trust during the life of G. and until the arrival of B. of age of twenty-one or B.'s previous death.

Roe v. Vingut, 117 N. Y. 204.

Provision that the property shall be kept undisposed of for use of children under age and unmarried after the life estate.

Williams v. Conrad, 30 Barb. 524.

Gift to A. provided he have heir arriving at majority, if not, over.

Brown v. Evans, 34 Barb. 594.

Gift for wife and children under age, and if youngest child should not arrive at age then division.

Burke v. Valentine, 52 Barb. 412; see DuBois v. Ray, 35 N. Y. 165; Butler v. Butler, 3 Barb. Ch. 310.

Estate to be sold and divided when youngest surviving of four children shall become of age.

McSorley v. Leary, 4 Sandf. Ch. 414.

Trust to sontinue until the testator's youngest child would, if living, attain a certain, age.

Boynton v. Hoyt, 1 Denio, 53.

Trust to continue until the youngest of testator's children (more than two) attaining the age of twenty-one years, should have attained that age.

Coster v. Lorillard, 14 Wend. 265; Hawley v. James, 16 id. 61; Schmidt v. Kahrs, 1 Dem. 114.

Trust until the eldest child of S., first taker of income, shall arrive of age. Two children living at, and one born after testator's death.

Butler v. Butler, 1 Hoff. Ch. 344, aff'd 3 Barb. Ch. 304.

"On my youngest child attaining the age of twenty-one years" referred to the youngest at the testator's death.

Eells v. Lynch, 8 Bosw. 465.

Trust until four children, or the youngest survivor of them, shall have attained the age of twenty-one years.

Benedict v. Webb, 98 N. Y. 460.

15. SUSPENSION BY PROVISIONS FOR SURVIVORSHIP.

Chipman v. Montgomery, 63 N. Y. 221; Kelso v. Lorillard, 85 id. 177; Matter of Verplank, 91 id. 439; Beardsley v. Hotchkiss, 96 id. 201; Nellis v. Nellis, 99 id. 505; Vanderpoel v. Loew, 112 id. 167; Dana v. Murray, 122 id. 604; Banks v. Phelan, 4 Barb. 80; Bulkley v. Depeyster, 26 Wend. 21; Wood v. Wood, 5 Paige, 595; De Peyster v. Clendening, 8 id. 294; Thorn v. Coles, 3 Edw. Ch. 330; Cromwell v. Cromwell, 2 id. 495.

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15. SUSPENSION BY PROVISIONS FOR SURVIVORSHIP.

Share going over to survivors on the death of one of several legatees is not subject to further suspension, p. 280.

Miller v. Emans, 19 N. Y. 384; Everitt v. Everitt, 29 id. 39; Smith v. Scholtz, 68 id. 41; Moore v. Hegeman, 72 id. 376; Vanderpoel v. Loew, 112 id. 167; Meserole v. Meserole, 1 Hun, 66.

Trust for A., B. and C., survivor or survivors; if B. and C. died before A., corpus to A.; if A. died before B. and C., corpus to A.'s appointees.

Bird v. Pickford, 141 N. Y. 18.

To what time words of survivorship refer — see Death, estates on contingency of, p. 346.

Three or more legatees taking by survivorship.

Oxley v. Lane, 35 N. Y. 340; Chipman v. Montgomery, 63 id. 221.

Devise to several persons and limitation to survivors of share of one dying without issue or under age.

Miller v. Emans, 19 N. Y. 384.

Gift of income to three persons and survivor so long as either should live.

Banks v. Phelan, 4 Barb. 80.

Cross remainders.

Purdy v. Hayt, 92 N. Y. 451; Mott v. Ackerman, id. 550; Beardsley v. Hotchkiss, 96 id. 214.

16. ALTERNATIVE LIMITATIONS, pp. 242, 336.

Savage v. Burnham, 17 N. Y. 561; Post v. Hover, 33 id. 593, 598; Schettler v Smith, 41 id. 328; Kiah v. Grenier, 56 id. 220; Moore v. Hegeman, 72 id. 376; Kelso v. Lorillard, 85 id. 182; Purdy v. Hayt, 92 id. 446; Cruikshank v. Home, etc., 113 id. 337; Genet v. Hunt, id. 158; Dana v. Murray, 122 id. 604; Fowler v. Depau, 26 Barb. 224; Hinckley v. Mayborne, 92 Hun, 473; Case v. Case, 16 Misc. 393.

17. SUBSTITUTED REMAINDERS.

Kelso v. Lorillard, 85 N. Y. 177; Wells v. Wells, 88 id. 323; Robert v. Corning, 89 id. 225; Vanderpoel v. Loew, 112 id. 167; Cruikshank v. Home, etc., 113 id. 337; Booth v. Baptist Church, 126 id. 215.

18. REMAINDERS.

Remainders after trust estates.

Gilman v. Reddington, 24 N. Y. 9, 15, 16; Embury v. Sheldon, 68 id. 227; Stevenson v. Lesley, 70 id. 512; Genet v. Hunt, 113 id. 158 (172–3); Goebel v. Wolf, id. 405.

See, 1 R. S. 729, 62; Woodgate v. Fleet, 44 N. Y. 1; U. S. Trust Co. v. Roche, 116 id. 120; Goebel v. Wolf, 113 id. 405; Townshend v. Frommer, 125 id. 446.

Remainders—acceleration of, pp. 317, 390.

Purdy v. Hayt, 92 N. Y. 446, 451; Dana v. Murray, 122 id. 604, 608.

19. ESTATES TO CHILDREN, HEIRS AND ISSUE, see pp. 255–7, 282, 325.

Tucker v. Bishop, 16 N. Y. 402; DuBois v. Ray, 35 id. 162; Kiah v. Grenier, 56 id. 220; Colton v. Fox, 67 id. 348; Smith v. Edwards, 88 id. 92; Wells v. Wells, id. 323; Bliven v. Seymour, id. 469; Purdy v. Hayt, 92 id. 446; Beardsley v. Hotch-

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19. ESTATES TO CHILDREN, HEIRS AND ISSUE.

kiss, 96 id. 201; Ward v. Ward, 105 id. 68; Van Brunt v. Van Brunt, 111 id. 178; Vanderpoel v. Loew, 112 id. 167; Surdam v. Cornell, 116 id. 305; Roe v. Vingut, 117 id. 204; Persons v. Snook, 40 Barb. 144; Burke v. Valentine, 52 id. 412; Hannan v. Osborn, 4 Paige, 336; Grout v. Van Schoonhoven, 1 Sandf. Ch. 336; Morris v. Porter, 52 How. Pr. 1.

Uncertainty of quantity of interest taken by members of a class.

Tucker v. Bishop, 16 N. Y. 402; Titus v. Weeks, 37 Barb. 136.

Definite or indefinite failure of issue, p. 403.

Trustees v. Kellogg, 16 N. Y. 83; Kiah v. Grenier, 56 id. 220; Nellis v. Nellis, 99 id. 505.

20. CHILD EN VENTRE SA MERE, p. 403.

See Mason v. Jones, 2 Barb. 299; Hone v. Van Schaick, 3 Barb. Ch. 488.

21. SUSPENSION OF ABSOLUTE OWNERSHIP OF PERSONALPROPERTY, pp. 383, 390-1.

Cruikshank v. Home, etc., 113 N. Y. 337; Greenland v. Wadell, 116 id. 234; Converse v. Kellogg, 7 Barb. 590; Kane v. Gott, 24 Wend. 641; Grout v. Van Schoonhoven, 1 Sandf. Ch. 336.

Rule respecting vesting of personal property, pp. 390–1.

Section 16 *does not apply to Manice* v. *Manice*, 43 N. Y. 303, 381.

Trust of personal property may be created for any purpose, p. 619.

Application of doctrine of equitable conversion.

Wells v. Wells, 88 N. Y. 323; Cruikshank v. Home, etc., 113 id. 337; Booth v. Baptist Church, 126 id. 215.

Suspension as affected by direction for payment of annuities or legacies.

Wetmore v. Truslow, 51 N. Y. 338; Johnson v. Cromwell, 26 Hun, 499 Radley v. Kuhn, 97 N. Y. 26; Griffen v. Ford, 1 Bosw. 120; O'Brien v. Mooney, 5 Duer, 51; Thomson v. Livingston, 4 Sandf. 539; Matter of Starr, 2 Duer, 141; Lange v. Ropke, 5 Sandf. 363; Hawley v. James, 16 Wend. 61; Stewart v. McMartin, 5 Barb. 438; Coster v. Lorillard, 14 Wend. 260; Hunter v. Hunter, 17 Barb. 25, 92; Killam v. Allen, 52 id. 605; Bradhurst v. Bradhurst, 1 Paige, 331, 346; Gott v. Cook, 7 id. 543; Clute v. Bool, 8 id. 83; Degren v. Closon, 11 id. 136; McGowan v. McGowan, 2 Duer, 57.

Payment of legacies from rents and profits.

Radley v. Kuhn, 97 N. Y. 26.

To what extent statutes relating to real property apply to personal.

Norris v. Beyea, 13 N. Y. 273; Savage v. Burnham, 17 id. 561, 570; Tyson v. Blake, 22 id. 558; Graff v. Bonnett, 31 id. 9, 13; Manice v. Manice, 43 id. 303, 381; Smith v. Van Ostrand, 64 id. 278; Bliven v. Seymour, 88 id. 478; Cook v. Lowery, 95 id. 103, 111; Matter of Denton, 102 id. 200; Genet v. Hunt, 113 id. 158, 168; Reed v. Williams, 125 id. 560, 567; Campbell v. Foster, 35 id. 361; Williams v. Thorn, 70 id. 270.

Laws relating to trusts, how far applicable to personalty.

Harrison v. Harrison, 36 N. Y. 543; Matter of Verplank, 91 id. 439; Hillyer v. Vandewater, 121 id. 681, aff'g 24 N. E. Rep. 999; Mason v. Jones, 2 Barb. 229, 242; Lorillard v. Coster, 5 Paige, 228; 14 Wend. 315, 335; Cromwell v. Cromwell, 2 Edw. Ch. 495.

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

21. SUSPENSION OF ABSOLUTE OWNERSHIP OF PERSONAL POWER.

When futurity is annexed to the time of payment and not to the substance of the gift, pp. 260, 269, 391.

When futurity is annexed to the substance of the gift and not to the time of payment, pp. 329–330, 391.

The fact that the whole income in each share, from the death of the parent to the time of payment, is bequeathed to the remainderman, has great weight in denoting an intention to vest the remainder from the time at which the income begins to accrue, p. 259.

Gilman v. Reddington, 24 N. Y. 10; Warner v. Durant, 76 id. 136; Smith v. Edwards, 88 id. 92; Wells v. Wells, id. 323; Manice v. Manice, 43 id. 378; Matter of Verplank, 91 id. 439; Robert v. Corning, 89 id. 225, 241; Vanderpoel v. Loew, 112 id. 167; Schermerhorn v. Cotting, 131 id. 48, 59.

Proceeds of sale continuing under trust, p. 369, 393, 395.

22. TENANCY, pp. 395, 404.

Whether tenants take jointly or in common.

Everitt v. Everitt, 29 N. Y. 39; Blanchard v. Blanchard, 70 id. 615, aff'g 4 Hun, 287; Matter of Verplank, 91 N. Y. 439, 443; Purdy v. Hayt, 92 id. 446; Dana v. Murray, 122 id. 604; Lane v. Brown, 20 Hun, 382; Matter of Lapham, 37 id. 18.

Fact, that issue of a beneficiary may take parent's share per stirpes, does not make them tenants in common.

Van Bruut v. Van Brunt, 111 N. Y. 178.

23. RESTRICTION ON JUS DISPONENDI. See Conditions, p. 1027.

Wetmore v. Parker, 52 N. Y. 450; Robert v. Corning, 89 id. 225; Genet v. Hunt, 113 id. 158; Williams v. Montgomery, 148 id. 519; Morris v. Porter, 52 How. Pr. 1; Converse v. Kellogg, 7 Barb. 590.

Restraint on right of immediate partition or division.

Doubleday v. Newton, 27 Barb. 431.

24. WHETHER INTERESTS ARE GIVEN IN SEPARATE SHARES OR IN SOLIDO, pp. 404–5.

Everitt v. Everitt, 29 N. Y. 39; Colton v. Fox, 67 id. 348; Stevenson v. Lesley, 70 id. 512; Moore v. Hegeman, 72 id. 376; Monarque v. Monarque, 80 id. 320; Smith v. Edwards, 88 id. 92; Matter of Will of Verplank, 91 id. 439; Bailey v. Bailey, 97 id. 460; Tiers v. Tiers, 98 id. 568; Ward v. Ward, 105 id. 68; Vanderpoel v. Loew, 112 id. 167; Surdam v. Cornell, 116 id. 305; Haynes v. Sherman, 117 id. 433; Dana v. Murray, 122 id. 604; Schermerhorn v. Cotting, 131 id. 48; Burrill v. Sheil, 2 Barb. 457; Persons v. Snook, 40 id. 144; Field v. Field, 4 Sandf. Ch. 528. See Trolan v. Rogers, 79 Hun, 507; Cromwell v. Cromwell, 2 Edw. Ch. 495; Dickie v. Van Vleck, 5 Redf. 284.

Trusts inseparable and void.

Knox v. Onativia, 47 N. Y. 389; Van Nostrand v. Moore, 52 id. 12; Colton v. Fox, 67 id. 348; Ward v. Ward, 105 id. 68; Shipman v. Rollins, 98 id. 311; Haynes v. Sherman, 117 id. 433; Will of Butterfield, 133 id. 473; Hawley v. James, 16 Wend. 61; Field v. Field, 4 Sandf. Ch. 563.

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

24. WHETHER INTERESTS ARE GIVEN IN SEPARATE SHARES OR IN SOLIDO.

When separate trusts are created.

Everitt v. Everitt, 29 N. Y. 39; Savage v. Burnham, 17 id. 561; Stevenson v. Lesley, 70 id. 512; Moore v. Hegeman, 72 id. 376; Wells v. Wells, 88 id. 323; Bailey v. Bailey, 97 id. 460; Vanderpoel v. Loew, 112 id. 167; Woodgate v. Fleet, 44 id. 1; Giraud v. Giraud, 58 How. Pr. 175; Leavitt v. Wolcott, 65 id. 57. See Mulry v. Mulry, 89 Hun, 531, 533.

Provision that if any child should die under age her share should go to her issue, if any; if not, to the survivor, causes each share to vest separately as each becomes of age, and indicates an intention to divide corpus into shares.

Everitt v. Everitt, 29 N. Y. 39. See Colton v. Fox, 67 id. 348; Van Brunt v. Van Brunt, 111 id. 178; Bulkley v. Depeyster, 26 Wend. 21; Persons v. Snook, 40 Barb. 144; Monarque v. Monarque, 53 How. Pr. 438.

25. WHETHER LEGAL SEPARABLE FROM ILLEGAL PROVISIONS, AND EFFECT OF VOID PROVISIONS, pp. 405, 406–7.

Whether the purposes of a trust are separable, so that some may be maintained and others declared void.

Post v. Hover, 33 N. Y. 593; Oxley v. Lane, 35 id. 340; Smith v. Edwards, 88 id. 92; Benedict v. Webb, 98 id. 460; Henderson v. Henderson, 113 id. 1; Haynes v. Sherman, 117 id. 433; Richards v. Moore, 5 Redf. 278.

Whether failure of trust caused failure of devise or bequest.

Holmes v. Mead, 52 N. Y. 332. See Hatch v. Bassett, id. 359; Bean v. Bowen, 47 How. Pr. 306.

Legal separable from illegal provisions.

Stevenson v. Burnham, 17 N. Y. 561; Kiah v. Grenier, 56 id 220; Smith v. Edwards, 88 id. 92; Haynes v. Sherman, 117 id. 433.

Separate legacies valid although general trust was void.

Hone's Exrs. v. Van Schaick, 20 Wend. 263.

Void ulterior limitations dropped and valid primary dispositions allowed to stand.

Oxley v. Lane, 35 N. Y. 340; Harrison v. Harrison, 36 id. 543; Van Schuyver v. Mulford, 59 id. 426; Henderson v. Henderson, 113 id. 1; Fiuch v. Wilkes, 17 Misc. 428.

When there are alternative provisions, the illegality of one does not affect the other.

Shipman v. Rollins, 98 N. Y. 311; Benedict v. Webb, id. 460; Ward v. Ward, 105 id. 68; Cruikshank v. Home, etc., 113 id. 337; Depre v. Thompson, 4 Barb. 279; 8 id. 537; Hannan v. Osborn, 4 Paige, 336; Parks v. Parks, 9 id. 106; Thomson v. Thomson, 56 How. Pr. 444.

All life estates and remainders fall with the illegal trust.

Hawley v. James, 16 Wend. 61.

When power to sell fell with a void trust.

Benedict v. Webb, 98 N. Y. 460.

Whether a failure of a part of the scheme of a will should cause the whole scheme to fail.

Holmes v. Mead, 52 N. Y. 332; Benedict v. Webb, 98 id. 460; Rice v. Barrett, 102 id. 161; Henderson v. Henderson, 113 id. 1; Will of Butterfield, 133 id. 473; Hawley v. James, 16 Wend. 61; Root v. Stuyvesant, 18 id. 256; Field v. Field, 4 Sandf. Ch. 520.

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

25. WHETHER LEGAL SEPARABLE FROM ILLEGAL PROVISIONS, AND EFFECT OF VOID PROVISIONS.

Gift to several beneficiaries equally and gift to one void; the others take only their proportional shares.

Booth v. Baptist Church, 126 N. Y. 215.

When beneficiaries required to elect whether they would accept valid provisions in will, or renounce and take as heirs and next of kin.

Hawley v. James, 16 Wend. 61; Thompson v. Clendening, 1 Sandf. Ch. 387.

When void devise avoids directions for apportionment of estate.

Salmon v. Stuyvesant, 16 Wend. 320.

The invalidity of a limitation on account of remoteness places all prior gifts in the same situation as if it had been entirely omitted in the dispositive system. Lewis on Perp., 657.

Leonard v. Burr, 18 N. Y. 96.

Whether, if trust estate be void, estates to legatees remain.

Everitt v. Everitt, 29 N. Y. 39; Parks v. Parks, 9 Paige, 106; Richards v. Moore, 5 Redf. 278; Bean v. Bowen, 47 How Pr. 306.

Failure of trust for unborn children did not increase interests of beneficiaries.

Woodgate v. Fleet, 44 N. Y. 1.

Will directing disposition of property if gift thereof is declared void.

Booth v. Baptist Church, 126 N. Y. 215.

Devise to executors to carry out provisions that may be declared void.

Booth v. Baptist Church, 126 N. Y. 215.

In case of void power to lease land descended to heirs subject to right of legatees to have it sold.

Van Vechten v. Van Veghten, 8 Paige, 103.

When trust is void but purpose may be effected, estate vests in devisees.

Beekman v. Bonsor, 23 N. Y. 317–318; Helck v. Reinheimer, 105 id. 470, 475. As to powers, see, 1 R. S. 729, secs. 56–59; id. 727, secs. 45–48; Fisher v. Hall, 41 N. Y. 416; Syracuse Savings Bank v. Holden, 105 id. 415.

Undue suspension of power of alienation and provision that if gifts be adjudged void the executors should take in trust to carry out void gifts.

Booth v. Baptist Church, 126 N. Y. 215.

Direction that if estates first limited be void, other persons should take the property.

Cruikshank v. Home, etc., 113 N. Y. 337.

26. CONFLICT OF LAWS, p. 407.

Chamberlain v. Chamberlain, 43 N. Y. 425; Hobson v. Hale, 95 id. 588; Cross v. U. S. T. Co., 131 id. 330; Dammert v. Osborn, 140 id. 30; Hillen v. Iselin, 144 id. 365; Trowbridge v. Metcalf, 5 App. Div. 318.

27. COMPUTATION OF PERIOD OF SUSPENSION, p. 404

28. LIMITATION OF CHATTELS REAL, p. 498.

29. MARRIED WOMEN.

Fact that trustee could convey to a married woman under the act of 1849 *did not cure undue suspension.*

Genet v. Hunt, 113 N. Y. 158.

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

29. MARRIED WOMEN.

Trust estate, under acts relating to married women.

Crooke v. County of Kings, 97 N. Y. 421.

30. DOWER—REFUSAL OF.

Whether devise to wife for life in lieu of dower, which she refused, suspended power of alienation.

Bailey v. Bailey, 97 N. Y. 460.

31. WHAT ESTATES OR INTERESTS ARE SUBJECT TO THE STATUTE, pp. 384–5, 409.

Possibilities of reverter, p. 410.

Vail v. L. I. R. Co., 106 N. Y. 283; Chaplin's Susp. sec. 131.

Right of entry for breach of condition subsequent, p. 410.

Chaplin's Susp. sec. 132.

Estates defeasible vested, p. 297, 317.

Hannan v. Osborn, 4 Paige, 336; Robert v. Corning, 89 N. Y. 225, 241.

Real Prop. L., sec. 32 (L. 1896, ch. 547, took effect Oct. 1, 1896). 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 purpose 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."

1 R. S. 724, sec. 14, Banks's 9th ed. 2176. Void future estates. Suspending power of alienation. Sec. 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 R. S. 724, sec. 15, Banks's 9th ed. 2176. How long it may be suspended. Sec. 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."

1 R. S. 724, sec. 16, Banks's 9th ed. 2176. Contingent remainder in fee. Sec. 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."

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

Suspension of ownership of personal property. Laws of 1897, ch. 417 (ch. 47 of Genl. Laws, took effect Oct. 1, 1897), art. 1, sec. 2. "The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or, if such instrument be a will, for not more than two lives in being at the death of the testator; in other respects, limitations of future or contingent interests in personal property are subject to the rules prescribed in relation to future estates in real property."

2 R. S. pt. II, ch. 4, tit. 4, Banks's 9th ed. 1857, secs. 1, 2 repealed thereby.

EXPLANATORY NOTE TO SEC. 32.

Effect of the changed phraseology of section 32.

Former section fourteen provided that a *future* estate was void, when there was an undue suspension of the power of alienation, and that a suspension of the power of alienation existed, when there were no persons in being by whom an absolute fee in possession could be conveyed.

Former section fifteen provided that the absolute power of alienation should not be suspended, *by any limitation or condition whatever*, for more than two lives in being, etc., except in the case mentioned in section 16. Section fifteen, by itself, was sufficient to include a vested estate.

Section thirty-two, however, while retaining the former definition of suspension, and the permitted continuance thereof, applies the entire prohibition to *future* estates, and declares that "every *future* estate shall be void in its creation, which shall suspend the absolute power of alienation by any limitation or condition whatever," etc.

Section thirty-two, therefore, *by its terms*, has sole reference to *future* estates. It has, with good reason, been suggested that this excludes from its operation estates vested in trustees. While probably not so intended by the original revisers, section fifteen has been regarded as broad enough in its terms to include estates vested in trustees under an express trust.

An express trust can only be formed under section seventy-six (former section 55). In such a case the trustee takes the title (section 80, former section 60), and a sale in contravention of the trust is void by section eighty-five (former section 65); and a restriction is placed upon the alienation of the beneficiaries' interests by section eighty-three, former section

sixty-three. Therefore, property held in trust under these statutes is, at least in certain cases, inalienable, and the question arose, for what period such a trust could continue. Subdivision three of section seventy-six provides that a trust may be created "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.*" Subdivision three, as contained under former section fifty-five, read somewhat differently, viz., "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.*"

Subdivision four of section seventy-six permits a trust for accumulation of rents and profits for the purposes, and "*within the limits prescribed by law,*" or, under former section fifty-five, "*within the limits prescribed in the first article of this title.*"

These provisions and references, with the language of section fifteen, were thought sufficient to bring subdivision three of section fifty-five under section fifteen, limiting the duration of the suspension of the power of alienation, and subdivision four of section fifty-five under the sections relating to accumulation. This was accomplished by the reference to the first article of the title, as contained in section seventy-six in connection with the general language of section fifteen, whose terms were such that it could be made applicable to a vested estate, by such a provision as was contained in former section fifty-five.

It will be observed now, however, that any *special* reference to the first article is stricken from section seventy-six, and what is essentially serious, that section thirty-two is re-arranged so as to apply to *future* estates only; hence, it could be applicable to trusts only so far as trusts could be regarded as future estates, or by their existence could suspend the absolute power of alienation of future estates. It is not logically conceivable that section thirty-two, under its present reading, can have any reference to an estate held under an express trust, whatever effect it may have upon the contingent estates dependent thereon. The correction seems to rest with the legislature alone.

Relation of section 32 *to sections* 33 *and* 35.

Although by incorporation it has been made applicable to trusts, section thirty-two (former sections 14 to 16) primarily relates to contingent and not to vested estates. The revisers so intended and the courts have

See this subject forcibly and correctly discussed in Chaplin's Express Trusts and Powers, p. 273.

so held. Wetmore v. Parker, 52 N. Y. 450, 458; Williams v. Williams, 8 id. 536; Kane v. Gott, 24 Wend. 662. On the other hand, vested estates are alone embraced in sections thirty-three to thirty-five.

Where the remainder is vested, as where the lands are given to A. for life, remainder to B. (a person in being), in fee, there is no suspension of the power of alienation; for B., the remainderman, and A., the taker of the life estate, own the entire title, and, by uniting, may always convey the whole estate.[1] Nor would the case be changed if there were two or more precedent life estates.

Since, then, section thirty-two treats of contingent future estates, and sections thirty-three to thirty-five of vested estates, it follows that so far as section thirty-two is concerned, estates may be given for any number of lives with remainder, provided the estates be vested in persons in being. The prohibition against this is found in sections thirty-three and thirty five (former sections 17 and 19). Amory v. Lord, 9 N. Y. 403; Purdy v. Hayt, 92 id. 446; Dana v. Murray, 122 id. 618. Hence, if a devise be to A. for life, then to B. for life, then to C. for life (persons in being), there are three lives; if now a remainder be given to D. (in being), section seventeen is violated, yet there is no suspension of the power of alienation, since the estates are all vested, and the owners of the several estates, by uniting, can convey the whole title; but if the devise be to A. for life, B. for life, C. for life, and remainder to the heirs of C. living at C.'s death, there is a contingent remainder limited on three lives, and as the remainder is contingent, since it can not be known until the death of C. who the remaindermen will be, there are no persons in being, by whom an absolute fee in possession can be conveyed, and the power of alienation is unduly suspended within the meaning of section thirty-two.[2]

Had the same remainder been limited upon estates for life to A. and B., the devise would have been valid, because the inability to abso-

[1] And so it will be seen later that the creation of a contingent estate will not, save as hereafter stated, p. 389, suspend the power of alienation, if the person be ascertained who is entitled to such estate; for in such case it is vested *in right* (as to the distinction between remainders vested in possession, in interest and in right, see pp. 254, 259) although not in interest, and the owners of the several estates may unite and convey.

[2] Suppose the life estates were successively to A., B. and C., with remainder to D. (a person in being) upon an event that may not happen until C.'s death. Here all the interests may be conveyed, and under the rule by which the violation of section thirty-two is usually tested there is no undue suspension, and so there is not unless the statute requires the estate of D. to vest within two lives. As to this, see p. 390.

lutely convey could continue only through two lives in being. Under section thirty-two, it will be noticed, the *future* estate alone is void, but if a vested remainder be limited on more than two successive lives, or more than two lives, the remainder is, by sections seventeen and nineteen (present sections 33 and 35) not defeated, but takes effect upon the expiration of the proper number of lives, but the first two life estates only are valid; or if a life estate be given for the lives of third persons, more than two, it will run through the life of the first two named, as provided by section thirty-five.

Relation of former sections 15 *and* 16.

The relations of former sections fifteen and sixteen (now inconveniently merged into one section, 32) should be noticed. Section sixteen enlarges the time within which the second remainder may take effect. In every other case the remainder must take effect so as to permit an absolute alienation of the property before or at the expiration of two lives; but only in cases arising under section sixteen may the second remainder take effect during the two lives and the minority[1] of the first remainderman, and this exception applies to real property and not to personalty. Manice v. Manice, 43 N. Y. 305; Woodgate v. Fleet, 64 id. 566–572. See pp. 368, 390.

This section applies only to remainders and does not apply to a devise to A. in fee and upon some contingency happening in A.'s life, then to B. in fee. But by section forty it is provided that 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*, viz., two lives in being. Page 241.

Having now stated the relation of section thirty-two to sections thirty-three and thirty-five, and the purpose of such part of section thirty-two as was formerly contained in section sixteen, a brief reference to the salient features of the prohibition contained in these sections may be useful.

[1] In the Revisers' notes, R. S., vol. 3, 2d ed., 573, it is said: "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 upon it would be void; and on the determination of the life estate, the fee would descend to the heirs of the testator."

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The rule in New York and that of the common law compared.

The English rule (obtaining also in many American states) is, that a future contingent estate may be limited to begin in enjoyment during any number of lives in being at the creation of the estate, and in addition twenty-one years, and in addition the necessary period of gestation of a child *en ventre sa mere*. This rule was, painfully to suitors, deduced through many years of inharmonious decisions. It was finally established in the Duke of Norfolk's Case (3 Ch. Cas. Pallex 223, 2 Ch. 229), that a future interest might be limited to begin on a contingency which must occur within any number of lives in being. Kent's Com. vol. 4 *266 (288), Gray's Perpetuities, 115. It was thereafter established that this period might be extended beyond a life or lives in being, so as to cover the time necessary for the birth of a posthumous child, and until such child should become of age. Kent's Com. *267 (289), Gray's Perpetuities 121; Stephens v. Barnard, 2 K. B. 375, Cas. Temp. Talb. 228. So this addition of twenty-one years originally related to minorities, but it was questioned whether the suspension could be for lives in being and an additional twenty-one years in gross, that is for lives and a term of years unconnected with the minorities of the persons who should take under the limitation, and it was in 1832 definitely decided in the affirmative. Kent's Com. vol. 4 *268–9 (note d); Gray's Perpetuities, 122, etc. Hence, the common law rule favors a suspension during (1) any number of lives in being when the estate is created, and (2) a minority or twenty-one years in gross, and (3) sufficient additional time to reach the case of the gestation and birth of a posthumous child.

The original revisers of the New York Revised Statutes, disallowed (1) a term in gross, *i. e.* a term for an arbitrary time, (2) a suspension for more than two lives, save *in a single instance*, viz., where a contingent remainder in fee is limited upon a prior remainder in fee, determinable during the minority of the first remainderman; in which case the suspension may be for two lives and such minority, and such is the statute of New York. Manice v. Manice, 43 N. Y. 303, 375.

Rule for determining whether there is an undue suspension.

At common law, questions relating to perpetuities turn upon the remoteness of the estate, that is, whether they will vest within the prescribed period. Under the statutes of New York, the inquiry, save as to the vesting of remainders (p. 389), relates entirely to the absolute alienability of the property; that is, whether the title will vest in *right*

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within the statutory period. The sole inquiry is, *are there persons in being, or during two designated lives must there be persons in being by whom an absolute estate in possession can be conveyed or transferred?*

If this question be answered in the affirmative, there is no undue suspension of the power of alienation of real property, or of the absolute ownership of personal property. Real Prop. L. sec. 32; [1]Robert v. Corning, 89 N. Y. 225; Sawyer v. Cubby, 146 id. 192; see *post*, p. 473. By section forty-nine it is provided that "an expectant estate is descendible, devisable and alienable in the same manner as an estate in possession," p. 251.

Hence, all estates are in their nature alienable. Nothing is needed, then, to enable such alienation, save that there should be ascertained owners of the property, or of all the estates existing therein, then the absolute title may be conveyed. Hence, the rule follows, "a contingency attached to a legacy or an estate in land which will render it void as an unlawful suspension of the power of alienation, must be one that relates to *the person* who shall take, and who may not come into being or gain capacity to take and hold within the prescribed two lives, whereby it may happen that there is no one who can alienate within that time."

Sawyer v. Cubby, 146 N. Y. 192, rev'g 73 Hun, 298; Murphy v. Whitney, 140 N. Y. 541; Williams v. Montgomery, 148 id. 519; Allen v. Allen, 149 id. 280, aff'g 63 Hun, 635; Robert v. Corning, 89 N. Y. 225. For other cases see *supra*, p. 368.

Under this rule it is unimportant how many, or what estates are existing in the property, whether they are *vested or contingent;* whether there are many or few owners of estates and interests. If by uniting they can convey an absolute estate in possession, there is no suspension whatever.

Norris v. Beyea, 13 N. Y. 273, 289; Garvey v. McDevitt, 72 id. 563; Williams v. Montgomery, 148 id. 519, 526.

Hence, the inquiry always relates to this—is the owner of a contingent estate or interest ascertained, or, if not ascertained, must he be ascertained if at all within the time prescribed by the statute. If he is certain, there is no suspension at all; if he must be ascertained within the time prescribed by the statutes, there is no undue suspension. Such is the meaning of the rule against the *suspension of the power of alienation*, by the creation of future estates *as provided in section thirty-two.*

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[1]See quotation from opinion in this case, *post*, p. 394.

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Remote vesting of remainders.

The New York statutes also limit the remote vesting of such future estates as are strictly remainders.[1]

This is a further restriction applicable to particular cases, whereby estates and interests must cease to be contingent, and vest in interest during two lives in being. Otherwise these estates or interests may be too remote, although the rule against suspension of the power of alienation be not violated. These sections of the statute relate entirely to the *remote vesting of remainders* as contradistinguished from other future estates. Section twenty-eight of the Real Property Law defines such a remainder, and the difference between *a remainder and* other future estates has been pointed out. *Ante*, pp. 232–239.

(1.) Under section thirty-six of the Real Property Law, "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." Henderson v. Henderson, 46 Hun, 509, 513; Butler v. Butler, 3 Barb. Ch. 304; Hawley v. James, 5 Paige, 463. See discussion of this section at p. 239.

(2.) By section thirty-seven of the Real Property Law, it is provided that "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." See discussion of this section at p. 240.

The last two sections cover the case of remainders limited on a term of years.

(3). Under section forty, "a fee or *other less estate* (new in Real Property Law) may be limited on a fee, on a contingency which, if it should occur, must happen within the period prescribed in this article." See p. 241.

This covers the case of a fee or lesser estate limited on a fee; but unlike the other sections does not relate to strict remainder, but rather to executory devises.

(4.) Under section thirty-two, 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. See p. 367.

This covers the case of a contingent remainder in fee limited on a prior remainder in fee.

[1] See the clear exposition of this subject in Chaplin's Suspension, § 314, *et seq.*

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It will be seen that these sections require not a mere ascertainment of the owner of the future estate, but that the estate must actually vest *in interest*, if at all, within the statutory period.

(5.) The above sections cover the usual manner of creating a remainder, save by limiting it upon lives. Suppose, then, a contingent remainder to D., a person in being at the creation of the estate, be limited upon three successive life estates, or a life estate for the lives of three persons. What statute forbids it? Section thirty-three declares that a remainder under that section shall vest at the expiration of the first two lives, and section thirty-five declares that the remainder shall vest at the expiration of the lives of the first two persons designated; but it has been held that section thirty-three relates only to vested remainders. Amory v. Lord, 9 N. Y. 403; Purdy v. Hayt, 92 id. 446–457; Dana v. Murray, 122 id. 604, 618.

The argument is this: The contingency appointed to vest the remainder may not happen until after the expiration of the two life estates, maybe not until the third life estate shall have run. But section thirty-three cuts off the third life estate and preserves only such remainders as can take effect at the expiration of the second life estate. The contingent remainder above described might not be able to take effect at the end of the second life, and the statute can not accelerate the happening of the contingency upon which it is to vest. See cases, p. 377. Chaplin's Suspension, § 323.

Hence, as the remainder can not comply with the demands of the statute it can not be preserved; the remainder must fall. It results, as has been stated, that sections thirty-three and thirty-five apply only to vested estates.[1]

This result, however, does not seem to harmonize with [2] Woodruff v. Cook, 61 N. Y. 638; 47 Barb. 304.

Personal property.

The statute relating to personal property differs from that relating to real property as follows:[3]

(1.) There is no provision for an additional minority, as is provided in section thirty-two (former section 16). See p. 368.

(2.) It has been considered that the statute relating to personal property is violated unless *all* executory limitations thereof, whether they be in the nature of *remainders*, or other future estates, must vest within two lives

[1] See cases p. 367.

[2] See p. 338.

[3] See statute set out p. 383.

in being; and that the mere fact that there are persons in being who can transfer the absolute title thereof is not sufficient. Chaplin's Suspension, p. 217, *et seq.* By this rule, if a future contingent interest is given in personal property, not only must there be persons within two lives in being who can transfer the absolute title, but also the interest must vest during such time. The language of the section countenances such a construction. Nevertheless, the same general test applicable to real property is usually applied to personal property, viz., are there persons in being who can transfer the absolute title thereof. Sawyer v. Cubby, 146 N. Y. 192; Robert v. Corning, 89 id. 225, and the usual rules as to the vesting of remainders would be applicable.

It may be that an examination of the decided cases would illustrate that this general rule has heretofore proved sufficient.

Postponement of payment and possession may not suspend ownership.

The inquiry whether a person has such an ownership of personal property that he can transfer the title thereof, often turns upon the question whether the postponement of payment is a deferment of the vesting of the title in him. If the postponement relate only to the time of payment and not to the time when the ownership vests, there is no suspension. The usual and somewhat insufficient rule is, that if futurity relates to the substance of the gift, or the legatee who shall take it, the absolute ownership is suspended; if futurity refer only to the time of payment or delivery of possession, either for the convenience of the estate or the proper management and conservation of the interest, there is no such suspension. See Vested Estates, p. 260; Contingent Estates, p. 330.

Whether the gift takes effect at one time or another is primarily a question of intention, but certain rules thought to be helpful in discovering such intention are observed; and, moreover, the law favors the vesting of interest. These rules have been given elsewhere, pp. 259, 260.

The following generalizations may be repeated at this place:

If the will by appropriate words give the property to a person so that if that were all he would take it, and there be further words directing that it be paid or delivered to him at some future time, or, if it be real estate, that it be converted and so paid to him, he takes a vested interest. See cases digested pp. 260, 261.

If, however, there be no words indicating a present gift, but a provision that after a life estate the property should be converted, or a fund be created in the future, distributed, or paid to a person, or to a

class of persons, it is a general rule that the title does not vest until that time. See cases digested, p. 330.

In what manner the suspension of the power of alienation may be unduly effected.

The power of alienation or absolute ownership may be illegally suspended,

(1) By the creation of contingent expectant estates, so that there may be no persons in being during the continuance of the lives of two designated persons in being at the creation of the estate, who can convey a perfect title. Smith v. Edwards, 88 N. Y. 102; Everitt v. Everitt, 29 id. 71; Robert v. Corning, 89 id. 225, 235.

(2) By vesting the title in trustees pursuant to section seventy-six, p. 616 (former section 55), of the article upon trusts, so that property becomes inalienable under section eighty-five, p. 683 (former section 65), and section eighty-three, p. 813 (former section 63), for a period of more than two lives in being at the creation of the trust. Cases *supra*, also Murphy v. Whitney, 140 N. Y. 541; Haynes v. Sherman, 117 id. 433; Robert v. Corning, 89 id. 225; Schettler v. Smith, 41 id. 328; Downing v. Marshall, 23 id. 366; see pp. 368–9.

(3) A power in trust may be instrumental in effecting a suspension in connection with estates contingent or in trust. Radley v. Kuhn, 97 N. Y. 34.

Garvey v. McDevitt, 72 N. Y. 556; Mott v. Ackerman, 92 id. 539; Van Brunt v. Van Brunt, 111 id. 178; Dana v. Murray, 122 id. 604; Booth v. Baptist Church, 126 id. 215; Downing v. Marshall, 23 id. 366; Schettler v. Smith, 41 id. 328; Chaplin's Suspension, etc., 74; see cases pp. 373–5.

Suspension by means of a trust.

As has been stated (p. 383), express trusts are created by authority of section seventy-six (former section 55). By section eighty (former section 60), the title is vested in the trustee. By section eighty-three (former section 63), the right of a beneficiary in an express trust to receive and apply the rents and profits of real property can not be transferred, except as therein stated; and by section eighty-five (former section 65), alienation in contravention of the trust is prohibited.

By these sections the trust property is inalienable; but under subdivision three of section seventy-six, the trust may be created to receive and apply the rents and profits 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." This phrase, "*subject to the provisions of law relating thereto*," by reference, brings the trust within the terms of section thirty-two so that that section is regarded as measuring the possible duration of the entire trust, while the specific provision contained in the words "during the life of that person," measures the continuance of the trust as related to the interest of the beneficiaries. The following quotation from the opinion in Crooke v. County of Kings, 97 N. Y. 421, 439, 440, describes the nature and operation of these two periods:

"A trust dependent upon lives, as beneficial objects, need not necessarily be dependent upon the same lives for its duration. The two things are inherently different, and yet, when both enter into the constitution of the trust, they affect and modify each other, and together dictate the extreme limit of the trust. The natural term, which is the lives of all the beneficiaries, and the stipulated term, which is the close of the selected and designated lives, may either, taken separately, work out an unlawful trust; while construed together and in combination, as they should be, they bring the trust within the requirements of the statute. The natural term alone might make the trust last beyond the lawful extent of two lives in being. The stipulated term alone might go beyond the lives of the beneficiaries, but the two combined and made elements of the trust, in its creation, effect a lawful duration, and limit the trust to the stipulated term, unless before it is reached the natural term expires, or to the natural term unless before it is reached the stipulated term expires. Unless the language of the will creating the trust imperatively forbids, where both terms are present as elements of the creation, it must be construed to run for the natural term, except as shortened by the stipulated term; or for the stipulated term except as shortened by the natural term."

But it may be that a trust is of such a nature or is so framed that the statute does not prohibit the alienation of the trust property, as where the trust is created under subdivisions one or two of section seventy-six, or where alienation is authorized by the creator of the trust. In such cases the question whether an express trust suspends the power of alienation is to be determined by the terms of the instrument creating the trust. If the trustees alone, or in conjunction with others, can convey an absolute estate in possession, there is no suspension of the power of alienation. (Chaplin's Susp., 91–92.) This supposes that the proceeds of the sale are not made inalienable under the trust. If the proceeds of sale are made inalienable for an unlawful period, the statute is violated. In such case the form of the property merely is changed, and thereupon inalienability attaches. The following extract from the

opinion in Robert v. Corning, 89 N. Y. 225, 235–6, has been found useful and can not fail to be instructive in this connection:

"By section 15, of the article of the Revised Statutes relating to the creation and division of estates in land (1 R. S. 723), the absolute power of alienation can not be suspended by any limitation or condition whatever, for a longer period, than during the continuance of two lives in being, at the creation of the estate, except in a single case, * * * (that provided by former section 16). What shall constitute such suspension is declared in section 14. Such power of alienation (the section declares), is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed. The rule declared in this section, constitutes, under our statute, the sole test of an unlawful perpetuity. Construing sections 14 and 15 together, it is manifest, that where there are persons in being at the creation of an estate, capable of conveying an immediate and absolute fee in possession, there is no suspension of the power of alienation, and no question under the statute of perpetuity arises. But the statute does not prohibit all limitations of estates, suspending the power of alienation. It permits them, within the restriction of two designated lives in being at their creation, and a minority. If the suspension of alienation is affected by the creation of future contingent estates, the validity of the limitation depends upon the question, whether the contingency upon which the estates depend, must happen within the prescribed period. If the suspension is effected by the creation of an express trust to receive the rents and profits of land, under section 55 of the statute of uses and trusts (1 R. S. 728), the lawfulness of the suspension depends upon the question, whether the trust term is, in respect of duration, lawfully constituted. But the mere creation of a trust, does not, *ipso facto*, suspend the power of alienation. *It is only suspended by such a trust, where a trust term is created, either expressly or by implication, during the existence of which, a sale by the trustee, would be in contravention of the trust.* Where the trustee is empowered to sell the land without restriction as to time, the power of alienation is not suspended, although the alienation in fact may be postponed by the non-action of the trustee, or in consequence of a discretion imposed in him, by the creator of the trust. The statute of perpetuities is pointed only to the suspension of the *power* of alienation, and not at all to the time of its actual exercise, and when a trust for sale and distribution is made, without restriction as to time, and the *trustees are empowered to receive the rents and profits*, pending the sale for the benefit of beneficiaries, the fact that the interest of the beneficiaries is inalienable by statute, during the existence of the trust, does not suspend the power

of alienation, for the reason, that the trustees are persons in being, who can, at any time, convey an absolute fee in possession. The only question which, in such a case, can arise under the statute of perpetuities, is, whether the trusts in respect to the converted fund, are legal or operate to suspend the absolute ownership of the fund, beyond the period allowed by law. If the limitation of the interests in the proceeds is illegal, the consequence might follow, that the power of sale given to accomplish the illegal purposes, would be void. (Van Vechten v. Van Veghten, 8 Paige, 124.)"

Effects of a theoretical division of trust estate.

Although the property by a general devise be given to trustees to be held for a period exceeding the continuance of two lives, the trust may not be invalid, provided that, by an allowable construction, the testator may be deemed to have intended that the trust property should be separated, as regards the rights and interests of the several beneficiaries. If so, each intended separable share is regarded, in theory, although not in fact, as separate and held under a trust distinct from the shares of the other beneficiaries. See, for further consideration of this subject, p. 404 and cases collected, p. 379–380.

Effect of release by beneficiary and remainderman under section 83.

The above brief statement concerning express trusts does not take account of a radical and seemingly startling change in section eighty-three (former section 63). This section formerly prohibited the alienation by a beneficiary of an interest held in trust under subdivision three of section seventy-six. But to this has been added the following:* "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." See Real Property Law, sec. 83.

Hence if property be given to A. in trust to receive and apply the rents to B., with remainder to B., B. could destroy the trust by releasing his beneficial interest. This provision would seem to make such estates absolutely alienable and an exception to other express trusts

*This change was introduced by L. 1893, ch. 452, and subsequently incorporated in Real Prop. L., sec. 83.

created under subdivision three of section seventy-six, and greatly diminish the usefulness of that section.

Accumulations.

As to suspension of the power of alienation by trusts, to accumulate the rents and profits under subdivision four of section seventy-six of the Real Prop. Law, see Accumulation, p. 499; Trusts, p. 616.

Suspension on the power of alienation by means of a power.

"A power is an authority to do an act in relation to real property, or the creation or revocation of an estate therein, or a charge thereon, which the owner, granting or reserving the power, might himself lawfully perform."

Real Prop. L., sec. 111 (1 R. S. 732, sec. 74, repealed thereby).

Such a power may be given to a person to dispose of or encumber a fee or lesser estate by grant, will or a charge on the property either to designated persons or to any alienee whomsoever. If the estate to be transferred is less than a fee, or the transfer authorized to be made be to designated persons or class of persons, it is a special power; otherwise it is a general power. Such powers are beneficial when, by their terms, the grantee of the power alone has an interest in their execution. They are powers in trust,

(1) When the grantor of the power designates any person or class of persons, other than the grantee of the power, as entitled to any benefit resulting from their execution.

(2) Also a special power is in trust when it authorizes a disposition or charge to be made to a person or class, other than the grantee of the power. Real Property Law, secs. 114–118.

Under common law rules, if a power could be exercised at a time beyond the limits of the rule against perpetuities, it was bad. Gray's Rule against Perpetuities, 306.

Under the New York statutes the question of the validity of the power does not depend upon the absence of a limit to its exercise. The effect of the power upon estates subject to it, or created by it or directed to be created by it, is the subject of inquiry. A beneficial power can not suspend the absolute power of alienation. The exercise of the power is for the benefit of the grantee of the power, and there is no means of preventing alienation. See Chaplin's Suspension, 164, *et. seq.* A power in trust, however, may so operate on estates as to create an unlawful suspension. But even this could not happen, if there were persons in being, who could convey an absolute fee within

the period provided by the statute, and thereby extinguish the power. Such was the case in Hetzel v. Barber, 69 N. Y. 1, where the owners of the fee, by conveying, extinguished a power to sell land and invest the proceeds for their benefit, and the same result would obtain if the persons entitled to the benefits of sale, being of lawful age and entitled to do so should elect to take the land. Hetzel v. Barber, 69 N. Y. 1, 11.

A power of sale unrestricted in time does not suspend the power of alienation, nor, if it is to be executed after a certain time, if the donee of the power have discretion to sell within such time, for in such case the power is not imperative. Robert v. Corning, 89 N. Y. 225; Weeks v. Cornwell, 104 id. 325; Henderson v. Henderson, 113 id. 1. See cases collected *post*, pp. 373–5. Nor is a suspension effected, while the title of the personal property is vested in the beneficiary, but the possession is meanwhile directed to be held by the grantee of the power to manage the property, to receive the profits, and to pay the net income to such beneficiary. Tucker v. Tucker, 5 N. Y. 408; Everitt v. Everitt, 29 id. 39; Gilman v. Reddington, 24 id. 9; Post v. Hover, 33 id. 593; Vanderpoel v. Loew, 112 id. 167. See cases collected, pp. 369, 374.

A power may be so related to an estate as to suspend the power of alienation thereof or prevent the vesting of remainders within the time required by the statute; hence, where a power was given to trustees to sell after four years and pay the proceeds to R., in trust, the estate in trust was void and the land descended to the heirs, subject to the power of sale. R.'s trust estate was inalienable during the four years as no one could convey the fee. This would have been otherwise had R. individually, and not as trustee, taken the estate, for in that case he could have alienated the property. Garvey v. McDevitt, 72 N. Y. 566. See Dana v. Murray, 122 id. 604; Delaney v. McCormack, 88 id. 174. See cases collected pp. 373–5.

Execution of a power.

Although a power be sufficiently broad to permit the execution of estates that would violate the statute, this does not invalidate the power, nor lawful estates appointed under it. Hillen v. Iselin, 144 N. Y. 365; Baker v. Lorillard, 4 id. 257; Radley v. Kuhn, 97 id. 26; Hone's Ex'rs v. Van Schaick, 20 Wend. 569. See cases collected, p. 374.

So far as a power directs an unlawful act it is void. Robert v. Corning, 89 N. Y. 225, 236.

With reference to estates executed under a power it is sufficient to inquire whether such estates would have been valid if created by the

grantor of the power, for the grantee of the power is simply standing in the place of, and acting for, the grantor thereof, and 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. Real Prop. L., sec. 158, former section 128. Therefore, the inquiry may be involved, what estates has the grantor of the power already created? Do estates created by the grantee of the power, considered in connection with those already created, entirely suspend the power of alienation? This is determined by the same test that would apply if all the estates had been created by the grantor of the power. What the grantor of the power could do he and the grantee of the power, acting separately, could do, and nothing more. See p. 404.

The question of undue suspension is determined by the terms of the instrument.

It is a general rule that the terms of the instrument and the conditions existing at the testator's death, and not actual facts or happenings thereafter, determine the question of undue suspension. Hence, if, at the creation of the estate, it appears that the terms of the instrument are such that there may be an undue suspension, it is immaterial that events so happen that an undue suspension does not in fact take place. See cases collected at p. 368.

An apparent exception to this rule exists in Purdy v. Hayt, 92 N. Y. 446. There was a limitation for three lives as to the share of one of two sisters of the testator, but upon which sister's share that limitation would operate could not be known until one of two sisters should die, which event would render it certain that an unlawful limitation in remainder was of the share of the sister so first dying. The question arose whether it wholly defeated the remainder, that it could not be ascertained, until one life estate was spent, which of the shares would be unlawfully suspended, and it was held that the *general* rule above given related to cases where, if the limitations took effect, in their order, as contemplated by the grantor or devisor, some of the estates would not vest within the prescribed period, and they were therefore cut off as too remote, although it might happen that the estates so cut off, would, by events subsequently happening, take effect within two lives. And it was held that the case under consideration did not fall within that rule. But if the same question may not be determined within two lives there is an undue suspension as to both shares. See Dana v. Murray, 122 N. Y. 604.

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Lives in being at the creation of the estate.

Section thirty-two provides that, the suspension may not be 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 case of a contingent remainder in fee created on a prior remainder in fee, to take effect in the event that the person 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 person may be determined before he attain full age.*

Suspension for lives of persons not in being.

A suspension during the lives of persons *not in being* at the creation of the estate violates the precise language of section thirty-two. Cases collected p. 373.

How lives may be designated.

The persons during whose lives the suspension continued need not be designated by name or individually pointed out, if they can be positively ascertained; nor need the second life be ascertained before the ending of the first. See cases collected p. 370. See 104 N. Y. 45.

What lives may be selected, p. 370. See 104 N. Y. 45.

Any two lives may be selected. It is not necessary that they should have any connection with any of the estates created, but they may be strangers. It is also immaterial how many life estates may be created if they are to expire within the two lives selected. See Bailey v. Bailey, 97 N. Y. 460; Crooke v. County of Kings, id. 421, and cases collected at p. 370.

Suspension dependent upon children becoming of age.

A suspension until "youngest child now living (there being more than two) arrive at the age of twenty-one years, or would arrive at that age if living" is void, as the term of years is not bounded by a life, but is expressly directed to continue although the life end. Haynes v. Sherman, 117 N. Y. 433. See cases pp. 375–6.

So, also, a suspension until the youngest of the testator's children (if there be more than two), living at the date of his will and attaining the age of twenty-one years, should attain that age. Hawley v. James, 16 Wend. 61. See cases collected pp. 375–6.

*It has been noticed that the exception has no reference to personal property. Manice v. Manice, 43 N. Y. 303; Beardsley v. Hotchkiss, 96 id. 201; Greenland v. Waddell, 116 id. 234.

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So, where the suspension was until "the eldest surviving child (if more than two) should arrive of age," the provision is void unless the words may properly be considered to mean the eldest child surviving at the creation of the estate. Jennings v. Jennings, 7 N. Y. 547. See references to cases of this general description at pp. 375–6.

If, however, the will, by the use of the words "youngest" or "oldest surviving child," designates, or can be fairly intended to describe a particular child, living at or before the creation of the estate, it would be as valid as if he were designated by name. Butler v. Butler, Hoff. Ch. 347–8; Chaplin's Suspension, 61–3; Wells v. Lynch, 8 Bosw. 465; Roe v. Vingut, 117 N. Y. 204. See cases, pp. 375–6.

Suspension for the life of A. and his widow.

A devise to A. for life and to his widow for life, remainder to B., is not good unless the testator's intention to designate some living person, as the widow of A., can be gathered; because A. *may* marry a woman not in being at the creation of the estate. Schettler v. Smith, 41 N. Y. 328; Tiers v. Tiers, 98 id. 568; Van Brunt v. Van Brunt, 111 id. 178; Gray's Perp. 151; Chaplin's Susp., sec. 102; see cases, p. 373.

Devise to such of a woman's children as shall reach the age of twenty-five.

It is said that this is bad, although the woman be of such an age that it is certain that she can have no more children, and therefore the event must occur, if at all, in the lives of her children in being at the testator's death. Gray's Perpetuities, 151.

Minorities, p. 371.

It already appears that in New York the vesting of an estate may be lawfully suspended for two lives, or for two lives in being and the minority of a person under age at the termination of the last life, where a contingent remainder in fee is limited on a prior remainder in fee, as provided by former section sixteen, now a part of section thirty-two.

A minority is not an absolute term, but counts as one life or a part thereof, and this rule previously established has been embodied in section thirty-two as follows: "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." If an estate be given to A. for life, to B., an infant, until he shall become twenty-one years of age, to B. thereafter for his life, then to C.'s heirs in fee, the suspension until B. shall become twenty-one years of age is not a term in gross, but the minority counts for a life; or, if as illustrated above, the vesting be suspended after B. becomes twenty-one years of age for the rest of his life, the minority

counts for part of a life, which, added to his life after majority, amounts to one life. Benedict v. Webb, 98 N. Y. 460.

Hence, as a minority counts for a life or a part thereof, unless the case fall within former section sixteen, a suspension for two lives and a minority is bad; Savage v. Burnham, 17 N. Y. 561; and so if the suspension be during the minority of a person not in being; Woodgate v. Fleet, 64 N. Y. 566; and so if the suspension be for the minorities of more than two persons in being at the creation of the estate. Jennings v. Jennings, 7 N. Y. 547. See p. 371.

For this reason, as has been stated, p. 399, the limitation is bad, when the suspension is until all the testator's children (more than two) arrive of age, or until the majority of the youngest child that should become of age (Hawley v. James, 16 Wend. 61); but the suspension may be until the majority of the youngest child, if such child be pointed out. Roe v. Vingut, 117 N. Y. 204.

Term in gross, pp. 371–2.

The rule in England and in many of the states is, that the power of alienation may be suspended beyond lives in being for the term of twenty-one years taken in gross, even without reference to any infancy. Gray on Perpetuities, 158. Such a rule does not exist in New York. See p. 387. Except in the case provided in former section sixteen (now embodied in section 32), where an additional minority is allowed, the suspension can be no longer than for two lives in being. It can not be for an arbitrary or definite time, however short, or for any time not measured by lives in being, or minorities equivalent thereto. Beekman v. Bonsor, 23 N. Y. 298; Smith v. Edwards, 88 id. 92; Rice v. Barrett, 102 id. 161; Dodge v. Pond, 23 id. 69; Cruikshank v. Home, etc., 113 id. 337. See cases collected p. 371.

Suspension until some act shall be done, p. 372.

A gift to take effect when some act shall have been done after testator's death, is void, unless it be provided that the act shall be done within the permitted two lives in being. Hence, gifts to a corporation to be incorporated by the legislature after the testator's death, are too remote, unless it be also provided that such incorporation shall take place within two designated lives in being at the creation of the estate. Levy v. Levy, 33 N. Y. 97; Burrill v. Boardman, 43 id. 254; Holmes v. Mead, 52 id. 332; Cruikshank v. Home, etc., 113 id. 337; Booth v. Baptist Church, 126 id. 215; People v. Simonson, id. 299; Tilden v. Green, 130 id. 29. See cases collected at p. 372.

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So, a gift of a sum to a church for an object, if another sum be contributed or raised for the same object. If it were provided that the additional sum must be raised within two designated lives, the gift would be good, but if the suspension is measured by time definite or indefinite, the provision is bad. Dodge v. Pond, 23 N. Y. 69; Booth v. Baptist Church, 126 id. 215. See cases at p. 372. It was held in these cases that the gift did not vest; hence, a contingent estate was given to vest upon a contingency that might never happen, or, if it did happen, might not happen within two designated lives in being at its creation.

So, a suspension until a certain mortgage on trust property should be extinguished from the rents. Killam v. Allen, 52 N. Y. 605. See p. 372.

So a suspension until a partition shall have been made. Henderson v. Henderson, 113 N. Y. 1. See p. 372.

Terms necessarily bounded by a life.

Although there be provisions that in themselves would create a suspension for more than two lives, or for an arbitrary time, yet, if the period is absolutely bounded by not more than two designated lives in being, and must end within such period, there is no undue suspension. Oxley v. Lane, 35 N. Y. 340; Crooke v. County of Kings, 97 id. 421; Bird v. Pickford, 141 id. 18; Schermerhorn v. Cotting, 131 id. 48; Montignani v. Blade, 145 id. 111; Gilmore v. Ham, 142 id. 1; Smith v. Edwards, 88 id. 92; Provoost v. Provoost, 70 id. 141; Bailey v. Bailey, 97 id. 460. See cases collected at p. 372.

Suspension until a person shall become of a certain age, p. 375.

A gift to vest in A. when he shall become thirty years of age, or sooner die, is valid, and so a bequest to a grandchild born within twenty years after testator's death, as the child of a daughter, must necessarily take during the life of its mother, and the child of a son, even if born after its father's death, is still regarded as living at the death of its father for the purpose of the vesting of the legacy. Smith v. Edwards, 88 N. Y. 92; and so a trust to continue until K.'s son C. is of the age of twenty-five, or sooner die, is valid; Radley v. Kuhn, 97 N. Y. 26; Roe v. Vingut, 117 id. 204; as is also a gift in trust to A. for seven years for the benefit of A. and B.; then gift to be transferred to B.; if B. die before seven years to A.; and if A. and B. die, then to testator's heirs. The estates must all vest within the lives of A. and B. Montignani v. Blade, 145 N. Y. 111. Although the suspension in these cases is measured by years, the time can not run beyond a life or two lives in being. Sawyer v. Cubby, 146 N. Y. 192.

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Child en ventre sa mere.

The suspension of the power of alienation during the minority or life of a child conceived, but unborn at the creation of the estate, is allowed. Such child is in being from the time of conception, and estates limited to him or upon his life are valid. See Hone v. Van Schaick, 3 Barb. Ch. 488.

Thus a bequest to testator's children includes his children born after his death. See sec. 46. Such a child may take a life estate and a future estate, vested or contingent, limited thereon is good. Thus, by will A. devises to his children for life, remainder to his grandchildren in fee; if any grandchild die under age, his share to go to B. A. leaves a posthumous child, who takes for life and dies leaving a posthumous child, taking a remainder; if this child die under age B. takes by his executory devise. See Gray on Perpetuities, 157.

Indefinite failure of issue, p. 378.

Devise to A., but if he should die without issue or without heirs, or on failure of issue, or without leaving issue, over to B. The question in such cases arises whether this means a failure of issue, heirs, etc., at A.'s death, or a general and definite failure in any generation of A.'s descendants, however remote. If an indefinite failure was meant in such last sense, then the gift over to B. might begin in enjoyment at a period forbidden by the rule against perpetuities and is void; if a definite failure at A.'s death was intended, then the devise to B. would be good, and would take effect or not, accordingly as A. had or had not issue at his death.

At common law, in the example given above, it would be presumed that an indefinite failure was meant unless a different intention appeared in the instrument creating the estate.

But when the limitation over was upon the first taker dying without issue *living*, without leaving issue *behind* him, it was held that a definite failure was intended. There were other similar constructions. Kent's Com. vol. 4, *274–279. But the departure from the rule usually rested upon some particular features of the case in question. There was considerable disposition to hold that as to *personal property* the testator intended a failure of issue at the death of the first taker, but this distinction between real and personal property does not seem to have been established, although it is said that the courts were disposed to lay hold of slight circumstances to support limitations of personal property. Kent's Com. vol. 4, *282. But the Revised Statutes have definitely settled the difficulty. Real Prop. Law, section thirty-eight (former sec-

tion 22), provides that *"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."

From what date the suspension is to be computed.

Whether there is an undue suspension of the power of alienation it is to be determined with reference to the state of things at the time of the creation of the estate in question, viz., if the estate be created by will at the time of the testator's death, if by grant at the time of the delivery of the grant. See Real Prop. L., sec. 54. See Chaplin's Susp. 53; Gray's Perpetuities, 163. Lange v. Ropke, 5 Sandf. S. C., 363, 369, 370; Lang v. Wilbraham, 2 Duer, 171, 175; Griffen v. Ford, 1 Bosw. 123, 137. In Odell v. Youngs, 64 How. Pr. 56, it is considered that Schettler v. Smith, 41 N. Y. 328, Van Nostrand v. Moore, 52 id. 12, and Colton v. Fox, 67 id. 348, overrule Lange v. Ropke and Griffen v. Ford. These cases, however, are thought to have no such bearing or effect. Gray's Perp. 163; Chap. Susp. 53.

In determining whether estates created by the execution of a power are too remote, the period of suspension is computed from the time of the creation of the power.

Crooke v. County of Kings, 97 N. Y. 421; Genet v. Hunt, 113 id. 158; Dana v. Murray, 122 id. 604. The Real Prop. Law, sec. one hundred and fifty-eight (former section 128), also provides, 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.

Whether estates or interests are given in shares or in solido, p. 379.

The former rule that there was a presumption in favor of joint tenancy was changed by section forty-four of the Revised Statutes (Real Prop. L. sec. 56), and present or future estates, both in real and personal property, to two or more persons, are deemed held by them as tenants in common in the absence of a contrary intent. Chaplin's Suspension, 122 (see discussion 113, *et seq.*); Everitt v. Everitt, 29 N. Y. 39; Bliven v. Seymour, 88 id. 469 (478); Lane v. Brown, 20 Hun, 382; Matter of Lapham, 37 id. 18; Blanchard v. Blanchard, 4 Hun, 287;[1] Smith v. Edwards, 88 N. Y. 103. See cases collected at p. 379. See also pp. 380, 381, 1663.

* See statute and discussion of same, 379.

[1] Aff'd 70 N. Y. 615.

Hence, it has been contended that a gift made to several persons, will be presumed to be to them as tenants in common, unless this presumption be overridden by the intention of the testator otherwise disclosed.* Of course, the intention of the testator may of itself disclose a purpose that the beneficiaries shall so take. This adds force to the presumption arising from the statute. The value of knowing whether several persons take interests as tenants in common is, that such a taking is deemed theoretically to divide the interests into separate shares, and hence the suspension will be measured by the direction concerning each share. For tenants in common each take a several interest in the undivided property. Hence, if property be given in trust to collect the rents and profits and apply to A., B., C. and D. until they should be twenty-one years of age, with remainder to such persons, it would be urged that the remainder might be deemed to be to such persons in severalty, because they take the remainder as tenants in common and the trust would correspond to the holdings of the remainder and become divisible into separate trusts for each person. Hillyer v. Vandewater, 121 N. Y. 681; 24 N. E. 999. See Chaplin's Suspension, 124, *et seq.*, and rules stated at pp. 131–2.

Whatever the form of language, if within sanctioned rules of construction, a gift be ascertained to have been given devisably to the several takers of interest therein, each devisable interest is construed as if it were the only one. The question then is, as to each one, is the power of alienation or absolute ownership unduly suspended? Each interest found to be a separate interest stands alone in determining its validity.

Separation of legal from illegal provisions, p. 380.

But, suppose that some interests are found to be invalid and some valid. If the fund were entire and the interests therein inseparable, the whole provision would fail. Even if the interests were separable, the failure of one interest might so far wreck the testator's intention that the whole will would fail; on the other hand, the valid interests might be and would be retained and the invalid interests lopped off, if this could be done without injustice to the testator's general scheme and the just transmission of his property to the persons intended by him as beneficiaries. The rule is applicable to trusts, to alternative dispositions, to dispositions that depend on two contingencies, one of which is not too remote and the other is, Schettler v. Smith, 41 N. Y. 328 (336, 345–6); Chaplin's Suspension 275, *et seq.;* dispositions, some valid and

*Hillyer v. Vandewater, 121 N. Y. 681, aff'g 24 N. E. Rep. 999.

some invalid, but which is valid or invalid not determinable at the creation of the estate. Purdy v. Hayt, 92 N. Y. 446; Dana v. Murray, 122 id. 604, 618; Chaplin's Suspension, 282. See cases collected at pp. 377, 379–380.

Beginning of estate, not its continuance, is considered.

If an estate may vest in enjoyment within the time limited by section thirty-two, it is, as regards such section, immaterial when it ends. Gray's Perpetuities, 164.

Effect of an undue suspension of the power of alienation.

"The rule is laid down in Lewis's Treatise on the Law of Perpetuities, 657, thus: 'The invalidity of a limitation on account of remoteness places all prior gifts in the same situation as if it had been entirely omitted in the dispositive system. The gift of a fee simple, therefore, or of the entire interest, subject to an executory limitation which is too remote, takes effect as though it had been originally limited absolutely, or free from any divesting gift. A limitation of a life estate or other partial interest, with a remainder expectant on it which is void for remoteness of course remains in *statu quo prius*, neither receiving enlargement nor suffering diminution. And the like holds with respect to executory limitations, not operating to divest previous partial estates, but expressed to take effect at some period subsequent to their determination; the limited interest remains as originally created, both as to character and extent, without reference to the manner of devolution of the property after its expiration.' See, to the same effect, 2 Fearne on Rem. 12 to 15, 134, ed. 1844." *Leonard* v. *Burr*, 18 N. Y. 96, 105–6; see Williams v. Williams, 8 id. 525; DeKay v. Irving, 5 Denio, 646. See cases collected pp. 380–381.

The rule is concisely stated in Gray's Perpetuities: "If future interests in any instrument are avoided by the rule against perpetuities, the prior interests become what they would have been had the limitation of the future estates been omitted from the instrument." Gray's Perpetuities, 176.

"When an interest is vested it is never too remote, although preceded by other interests which are too remote." Gray's Perpetuities, 179.

The same author also states that, although a later interest is not vested at its creation, yet if it must become vested within the allowable limits, it is good, and that "as all life interests to persons now in being must take effect, if at all, within lives in being, it would seem as if all such interests should be good, although preceded by interests that are

too remote." See Gray's Perpetuities, 179, *et seq.*, where the subject is discussed, illustrated and authorities analyzed.

If, however, the testator intended that an event too remote to vest a contingent estate should in any case determine the prior estate, that result will follow. Gray's Perpetuities, 179; Lewis's Perpetuities, 173.

Disposition of property embraced in void provisions, p. 381.

The will sometimes directs what disposition shall be made of any gifts found to be illegal. If such direction be valid it is observed. Cruikshank v. Home, etc., 113 N. Y. 337; Booth v. Baptist Church, 126 id. 215.

Personalty, the subject of a void gift, goes into the residuary, unless otherwise intended.[1] Gray's Perpetuities, 177 n; Accounting of Benson, 96 N. Y. 509.

This is so under an absolutely general residuary clause, but where a part of the residue, of which disposition is made fails, it devolves as undisposed of.

See Booth v. Baptist Church, 126 N. Y. 215; Beekman v. Bonsor, 23 id. 312. There are many cases where it is said to devolve as undisposed of.[2]

And void devises go to the heir.[3] Gray's Perpetuities, 177 n.

Van Kleeck v. Reformed Dutch Church, 6 Paige, 600; 20 Wend. 457. See this subject treated, pp. 1568, 1569.

Conflict of laws, p. 381.

The question whether the power of alienation of real property is unduly suspended is adjudged by the *lex rei sitæ*. White v. Howard, 46 N. Y. 144; aff'g 52 Barb. 294; Knox v. Onativia, 47 N. Y. 389; Brewer v. Penniman, 72 id. 603, aff'g 11 Hun, 147; Hobson v. Hale, 95 N. Y. 588.

The existence of corporations organized under the laws of another state is recognized by the courts of the state of New York and such corporations may take personal property here under wills executed by citizens of this state, if by the laws of their creation they have authority to acquire property by bequest. Chamberlain v. Chamberlain, 43 N. Y. 424; Sherwood v. American Bible Soc., 1 Keyes, 565; Harris v. Harris, 4 Abb. N. S. 421.

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[1] Banks v. Phelan, 4 Barb. 80; Strang v. Strang, 4 Redf. 376.

[2] King v. Rundle, 15 Barb. 139; Haxtun v. Corse, 2 Barb. Ch. 506; Morgan v. Masterton, 4 Sandf. 442; Kerr v. Dougherty, 79 N. Y. 327; Bean v. Bowen, 47 How. Pr. 306; Floyd v. Carow, 88 N. Y. 570.

[3] Tucker v. Tucker, 5 N. Y. 408; Coster v. Lorrillard, 14 Wend. 265; Hawley v. James, 16 id. 61; De Barante v. Gott, 6 Barb. 492; Vail v. Vail, 7 id. 226.

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The courts of this state will not administer a foreign charity, but they will direct money devised to be paid over to the proper parties, leaving it to the courts of the state where the charity is to be established to provide for its due administration. Chamberlain v. Chamberlain, 43 N. Y. 424; Despard v. Churchill, 53 id. 192; Cross v. U. S. Trust Co., 131 id. 330; Parsons v. Lyman, 20 id. 112.

But they may not divest the title of one or transfer it to another contrary to the law of the domicil. Dammert v. Osborn, 140 N. Y. 30.

The law of the testator's domicil controls as to the formal requisites essential to the validity of the will, the capacity of the testator at the time of the construction of the instrument. Chamberlain v. Chamberlain, 43 N. Y. 424; Andrews v. Herriot, 4 Cow. 517; Holmes v. Remsen, 4 J. C. R. 469; Parsons v. Lyman, 20 N. Y. 103; Cross v. U. S. Trust Co., 131 id. 330.

When by the *lex domicilii* a will has all the formal requisites to pass title to the personalty, a valid and particular bequest will depend upon the law of the domicil of the legatee, except in the case where the law of the domicil of the testator in terms forbids a bequest for any particular purpose or in any particular manner, in which latter case the bequest would be void everywhere. Cross v. U. S. Trust Co., 131 N. Y. 330; Manice v. Manice, 43 id. 387; Despard v. Churchill, 53 id. 192.

The policy of this state does not interdict perpetuities or gifts in mortmain in other states. Chamberlain v. Chamberlain, 43 N. Y. 424; Cross v. U. S. Trust Co., 131 id. 330, 343; Hollis v. The Drew Theological Seminary, 95 id. 166; Hope v. Brewer, 136 id. 126.

The will of a resident of another state, admitted to probate in that state, creating a trust in personal property to be administered in this state, for the benefit of residents therein, the trustees to have possession of the trust fund, being a New York corporation, which trust is in contravention of the statute against perpetuities, is to be decided as to its validity by the laws of the state of the domicil, and if valid under those laws an action is not maintainable here to have it declared invalid. Cross v. U. S. Trust Co., 131 N. Y. 330; Fellows v. Miner, 119 Mass. 541; Sohier v. Burr, 127 id. 221; Sewall v. Wilmer, 132 id. 131; Jones v. Habersham, 107 U. S. 174.

If testamentary disposition of personal property made by a citizen of another country, valid at the domicil of the testator, is valid here, it may not be questioned when jurisdiction has been obtained by the courts of this state over the property disposed of or the parties claiming it, save where the disposition is contrary to public policy. Dammert v. Osborn, 140 N. Y. 30.

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Charitable uses, pp. 372–3.

The law of charitable uses obtaining in England was never in force in New York. Holland v. Alcock, 108 N. Y. 312. See Charitable Uses, p. 847. Property can not be tied up beyond the statutory period for charitable purpose, except so far as this may be effected by giving it directly to a corporation. Hence, in the creation of estates and the limitation of the same to such corporations, the usual rules apply. Wetmore v. Parker, 52 N. Y. 450. A gift to a corporation to be formed is bad, unless it be provided that such formation shall be effected within two lives in being. See p. 372. But the capacity of corporations to take, to hold, to use, to transfer property is measurably regulated by law, and so far as the law by such regulation limits or restricts the alienation of the property so held by a corporation, it might perhaps be said to effect a suspension of the power of alienation. Holmes v. Mead, 52 N. Y. 332. But however this may be, there is no unlawful suspension effected by giving property to a charitable corporation perpetually to hold the principal, and expend the income for some corporate purpose. Wetmore v. Parker, 52 N. Y. 450; Williams v. Williams, 8 id. 524; Robert v. Corning, 89 id. 225; Holmes v. Mead, 52 id. 332; Holland v. Alcock, 108 id. 312; Riker v. Leo, 115 id. 93. If the restriction in the use of property is coincident with some duty, or function of the corporation respecting property which it may hold, such restriction is valid. This power of tying up by subjecting it to corporate ownership, so far as it may exist, only exists when the property is given so as to vest the title in the corporation. As regards gifts to trustees or officers of a corporation, or to any person in trust for the corporation, so far as a trust may ever exist for such purpose, the usual rule applies that the suspension can only be for the statutory period. Adams v. Perry, 43 N. Y. 487; Cottman v. Grace, 112 id. 299; Williams v. Williams, 8 id. 525.

A bequest for the benefit of a corporation although in terms to the trustees or officers of that institution, was held in the cases given below, in effect, a gift to the corporation. Chamberlain v. Chamberlain, 43 N. Y. 437; N. Y. Institution for the Blind v. How, 10 id. 84; Bailey v. Onondaga Co. M. Ins. Co., 6 Hill, 476; Manice v. Manice, 43 N. Y. 314, 387. See p. 373.

Estates and interests not subject to the statute.

The following interests in land are not subject to the statute against perpetuities:

Easements, profits *a prendre*. Gray's Perp. 201.

Profits, rents, etc. Gray's Perp. 225.

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Covenants as to the use of land. Gray's Perp. 202; Chaplin's Susp. 85.

Right of entry for condition broken. Gray's Perp. 213; Chaplin's Susp. 81.

Possibilities of reverter. Gray's Perp. 224; Chaplin's Susp. 79, 80.

Contracts not creating legal or equitable rights in property. Gray's Perp. 231; Chaplin's Susp. 84.

Mortgages. Gray's Perp. 351; Chaplin's Susp. 83.

Annuities. Chaplin's Susp. 83, 84, and cases cited.

See Real Prop. L. sec. 76, *post*, p. 815.

An executor does not take *by implication* an estate in lands, when all the enjoined duties can be discharged under a power, especially where the estate would be void as unduly suspending the power of alienation. *Tucker* v. *Tucker*, 5 N. Y. 408.

The testator left a legacy of $30,000 to trustees, out of which to pay an annuity of $700 to his sister for life, with remainder to her daughter for life, and to accumulate the residue of the income until the decease of the daughter, when the fund should go to her issue, and, in default of issue, to a nephew on his attaining his full age, or to his issue, if he died before his full age, and in default of issue, remainder over to other beneficiaries.

Construction:

The provision was void both as suspending the absolute ownership for more than two lives, and as providing for an accumulation not to terminate with the minority of the beneficiaries. *Harris* v. *Clark*, 7 N. Y. 242.

A devise, creating a trust for the maintenance of the widow and the support and education of four infants, with a provision for the accumulation of the surplus, and providing that the property should be kept together until the eldest surviving child should become twenty-one years of age, when his or her equal share should be apportioned and paid, may suspend the power of alienation beyond the termination of two lives in being, and is therefore void.

Jennings v. *Jennings*, 7 N. Y. 547; 5 Sandf. R. 174.

From opinion.—"The scheme of the will was this: That the income of the testator's estate, real and personal, after the payment of his just debts, should be applied to the clothing and maintenance of his wife, and the clothing, maintenance and education of his children by her, and the surplus was to be invested by the wife as trustee for the children. The property was all to be kept together, undivided, until the eldest surviving child, by his present wife, should become twenty-one years

old, and then to be appraised, and his or her equal share apportioned, and paid if required.

"Now the objection to this scheme is, that by the will the absolute power of alienation is suspended for a longer period than two lives in being, and therefore the will contravenes the fifteenth section of the article of the revised statutes entitled, 'Of the creation and division of estates,' 1 R. S. 723, sec. 15, and is therefore void. This very question was decided in Hawley v. James, 16 Wend. 61. It was held by Judge Bronson in that case, and his ruling has been followed by the courts since, that 'the power of alienation can not be suspended for a longer period than during the continuance of two lives in being at the creation of the estate and every limitation by which the power of alienation may be suspended for a longer period is void in its creation. The lives must be designated, either by naming the persons in particular or by limiting the estate on the two first lives that shall fall in a class of several individuals.' By this rule it will be seen that the power of alienation was suspended in the case at bar, or, which is the same thing, might be suspended during three lives. Suppose the three eldest of the four children living at the testator's death should die and the remaining child should, after their death, arrive at the age of twenty-one years, it is clear that by the terms of the will the estate must be kept together and the power of alienation must be suspended during three lives."

Williams v. Williams, 8 N. Y. 525, relates to charitable uses and will be found digested under Charitable Uses at p. 854.

A testator died leaving a wife, children and grandchildren, and devised his real estate to his wife and two other persons, in trust, to receive the net income thereof and apply it to the use of his wife during her life or widowhood, at her death or marriage to divide the same into as many shares as he should leave children surviving him, the net income of one share to be received by each child during his or her life, and afterwards by his or her husband or wife during life or until marriage, and then the fee of each share to vest absolutely in the children of each child, if any, and if none then in the right heirs of the testator.

Construction:

The entire devise was void, as it suspended the absolute power of alienation beyond the continuance of two lives in being at the time when the devise was to take effect.

By such devise the widow and children of the testator and their surviving wives and husbands did not take successive *legal estates*, in which case the two first would be valid and the others void, but mere *equities*, all dependent upon the trust, which being void, the equitable interests all failed.

The absolute power of alienation was suspended, notwithstanding a qualified power was given to the trustees to lease the estate for terms not exceeding ten years, and to sell such portions thereof as might be

necessary to discharge liens and pay for improvements upon the residue. *Amory* v. *Lord*, 9 N. Y. 403, see p. 336.

From opinion.—"The testator gives the net annual income of his estate to his wife so long as she shall continue his widow. After her death or marriage he directs his real and personal estate to be equally divided into as many shares as shall be equal to the whole number of his children surviving him, or who shall die before him leaving lawful issue surviving him. He gives the net annual income of one such share of his real estate to each child who shall survive him, to be received by such child during his or her natural life, and afterwards by his or her wife or husband while unmarried, and at the death of such child and the determination of the interest or title of his or her wife or husband, he gives the fee of the share of which such child received the profits to the children of such child absolutely. During the continuance of these three estates or interests the title to the property is vested in the executors in trust. The title does not vest in the widow, nor in the child, nor in the husband or wife of such child. It does not vest in fee upon the death or marriage of the widow or upon the death of the child, but is held by the executors in trust until the termination of the three intermediate estates. Is the absolute power of alienation suspended? The trust in this case, if valid as such, is a trust within the third subdivision of section 55 in the article relating to uses and trusts, viz.: '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.'

"By section 60 it is provided that 'every express trust, valid as such in its creation, except as otherwise provided, shall vest the whole estate in the trustees in law and 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.'

"Section 63 provides that '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;' and by section 65, 'every sale, conveyance, or other act of the trustees in contravention of the trust shall be absolutely void.'

"The testator authorized his executors to lease out all his real estate from time to time, for a term of years not exceeding ten at a time, to erect buildings thereon if it be necessary, and to pay all taxes, charges or liens on his real estate, by a sale, if it should be required, of so much only as should be necessary for the purpose. Aside, therefore, from the prohibition contained in section 65, the trustees are impliedly restrained from selling by the provisions of the will itself; and they are expressly disabled from selling by the provisions of that section. The *cestuis que trust* are prevented from selling by sections 63 and 60. There are, then, in the language of section 14, 'no persons in being by whom an absolute fee in possession can be conveyed.' The absolute power of alienation is consequently suspended for a longer period than during the continuance of two lives in being at the creation of the estate. The estate was therefore void in its creation, and never had a valid or legal existence.

"It is insisted that because the third life estate is made void expressly by the provisions of section 17 of the same statute, so much of the will as gives an estate to the surviving husbands or wives of the testator's children should be stricken out as surplusage, leaving the remainder of the will to stand in full force and effect. That section provides that successive estates for life shall not be limited unless to persons in being at the creation thereof. Now this provision avoids the estate to the surviving husband or wife, as their estate was in favor of persons not in being at the creation of

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the estate. But the remainder of section 17 is more especially relied upon to sustain the will. That provides that where a remainder shall be limited on more than two successive lives for life, all the life estates subsequent to 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.

"This argument is a plausible one, and were it not for the rule that all parts of a statute should have effect, if possible, perhaps it might prevail. The argument may be somewhat strengthened by section 19, which provides that where a remainder shall be created upon any such life estate, and more than two persons shall be named as the persons during whose life the 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.

"If, however, the reasons of the Supreme Court in the opinion delivered on the decision of this case are sound, what becomes of section 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,' viz., not more than two lives in being at the creation of the estate. (§ 41.) The creation of the estate was at the death of the testator. If it suspended the power of alienation beyond two lives then in being, it was then void. It clearly did suspend the power of alienation during the probable life of the widow, then during the life of the child, and contingently during the life of the surviving husband or wife. It was, therefore, a void estate by the provisions of sections 14 and 15, and (if the Supreme Court is right), a valid estate by the provisions of sections 17 and 19. The estate was vested in the executors during the continuance of the three lives, two in being at its creation, and the other not then in being. The third life interest is void by the first as well as the last clause of section 17. In order to give effect to sections 14, 15, 17, and 19, and each of them, we must adopt the following hypothesis, viz.: Where the absolute power of alienation is suspended for a longer period than two lives in being at the creation of the estate, the whole estate is void in its creation, so that not only the third life estate and the remainder, but the prior life estates are void. But where the absolute power of alienation shall not be suspended, although more than two successive life estates are created, the first two life estates and the remainder are valid estates under the provisions of sections 17 and 19, but the third life estate is void, and the remainder must take effect immediately. In one case, the estates attempted to be created are vested estates, and the persons in whom they are vested may convey an absolute fee in possession. In the other, the estates are contingent, and do not vest until the happening of the event upon which the estate depends. The distinction I have attempted to draw removes all the difficulties, and all of the provisions of the statute above referred to have their full effect consistently with each other."

A will, made before the Revised Statutes, devised to the testator's daughter Chloe, her heirs and assigns forever, the residue of his estate, real and personal, which should remain after the payment of his debts, funeral charges, and certain legacies; and if she should die without lawful issue, then the testator gave and bequeathed unto the Theological Seminary of Auburn the sum of $10,000, for the purpose of endowing a professorship in said seminary, *to be paid to the trustees of said seminary, in four equal annual payments, after the death of said Chloe.*

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Construction:

Failure of issue living at the death of his daughter was intended, and not an indefinite failure of issue; and, therefore, the bequest is not void because limited upon the happening of a contingency which is too remote. *Trustees of the Theological Seminary of Auburn* v. *Kellogg*, 16 N. Y. 83.

A testator bequeathed his residuary personal estate to his executors, in trust, to invest the same, declaring that one-half, principal and interest, should be for the benefit of the children of a grandson, the other half for those of a granddaughter, "and to be paid over in the following manner:" One-half of the income to be applied annually for the benefit of the children of each grandchild respectively; and whenever either of the children of the grandson should come of age, to pay over to that child his or her proportion of the one-half of said principal; with the same provision for the children of the granddaughter.

Construction:

Each of the great grandchildren living at the death of the testator took an immediate vested interest in an equal share of the fund bequeathed to the children of his parent, subject to be diminished in quantity by the birth of subsequent children before the first child of the class became of age. If the uncertainty of the quantity of the interest of the children in being at the death of the testator would suspend the power of alienation (as, per Paige, J., it does not), such suspension could only endure for one life in being at the creation of the estate, that of the parent. *Tucker* v. *Bishop*, 16 N. Y. 402.

A testator devised his estate, real and personal, upon these trusts: 1. To sell the real estate after the death of his widow. 2. That she should, during her life, receive and take to her own use one-third part of the clear yearly rents and profits of the real estate; the residue of the rents and profits, until the sale of the real estate, to be deemed part of the personal estate and subject to the same dispositions; which were: 3. To apply the income to the maintenance and education of six sons and four daughters, named in the will, in equal shares, until the sons should attain the age of twenty-one years and the daughters attain that age or be married, respectively. 4. To pay or transfer the principal in equal shares to the sons and daughters; the shares of the sons to become vested at twenty-one, and then to be sold or transferred; the shares of the daughters to be vested in the trustees, the income to be paid to them after twenty-one or marriage, during life, and upon the death of each daughter leaving issue, her share to go to and vest in such issue.

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The power of alienation, as to that part of the estate remaining in land, being suspended for the life of the widow, no further limitation, applying to the whole fund after the conversion of the land, is good which suspends the absolute ownership for more than a single additional life.

The contingent bequests of distinct shares as separate legacies, vesting in the sons upon their attaining the age of twenty-one years, respectively, and in the children of the daughters upon the deaths of their respective mothers, are valid.

But further limitations expressed in the will, by which the share of each son dying under twenty-one, and daughter dying without issue, was to go to the surviving children upon the same contingency, as to each taker, as that on which an original share would have vested, are void, because suspending the absolute ownership of such accruing shares during one or more minorities in addition to the lives of the widow and the first taker. *Savage* v. *Burnham*, 17 N. Y. 561.

Devise made in 1842 to B. of the use of land "until Gloversville should be incorporated as a village, and then to the trustees of said village, to be by them disposed of for the purposes of" a village library.

Construction:

(1) A devise of the use of land imports a gift of the land itself.

(2) Had the devise been to B. "until G. shall be incorporated as a village," B. would have taken a base or qualified fee, and the qualification "until G.," etc., would have been a collateral limitation, making the estate determinable upon an event collateral to the time of its continuance.

(3) The limitation over to trustees, whether valid or invalid, did not affect B.'s estate, but B.'s estate would terminate on the incorporation of G.

(4) If the devise had been to B. in fee, or fee tail, and, provided G. be incorporated, to trustees, the invalidity, if it be such, of the devise to trustees would have made B.'s estate absolute.

Such were Anderson v. Jackson, 16 Johns. 382; Lion v. Burtiss, 20 id. 483; Wilkes v. Lion, 2 Com. 333; Waldron v. Gianini, 6 Hill, 601.

(5) Devise to trustees by way of conditional limitation, was void for remoteness, not being to a charitable use. *Leonard* v. *Burr*, 18 N. Y. 96.

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NOTE 1.—Devise to B. and his heirs, tenants of the manor of Dale; to B. during widowhood; to B. until the return of B. from Rome; to B. until C. shall have paid him twenty pounds, illustrate collateral limitations.

NOTE 2.—Although a devise be invalid to carry an estate, it is not for that purpose to be deemed stricken out of the will.

NOTE 3.—" The rule, as we consider it to exist, is laid down with great distinctness in Lewis's *Treatise on the Law of Perpetuities*, p. 657, thus: 'The invalidity of a limitation on account of remoteness places all prior gifts in the same situation as if it had been entirely omitted in the dispositive system. The gift of a fee simple, therefore, or of the entire interest, subject to an executory limitation which is too remote, takes effect as though it had been originally limited absolutely, or free from any divesting gift. A limitation of a life estate or other partial interest, with a remainder expectant on it which is void for remoteness, of course remains in *statu quo prius*, neither receiving enlargement nor suffering diminution. And the like holds with respect to executory limitations, not operating to divest previous partial estates, but expressed to take effect at some period subsequent to their determination; the limited interest remains as originally created, both as to character and extent, without reference to the manner of devolution of the property after its expiration.'" *See*, to the same effect, 2 Fearne on Rem., 12 to 15, 134, ed. 1844.

See Woodgate v. Fleet, 44 N. Y. 1.

Devise taking effect in 1810 to three sons and four daughters of land in equal shares, and if either should die without issue, his or her share should be divided among the survivors.

Construction:

(1) The limitation in favor of surviving devisees, in case any of them should die without issue, was an executory devise.

(2) A future estate or interest, here the executory devise, is a *near one* which must eventuate one way or the other, during the two lives and time provided by statute (the number of years was unlimited at common law). It is *remote* when it depends upon some contingency which may extend beyond the lives of a proper number of designated persons.

(3) Here the possibility of the executory devise must eventuate during one life. (Note, as each one dies, etc., the survivor takes absolute fee.)

(4) The difference between an executory devise and a contingent remainder is chiefly in name. (390.)

(5) The release (without granting words) of some of the devisees to others carried their interests. Anderson v. Jackson, 16 Johns. 382. *Quære:* Would a release to a stranger have done? it seems not. *Miller* v. *Emans*, 19 N. Y. 384.

The will directed the investment of a fund to raise an annuity of $5,000 for his widow during her life. In case of her death before a

division of his residuary estate, which was to take place upon the death of two other persons, or at the expiration of ten years, such fund should fall into the residuum. If she should survive the period thus limited, then the fund provided for her annuity, to go to the testator's children and grandchildren.

The disposition in both its alternatives is void for illegal suspension of ownership, as suspending the distribution, either for three lives, in fact, or for the definite period of ten years.

Same will:

A bequest to executors, of $50,000 to be applied by them to the erection of a college in Liberia if $100,000 should be raised for that purpose in this country, is void, as depending upon a contingency which may never happen, without any limitation of the period of suspension. *Dodge* v. *Pond*, 23 N. Y. 69.

A bequest of a sum of money to be invested in land, of which the rents and profits are to be applied to certain beneficiaries during fifteen years, the land then to be sold and the proceeds divided amongst the same persons, is void, because it contemplates a trust which would unlawfully suspend the power of alienation. *Beekman* v. *Bonsor*, 23 N. Y. 298.

A will attempted to devise real estate used as a factory to the executors, in trust to continue the factory in use for two lives in being, and after such lives to sell the same, with certain restrictions upon the disposition of income. The provision failed as a trust, because the lives, on which it depended, were those of persons, who had no interest in its performance, for the statute requires it to be dependent upon the life of a beneficiary. A power, in trust, the execution of which was postponed until after two lives in being was valid. *Downing* v. *Marshall*, 23 N. Y. 366.

The statute does not invalidate a trust, which may permit the sale of land and the application of the proceeds to the use of unborn beneficiaries within the duration of two lives in being. No illegal suspension of the power of alienation is effected because the executors, after the expiration of the trust term, may be required to retain in their possession real and personal property—the ultimate right to which is vested—for the purpose of paying income to the widow for her life. *Gilman* v. *Reddington*, 24 N. Y. 9.

Devise to trustees of residue to be converted into personalty and held, used and managed * * * for the benefit of such of three younger children as should survive the testator "and if the said children should

have attained the age of twenty-one" at testator's death, then trustees should pay over funds and accumulations to said younger children, or to the survivor of them (if one should then be dead) in equal proportions, share and share alike; and so the whole fund to one survivor, if there should be but one. If, at testator's death, any of said children should be under the said age, executors should hold and use the funds until all of said three children, or the survivor or survivors of them, should become of age; and then to pay to them, or to the survivors of them in the same manner and in the same proportions as before provided, in case of his not dying until after the youngest one living at the time of his decease should become of age.

There was separate provision that "in case any of my said * * * children shall die before she shall become entitled to be paid in full, the amount coming to her for her share, and shall leave lawful issue, her share shall immediately belong to and go to such issue," but otherwise should go to survivors or survivor of these children.

Testator died before children, and before any of them were of age.

Construction:

(1) Legatees were tenants in common and took distributively. Tucker v. Bishop, 16 N. Y. 402.

(2) The bequest did not, independently of the trust, or if the trust was valid, unduly suspend the power of alienation.

(3) Had the interest been joint and contingent until the majority of youngest child, the absolute ownership would have been suspended unduly and void. Hawley v. James, 16 Wend. 61; Coster v. Lorillard, 14 id. 265.

(4) The trust, although relating to personalty, was valid.

(5) The trust did not suspend the power of alienation of any of the three shares beyond the life of the daughter to whom it was given.

(6) Upon the death of any daughter, without issue, the share primarily given her would go absolutely to the survivor or survivors.

(7) At the death of the testator the fund vested in legatees subject to executory limitation to survivors, although not payable until youngest child attained majority.

Futurity was not annexed to the substance of gifts, but to the time of payment. Gilman v. Reddington, 24 N. Y. 9; Patterson v. Ellis, 11 Wend. 260.

(8) If the trust estate were void and blotted out, the estates to the children would remain. (Instancing the legacy for $50,000 sustained in Hawley v. James, 16 Wend. 62, although the trust was void.)

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(9) Had there been nothing else in the will than bequest in trust until all the children were of age, the trust would have been void; but the provision is that if any child should die under age her share should go to her issue, if any; if not, to the survivor. According to this each share would vest absolutely on each one becoming of age, or dying, and thus be extricated from under the trust. *Everitt* v. *Everitt*, 29 N. Y. 39.

"The power of suspending the alienation of estates in land, and the absolute ownership of personalty is expressly limited by statute *upon life*. Life must, in some form, enter into the limitation; and any other term of limitation, however short, is unlawful. Where certain acts are to be done by congress or the legislature of Virginia, or other states, the performance of these acts is a precedent condition to the devolution of the estate. Their performance is not limited on life. This is a limitation in contravention of the statute. The legislative power might never be exercised. If its exercise at any period after the death of the testator, say within a year, would be valid, it would be valid if exercised at the termination of one hundred years. The suspension of the estate would, therefore, in each case, depend not on the statutory limitation, a life or two lives in being, but upon the volition of some legislative body, to be exercised at some indefinite time, or never. The estate might thus be suspended forever. *Levy* v. *Levy*, 33 N. Y. 97.

Rose v. Rose, Court of Appeals, Sept., 1864; Phelps v. Pond, 23 N. Y. 69; Leonard v. Burr, 18 id. 96; Yates v. Yates, 9 Barb. 324; Morgan v. Masterton, 4 Sandf. S. C. 442; Hawley v. James, 16 Wend. 61, 131. (pp. 125–6.)

If the purposes of a trust are separable, and some of them must arise within two lives, and there are others which can only become operative after the expiration of the two lives, the former may be sustained, but the latter can not be. *Post* v. *Hover*, 33 N. Y. 593.

Provision that three legatees should take by survivorship was good, if there were further limitations, only such further limitations would be void. *Oxley* v. *Lane*, 35 N. Y. 340, digested p. 263.

A bequest by a New York testator to such persons as the judges of another state may appoint after his death to receive it, is ineffectual for any purpose, if unlawful in the state of testator's domicil. Such a bequest to persons unknown for the general purpose of founding, establishing and managing in any other state an institution for the education of females, is bad under the laws of New York. *Bascomb* v. *Albertson*, 34 N. Y. 584.

In the sentence, "Or, in case such child or children should die without lawful issue, *and thus I shall have no lineal descendants*, I give, de-

vise and bequeath my whole estate, real and personal, to the children whom my brother Robert Ray and my sister Mary King may leave," etc., the words "may leave" may be read "may have," to sustain validity of the disposition. *DuBois* v. *Ray*, 35 N. Y. 162.

A devise was in trust for the use of testator's children during their natural lives, and, on the death of his wife, or the death of any child leaving issue, the trustees were directed to apply the share of the income to which such deceased parent or child was entitled, to the use of the surviving child during minority, and the share absolutely on the child's attaining full age. But if such child die without leaving lawful issue surviving, or if such issue die under age, such share should revert to, and become a part of, the residuary estate.

Construction:

The ulterior limitation over was void. Said ulterior limitation could be dropped, and the primary disposition of the estate be allowed to stand. *Harrison* v. *Harrison*, 36 N. Y. 543.

Devise to trustees to receive and pay income to B., son, during his life, and then to son's wife for her life, and to convey property to issue of son, living at widow's death if he left widow, or at son's death if he left no widow; if son died without issue, then, at expiration of life estates, to convey to others. B. died unmarried after testator.

Construction:

(1) The son might have married one *unborn* at death of testator, hence the trust was for the life of the son in being at death of testator and on a life not so in being at creation of estate as to realty, nor at death of testator as to personalty; hence provision for widow and son was inoperative.

(2) That alternative limitation upon death of B. was valid, and as he died without issue, the executory devise took effect. Crompe v. Barrow, 4 Vesey, 681; Savage v. Burnham, 17 N. Y. 561; Post v. Hover, 33 id. 593, 598; 1 Jarman on Wills, 3 Am. ed., 269, 270; Lewis on Perpetuities, 501–2.

(3) There was a similar provision for another son, C., who had a wife living at making of will and death of testator. The provisions would have been good as to such wife had it not used the general language "on her decease, if he leave a widow," etc., which would cover a second wife who might have been a woman *unborn*, as in case of B.'s wife; hence the provision was void, but C. being then alive, it was held that,

should he die leaving no widow, the alternative valid limitation would take effect as in B.'s case. *Schettler* v. *Smith*, 41 N. Y. 328.

A., by will, gave his residuary estate of real and personal property to trustees upon the trust to collect, invest same, and pay from net income a fixed amount to B., widow, and fixed amounts severally to children, etc.; if the income should exceed the aggregate amount thus fixed, to pay one-half of the excess to B. and children, and invest and accumulate the other one-half during life of B.

And upon the further trust upon B.'s death to cause the property to be appraised, sell certain real estate, and make a *division* of the assets thus and otherwise realized into twelve equal parts.

And upon the further trust to convey and pay in fee simple to each of his two sons three-twelfths thereof ("and I give, devise, etc., the same to him, or in case of his death, prior to the time of *such distribution*, to his *then* lawful issue"), and in case of the death of either son before *such division*, then to such son's issue *then* living, or if son so dying should leave no issue "*living at the time of such division*, the surviving son should receive and inherit the share of the deceased son."

And upon the further trust to retain and hold as trustees under the will ("and I give, devise, etc., the same to them accordingly"), and invest and receive rents, income, etc., apply net income, etc., to use of C., daughter, during her life, and after C.'s death, or at time of *distribution*, if C. died before *distribution*, to divide such shares into as many sub-shares as C. left children her surviving, retain one of said shares for each child and accumulate net income thereof during his minority, and on his arriving at the age of twenty-one years to pay same with accumulations (with power to apply to support meanwhile), and in case such child died during minority, to pay to its issue, if any, otherwise to surviving children; and in case of default of issue of C., then to convey and pay to heirs at law. Similar provision was made for each of two other daughters.

Construction:

(1) B. took valid life estate as beneficiary.

(2) Each of sons took vested remainder expectant in possession on death of the widow, at which very time it would become absolute to him, if then living (there would be executory devise to each son or his lawful issue of the other son's share contingent upon the latter dying without issue before division).

(3) Trustees took in trust a legal estate for life of B., and a second new estate beginning at death of B., limited thereon for the life of C.,

and as to the *realty* during the minority of any one of C.'s children an estate in the sub share given to such child, but the trust, as to the personalty during such minority, was void.

(4) There was no interval during *distribution* between death of B. and beginning of son's estate in possession, nor between death of B. and beginning of trustees' estate for life of C., because the appraisal and distribution was in theory and in testator's intention a single act to be done immediately upon B.'s death, quite irrespective of time of the completion of said distribution. This is upon the rule that equity looks upon that as done which ought to be done and will treat the subject matter and collateral circumstances and incidents in the same manner, as if the contemplated act had been performed exactly as it ought to have been done.

(5) Hence there was no trust estate interposed between death of B. and estates given to sons and the trustees for the daughters, and hence no unlawful suspension of the power of alienation. Had the limitation been to trustees for B.'s life, then while making division the suspension would have been for a time not dependent on lives in being and hence void; but the court held that the executors needed and took no title for the purposes of appraisement and division, but acted under a power.

(6) By 1 R. S. 723, secs. 15, 16; 726, sec. 37, a remainder in fee *of real estate*, to take effect upon the termination of two lives *in being* at the time of the creating of the estate, may be limited to *a person not in being at that time;* and so a further *contingent* remainder, in favor of a person *not in being* at the creation of the estate, may be limited to take effect in the event that the person to whom the first remainder is first limited shall die under the age of twenty-one years. Hence, devise of real estate to trustees for life of B., then for life of C., then for minority of C.'s child (possibly not in being at creation of estate), and in event of its dying under age to its issue (possibly not in being at creation of estate), or, if none, over, was good.

(7) Section 16 is not applicable to personal property, for sec. 15, title 2, chap. 1, part 2, R. S., declares that the absolute power of alienation shall not be suspended longer than two lives in being, except in the single case mentioned in section 16, which allows addition of time of minority; but sec. 1, title 4, ch. 4, relating to personal estate, permits absolute ownership of personalty to be suspended for *two lives* only and omits references to exceptions in sections 15 and 16. Hence, as to personalty, the suspension for B.'s and C.'s lives, and during the minority of C.'s child, was illegal, and limitation over of personalty in case

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of death of C.'s child during minority, was void. For the same reason accumulation of income of personalty for such minority was void.

(8) Hence, C.'s child would take his sub-share of personalty absolutely at C.'s death, and immediate enjoyment of income thereof extricated from the trust. Leonard v. Burr, 18 N. Y. 103; 2 Wash. on R. Prop., 2d ed., 357; 1 R. S. 726, sec. 40.

(9) These failures, viz., of limitation over of personalty on C.'s child's death during minority and of provision for accumulation during such time of income of personalty, and of provisions to accumulate one-half of surplus income during life of wife, does not affect validity of remainder of will, because, when the effect of a limitation over is to abridge or defeat his prior estate, the result of such contingent limitation being void for remoteness, is that the person whose estate would be defeasible, if the remainder were valid, takes the estate discharged of the limitation. Citing 2 Wasb. on Real Prop., 2d ed., 357; Leonard v. Burr, 18 N. Y. 103; Church v. Grant, 3 Gray, 156.

(10) The trust to accumulate a portion of the surplus income during the life of B. is void. Such surplus belongs to the person presumptively entitled to the eventual estate, viz., six-twelfths to sons, and the remainder to C. and other daughters equally. The statute does not mean the ultimate estate, but the next estate that will arise upon the happening of the event that shall terminate the preceding estate, during which the accumulation was to take place.

(11) Although there were several beneficiaries to take the income during B.'s life, yet it was valid because it was all limited on B.'s life. (386.) Gilman v. Reddington, 24 N. Y. 19; Harrison v. Harrison, 36 id. 543; Savage v. Burnham, 17 id. 569.

(12) If a son or daughter should die before B., there was no provision that his or her issue would take parent's share of income, and it would belong to parties presumptively entitled to the next eventual estate in that share. *Manice* v. *Manice*, 43 N. Y. 305, modifying 1 Lans. 348.

The law of the domicil governs. *Chamberlain* v. *Chamberlain*, 43 N. Y. 425, digested p. 1321.

Bequest to trustees for the establishment of a hospital for the sick and direction that trustees apply to legislature for a charter to incorporate the same, and that, if the legislature should refuse grant thereof within two years next after testator's death, *provided two lives named in will should continue so long*; then over to the United States.

Construction:

(1) The statute against perpetuities was not violated and the corpora

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tion could take only in case the charter was granted within the two lives named.

(2) Bequest was not void for uncertainty.

(3) *Quære* as to validity of contingent bequest over to the United States, *Burrill* v. *Boardman*, 43 N. Y. 354.

A bequest to trustees of personal estate to invest and reinvest, and pay over the income to an incorporated academy forever, is void under the statute of perpetuities.

The only power in charitable and educational corporations to hold property in perpetuity, in trust, is by virtue of their charters and the acts of 1840 and 1841. *Adams* v. *Perry*, 43 N. Y. 487.

Overruling Williams v. Williams, 8 N. Y. 524, so far as it holds the contrary.

A. conveyed land to trustees upon the trust, to receive rents, etc., and to apply same equally toward the support of B., wife, and the support and education of C., son, a minor, and of any children of the said A. and B. "that may hereafter be born," and upon the arrival of C. at the age of twenty-one to convey to C. and B. (provided B. be then unmarried) their respective portions, or all the right, title and interest of A., such proportions to be determined by the number of children of A. and B. living at the arrival of age of C. "It is the express intention * * * * that all the said * * property shall go to and be divided among the said" B. and C. "and all lawful children of" A. living at the time C. should arrive at age, in equal proportions, share and share alike. And that in the event of the death of B., C, or either of the said children, the share to which either would have been entitled shall be equally divided among the survivors; and, if upon the arrival of C. of age, the said B. not living, sole and unmarried, her share shall continue to be held by trustees in trust for her and her benefit, so long as her husband shall survive, and trustees shall pay over to her such money as she shall require for her support, and in case she shall not survive her husband, her share shall be vested in her heirs. And that the shares of the said children "as may be hereafter born" shall be held in trust for them until said children shall arrive at lawful age, with power of sale to trustees to convey and sell estate and apply proceeds as above.

Construction:

(1) C. took a vested estate at the age of twenty-one in one-fifth.

(2) The trust continued as to one-fifth during joint lives of B. and her husband.

(3) The trusts in favor of unborn children to continue until they

respectively reached the age of twenty-one years, was void, as the power of alienation was suspended during lives not in being at creation of the estate.

(4) The failure of this trust did not affect other provisions for B. and C., but neither of their interests were increased thereby.

(5) Three-fifths reverted to A., enjoyable in possession upon C.'s majority. *Woodgate* v. *Fleet*, 44 N. Y. 1.

Bequest to executor, *in trust*, to pay income to B. during life, upon his death to divide income equally and pay same to C. and D. during their lives, and upon the death of both to child or children of D.; if D. died without children, then to trustees of Columbia College.

Construction:

(1) There was no vested estate in remainder until the death of the three *cestuis que trust*, and the bequest was therefore void.

(2) The trust is one and inseparable and void. *Knox* v. *Onativia*, 47 N. Y. 389.

The system of charitable uses, as recognized in England prior to the Revolution, has no existence in this state.* *Holmes* v. *Mead*, 52 N. Y. 332.

*R. S. 727, sec. 451; Shotwell v. Mott, 2 Sandf. Ch. 46; Williams v. Williams, 4 Seld. 525; Potter v. Chapin, 6 Paige, 639.

Devise to trustees for life of M. and W. of two parcels of land, to be used, one as a church and the other as a parsonage lot, and upon death of M. and W. to be conveyed to any trustees authorized by the legislature to take and hold for church purposes; and if no act were passed, then to rector, etc., St. M.'s Church, Beechwood, if church were incorporated, if not to testator's right heirs; also bequest to said trustees of $5,000, the income thereof to be paid to support of the rector for the time being of said St. M.'s Church, or a clergyman of the P. E. Church appointed to and who should officiate therein, the principal to follow the disposition of the land. There was no act of the legislature, nor incorporation of the church named.

Construction:

(1) The trustees took no title of real estate and the trust was void.

(2) The bequest by itself was valid, but as the general scheme failed, no effect could be given to part of it. Howse v. Chapman, 4 Vesey, 404; Attorney General v. Davies, 9 id. 535; Same v. Bagley, 2 Brown, 429; Coster v. Lorillard, 14 W. R. 265; Harris v. Clark, 3 Seld. 242.

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(3) Whether devise failed in case of appointment by the legislature of trustees, or the creation of a corporation of the St. Mary's Church, Beechwood, was not passed upon but reserved until the proper parties should be before the court. *Holmes* v. *Mead*, 52 N. Y. 332.

NOTE 1.—Beneficiary need not be described by name; any other designation or description identifying him will suffice. Stubs v. Sargon, 2 Keen, 255, aff'd 3 M. & C. 507; St. Luke's Home v. Ass'n, etc., 52 N. Y. 194; New York Institution, etc., v. How's Exrs., 10 id. 84; Bernasconi v. Atkinsou, 10 Hare, 345; Smith v. Smith, 4 Paige, 271.

NOTE 2.—It is not an objection that the trust is for the benefit of one who shall for the time being perform certain duties and that the beneficiaries may change.

NOTE 3.—It is not material to the validity of a legacy that the legatee should be definitely ascertained at the date of the will, or death of the testator, provided he be described so that he can be ascertained when the right to receive the legacy accrues.

No undue suspension of ownership of personal property. *Hatch* v. *Bassett*, 52 N. Y. 359, digested p. 926.

A charitable corporation may by bequest take and hold personal property limited to any of the corporate uses of the legatee and a direction that the principal shall be kept *inviolate* and the income only be expended is valid, provided the bequest be fixed and certain and give an immediate and vested interest. It does not offend against the statute of perpetuities, nor create a trust. *Vetmore* v. *Parker*, 52 N. Y. 450.

Distinguishing Hayes v. Hayes, 21 N. J. Eq. R. 265, and following Colt v. Colt, 32 Conn. 422.

From opinion.—"Our statutes against perpetuities relate to *expectant* estates and limitations of *future* contingent interests in personal estate, and *future* estates in lands. The mortmain policy of this state is very simple, and is contained in each charter creating a charitable corporation. The amount of property which it may take and hold in mortmain is restricted; but its ownership is absolute, and only qualified by its artificial nature. There is nothing *contingent* about it; it is fixed and certain; there is nothing *expectant* or *future* about it, but its interest is immediate and vested. A contingent future interest might be limited to such a corporation, and the law of perpetuity would apply until the contingency upon which the limitation depended happened, and if that period was not dependent upon two lives in being it would be invalid; but if within that period the interest would become vested, and the law against perpetuity would cease. The property would then be in mortmain, and beyond the reach of the law of perpetuity. The right to hold and use it would then depend upon the capacity of the corporation.

"The gift in this case was to the asylum. It was immediate, and became at once vested. The corporation never could have any other or greater interest than it then had, and no one else had any interest, contingent or otherwise, in it. There was no expectant or future contingent interest in any one. It is said that the statute of perpetuity is violated because the direction to invest the principal takes away the *jus disponendi*, without which there can not be absolute ownership. If this is the effect of the direction to invest the funds, the direction would probably be held void, while the gift would be sustained to carry out the main purpose of the testatrix,

within a well recognized principle. 1 Wm. B. R. 428; 3 Burr., S. C., 1416; 1 Coll. 381; 5 Sandf. R. 365. This principle need not be invoked in this case, if the views before expressed in favor of the capacity of the corporation to take in this way are correct, and the only result would be a modification in that respect of the statute against perpetuities."

Citing Williams v. Williams, 4 Seld. 525; 32 N. Y. 116; 34 id. 612; Adams v. Perry, 43 id. 500.

NOTE.—For the purpose of estimating the value of property held by any institution its debts must be deducted.

Citing Chamberlain Will Case, 43 N. Y. 447, note.

Devise and bequest in trust for B. during life; after his decease, in case he leaves heirs, to said "heir or heirs" absolutely when they become of age. In case B. leave no "heirs or widow," then to C. In case B. leave "a widow, heir or heirs" to them for life, and after death of heirs, absolutely to C.

Construction:

Trust for use of B. during his life valid. Provision for "heir or heirs" when they become of age, and provision for "widow, heir or heirs," unduly suspended the power of alienation.

Provision that C. should take in case of death of B. without leaving "a widow, heir or heirs" was valid contingent remainder.

In case of B.'s death leaving widow or heirs of his body, trust estate would pass to heirs and next of kin under statute of descent and distribution. *Kiah* v. *Grenier*, 56 N. Y. 220.

NOTE.—The term "heirs" meant heirs of the body and not heirs generally. See 1 R. S. 730, sec. 67. Bundy v. Bundy, 47 Barb. 304; 38 N. Y. 410; Scott v. Guernsey, 48 id. 106.

The will of M., by separate and independent clauses, gave to his wife the rents, incomes and profits of his estate, real and personal, during her life, to the extent necessary for her support; in case they were insufficient, he directed his executor and trustee to take and pay to her, from the body of the estate, what should be necessary from time to time. In another clause he bequeathed the rents, income and profits after the death of his wife to his two daughters during life, and after the death of the wife and daughters, he devised and bequeathed the estate to the issue of his said daughters.

Construction:

The provision for the wife was valid and would be sustained, although the devise over was void. *Van Schuyver* v. *Mulford*, 59 N. Y. 426.

Distinguishing Knox v. Jones, 47 N. Y. 389.

When, by devise, a remainder is limited upon more than two successive estates for life, all life estates subsequent to the first two are void,

and the remainder takes effect upon the expiration of the first two, as if no others had been attempted. *Woodruff* v. *Cook*, 61 N. Y. 638.

Distinguishing Amory v. Lord, 5 Seld. 403; citing 1 R. S. 721, sec. 17.

NOTE.—The remainder in this case seems to have been contingent. If so the case does not seem to be in harmony with Amory v. Lord, 9 N. Y. 403; Purdy v. Hayt, 92 id. 446; Dana v. Murray, 122 id. 604, 618. See opinion, p. 338.

Gift by husband of residue to wife and three infant children jointly; in case of the death of wife or either of children without issue, property to vest in survivors; in case of death of the four children without issue of either of the children, over to other children with power to executors to lease, etc., during minority of children.

Construction:

Remainders to other children were too remote, and void. *Chipman* v. *Montgomery*, 63 N. Y. 221.

Suspending the power of alienation during the minority of a person not in being at the creation of the trust, in addition to two other lives *Woodgate* v. *Fleet*, 64 N. Y. 566, digested p. 351.

Devise of residue to executors in trust, to pay the income and profits to two brothers and two sisters of the testator, in equal proportion, during their joint lives, and after their "several deaths" to divide the same among their children. * * * "In case either of my said brothers or sisters shall die, leaving the others surviving, then the income here intended for one or the other so dying shall be paid to the issue or representative of the one or the other so dying."

Construction:

The design was that the corpus of the estate should remain undivided in the hands of the executors until the decease of all the brothers and sisters named; that the interests of the children of the respective brothers and sisters did not vest in them at the death of the testator, but were future and contingent upon their surviving the parent; and the provision was void. *Colton* v. *Fox*, 67 N. Y. 348, aff'g 6 Hun, 49.

Distinguishing Everitt v. Everitt, 29 N. Y. 40.

This case treats of contingent estates arising by survivorship—thus, if the estates be given to A., B., C. and D., with a direction that upon the death of any beneficiary the survivors shall take his share, is such share taken absolutely by the survivors, or does it again go over to the other survivors upon a second or third death? The will was construed as if the estate were given in separate parts so that upon the death of any beneficiary his interest would absolutely vest in the survivors sev-

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erally, and this rule obtains unless a contrary intention appears. *Smith* v. *Scholtz*, 68 N. Y. 41.

The same will was involved in Striker v. Mott, 2 Paige, 387; Brewster v. Striker, 2 N. Y. 19; Striker v. Mott, 28 id. 82. See Vested Estates, p. 285.

Trusts were held to be several, and hence there was no undue suspension of power of alienation. *Stevenson* v. *Lesley*, 70 N. Y. 512; aff'g and mod. 9 Hun, 637, digested p. 285.

Defendant's testator, by his will, devised to his wife and two youngest children all his personal property, and the use of a farm until June 29, 1890, and directed his executor, within two years from that date, to sell the farm and divide the proceeds among certain persons named in the will.

Construction:

The widow and children took an estate for years in the farm, and the remainder therein vested in the residuary devisees named in the will, subject to the execution of the power of sale; the power vested in the executor, being a mere naked power of sale, did not suspend the power of alienation, and was valid.

The will provided that "the personal property and use of said farm to be under the exclusive control and management of my wife, without interference by any person whatever." A valid power in trust was thereby created in the wife. *Blanchard* v. *Blanchard*, 70 N. Y. 615; aff'g 4 Hun, 287.

Limiting Beekman v. Bonsor, 23 N. Y. 298.

Devise and bequest of residuary estate to his executors in trust, in case his three children survived him, to divide the same into three equal shares, one to be held for each of said children for life, and upon the decease of the child first to die, his or her share to go in fee to its lawful issue, if none, then the share to be divided into two equal parts, one to be held in trust for each of the surviving children during life; upon the death of the child next dying, the part or sub-share so held for such one to go to his issue, if none, to those who, if the surviving child were dead, without issue, would be the testator's heirs at law; upon death of survivor, the sub-share to vest absolutely as specified.

Similar provision was made as to the share held for the child the second to die. If dying without issue, one of the sub-shares to go to the issue of the child first dying, if any; if none, to the persons who, if the surviving child were dead without issue, would be the testator's heirs at law.

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Construction:

The power of alienation was not suspended and the provision was valid.

Same will:

Further provision that a specified amount of the rents, issues and profits of each share of the estate during the minority of the children for whose benefit it was, "shall be applied to his or her education and support," and the balance added to the principal; after the arrival of each child at the age of twenty-one, then that the whole of the income "shall be paid over quarterly to such child."

Construction:

The words "applied" and "paid over" were substantially equivalents, and the trust was within the provision of the statute of uses and trusts relating to express trusts, and was valid. (1 R. S. 730, sec. 55.) *Moore* v. *Hegeman*, 72 N. Y. 376.

Direction to executors after four years after testator's decease to sell real estate and pay over proceeds to Bishop of R. upon certain trusts specified, and meantime to rent the real estate, and after paying taxes, etc., to deposit balance in a savings bank, to be paid with proceeds of sale of real estate and residuary personal estate to said bishop upon the terms mentioned.

Construction:

The direction to rent was an attempt to create an active express trust, which, if valid, would vest the title in the trustees, (Brewster v. Striker, 2 Com. 19; Tobias v. Ketcham, 32 N. Y. 319; Smith v. Scholtz, 68 id. 41), as the trustees could not alienate the lands during the trust term (1 R. S. 730, sec. 65), nor the *cestui que trust* dispose of his interest (1 R. S. 730, sec. 63), there was a suspension of the power of alienation not limited by life, and so void. (1 R. S. 723, sec. 15.) Hawley v. James, 16 Wend. 61; Hone's Ex'r v. Van Schaick, 20 N. Y. 564; Boynton v. Hoyt, 1 Denio, 53. The direction was not maintainable as a power in trust, as the title vested in the trustees, and a power to accumulate rents for the purpose named was invalid. (1 R. S. 726, secs. 37, 38.)

The real estate descended to testator's heirs, subject to the power of sale, if valid. But the power of sale was void, as the proceeds were to be paid to the bishop, not absolutely, but as a trustee, and the power of alienation was for four years suspended, both as to him and others, and the whole scheme of the will as to trusts failed. *Garvey* v. *McDevitt*, 72 N. Y. 556, aff'g 11 Hun, 459.

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A trust which would be otherwise void as suspending the power of alienation for more than two lives in being, is not made valid because there is given to the trustee power to sell the trust property, the proceeds of such sale remaining subject to the execution of the trust. *Brewer* v. *Penniman*, 72 N. Y. 603, aff'g *sub. nom.* Brewer v. Brewer, 11 Hun, 147.

Devise (1) to B., widow, for her life; (2) gift of income of estate to four daughters, "to be divided between them share and share alike, during each of their respective natural lives, remainder to their respective children," their heirs, etc.

The power of alienation was suspended only for the lives of B. and as to each one-quarter for life of one daughter. *Monarque* v. *Monarque*, 80 N. Y. 320.

C. died seized of certain real estate which had been devised to her by her mother, and leaving a will by which she gave all her estate, real and personal, to her husband for life, remainder to her son T. if he should live until he became of age; if he should marry and die before maturity, leaving a child or children, then such child or children to take; in case of his death before maturity unmarried and leaving no child, then she gave all the estate given to her by her mother to her two sisters, L. (the plaintiff), and E.; if either should die, leaving no child, the survivor to take the whole; if both should die leaving a child or children, the share of each parent to go to her child or children; if either should die leaving no child, the child or children of the one who died leaving a child or or children to take. The testatrix died the next day after the will was executed; her husband died soon after; her son T. died before he became of age, unmarried and leaving no child; before his death, E. (sister of the testatrix) died leaving no child, and leaving a will by which she gave all her estate to her husband.

Construction:

Upon the death of the testatrix her husband became seized of an estate for life, and her son of a vested remainder in fee subject to be defeated by his death before maturity, unmarried and without issue; the clauses following the devise to him speak as of the date of such death, and it was the intent in case of its happening that then an absolute fee should immediately vest in the person or persons indicated; therefore, there was no unlawful suspension of the power of alienation; each of the sisters took an estate in expectancy, *i. e.*, a remainder contingent upon the death of the son, before maturity, unmarried and without a child, and contingent upon her surviving him; upon the death of E.

leaving no child, her interest ceased, and the estate in expectancy of plaintiff was enlarged so as to include the whole, instead of a moiety of the land; and upon the death of the son it ripened into an absolute fee; and plaintiff, at the time of making the contract, owned and could convey a perfect title. *Kelso* v. *Lorillard*, 85 N. Y. 177.

E., by will, directed that $30,000 should be "kept invested" until his "youngest grandchild now born, or that may hereafter be born, before the final distribution" of his estate, should be of age; his executors "out of the interest and net income of the fund to keep in repair a cemetery lot, and make up any deficiency" there might be in funds to pay legacies and meet the other provisions "of the will, and authorized them from time to time after five years" from his death "to make division and distribution of the surplus * * * and also if they see fit at the same time to divide and distribute" $10,000 of the principal between four children and four grandchildren named; also, "thereafter from time to time" to "make division and distribution of other interest and increase" between the beneficiaries named; if either should "die before payment, leaving issue" he directed "that his or her aforesaid legacies and portion" should go "to his or her children;" if either should die without issue, then that his or her "legacy and portion" should go "to the surviving brothers and sisters."

When his "youngest grandchild born, and that may be within twenty years born, shall arrive at full age, or if a granddaughter shall sooner be lawfully married" his executors to divide the remaining $20,000 into two equal parts, one to be divided equally between his four children, the other equally between all his grandchildren then living, including those born after his death with a similar provision in case of a legatee's death as was attached to the $10,000. There was no residuary clause.

Construction:

The whole bequest was invalid, because it unduly suspended the absolute ownership, and as to the $30,000 the testator died intestate.

Same will:

The testator gave $7,000 to his executors in trust to be kept invested for the benefit of an insane daughter, the principal to go to her if she should regain her reason before the final settlement of the estate; otherwise, on her death, the same to "become a part of the general fund" in the hands of the executors "for final distribution."

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Construction:

The daughter died without having regained her reason. The $7,000 fell into the residue undisposed of in the hands of the executors.

Same will:

The will gave to each grandchild born within twenty years after his death, and before final settlement of the estate, $1,000, to be paid to each on reaching full age, or if a granddaughter, upon her marriage.

Construction:

There was no illegal suspension of the absolute ownership and the bequest was valid. *Smith* v. *Edwards*, 88 N. Y. 92, aff'g 23 Hun, 223.

Notes from opinion.

NOTE 1.—As to the $30,000 bequest, no trust was created, although it might be implied; but a trust would not be implied to be at once declared illegal and void. (102, 103.)

The legatees took distributively, as tenants in common. (103.) 1 R. S. 727, sec. 44; Everitt v. Everitt, 29 N. Y. 71; Tucker v. Bishop, 16 id. 402.

NOTE 2.—Nature of clauses postponing time of payment considered. (103–4.)

NOTE 3.—The ultimate vesting of the fund was postponed for twenty years and not during designated lives in being, and was invalid. Schettler v. Smith, 41 N. Y. 334.

NOTE 4.—"Its failure (of the bequest for $30,000) does not necessarily draw with it the portion of the bequest given to the four children and four grandchildren named and who were *in esse* at the date of testator's death. It does destroy so much of it as consisted of the accruing interest upon the portion which failed, but the principal of $20,000 and the interest upon that as bequeathed to the eight legatees are not so interwoven with the testator's general scheme as to be incapable of separation."

NOTE 5.—"In Manice v. Manice, 143 N. Y. 369, it was said, that where the terms of a bequest *import* a gift, and *also* a direction to pay at a subsequent time, the legacy vests, and will not lapse by the death of the legatee before the time of payment has expired. And in Warner v. Durant, 76 N. Y. 136, the general rule is declared to have an exception grafted upon it, that where the gift is to be severed *instanter* from the general estate for the benefit of the legatee, and in the meantime the interest is to be paid to him, that is indicative of the intent of the testator that the legatee shall at all events have the principal, and is to wait only for the payment until the day fixed."

NOTE 6.—"The appellants rely largely upon the provisions for the distribution of the interest to the named legatees, and seek to bring the case within the exception stated in Warner v. Durant, 76 N. Y. 136. That exception appears to be founded upon the idea that the gift of interest, *eo nomine*, is difficult to be reconciled with a suspension of the vesting, because interest is a premium or compensation for the forbearance of principal to which it supposes a title. (1 Jarman on Wills, 764.) It is a very plain inference from this assigned reason of the exception that it can only apply where the whole interest is given during the delay of payment. If any part of it is diverted to purposes other than the benefit of the legatees, that is treating the princi-

pal as not belonging to them, but remaining in the estate as a source of income for the benefit of the estate; and so the authorities decide. (Leake v. Robinson, 2 Mer. 363; Hanson v. Graham, 6 Ves. 239; Watson v. Hayes, 5 Myl. & Cr. 125; Warner v. Durant, *supra.*) In the present case the whole interest is not given. Some part of it, and that first accruing, is diverted to the purposes of the estate, and what is given is only through a permitted discretion of the executors prior to the period of final distribution. The disposition of the interest thus made can not safely be said to import an intention to vest the gift of the principal at the date of the testator's death."

NOTE 7.—"By the ninth clause of his will, the testator gave to each and every grandchild born within twenty years after his death and before the final settlement of his estate the sum of one thousand dollars, to be paid to each on reaching full age, or if granddaughters, upon their earlier marriage. The bequest is accompanied by a request that his children consent to and aequiesce in the provision. The General Term held these legacies to be present gifts of separate and distinct portions of the testator's property, and that all must necessarily take effect completely within the period of one life in being at the death of the testator. We concur in the conclusion. The legacy vested in each grandchild immediately upon its birth, payment only being postponed until majority or marriage. The child of a daughter must necessarily take during the life of its mother, and that of a son, if born after his decease, is still regarded as living at the death of its father for the purpose of the vesting of the legacy. There was, therefore, no illegal suspension of the absolute ownership."

W., by will, directed his executors to convert his estate, real and personal, into money, invest proceeds, pay one-third of interest to his wife during her life, and on her decease divide it equally among his children, in the manner provided for the two-thirds.

In case of the death of either of his children without issue before the death of his wife, it was directed that "the share or portion" of the estate "and the interest thereof, to which such child would at that time be entitled" should revert to the estate for distribution as thereinafter provided. In case of the death of any of his children leaving issue *after* the death of his wife, the share or portion of the estate "and the interest thereof, to which such child shall then be entitled, shall be paid to such issue, or to the next of kin of such deceased child." By the last clause, in case either of his sons should "acquire an amount of property equal to the amount of principal held in trust for them respectively," and should "have good habits and business qualifications" the executor was directed "to pay over such principal to the son so entitled thereto," and there was added "I hereby give and bequeath to such son said principal sum to be paid him."

W. died leaving wife and seven children surviving.

Construction:

The primary intent was to give income to wife and children respectively and the *corpus* to the issue of his children, save in the case speci-

fied in the last clause, in which clause the substituted gift was not inconsistent with the general purpose and such limitation was valid.

The fund was converted into personalty.

The will was to be construed as though it had in terms created a separate trust for each child, and his or her issue; the utmost suspension of the ownership of any part of the estate was for the lives of the widow and one child, and hence there was no undue suspension of the power of alienation, and the trust was valid.

As there was no devolution of the share of a child dying without issue after the death of the widow, in the happening of such a contingency, the share of the child so dying goes to the next of kin of the testator. *Wells* v. *Wells*, 88 N. Y. 323.

Notes from opinion.

NOTE 1.—The counsel for appellants, to support their contention that there is a gift of the *corpus* to the children, refer to the doctrine that a general gift of the income of a fund, is a gift of the fund itself. Haig v. Swiney, 1 Sim. & Stu. 488; Patterson v. Ellis, 11 Wend. 260. But this doctrine does not apply in this case, for the reason that there is no general gift of the income to the testator's children. It is true that the gift of the income to the children is not in express terms limited to their lives, but this is the necessary construction from the gift over of the principal sum on their death. The direction to divide the income among the children, and to pay over the principal to their issue on their death, is equivalent to a bequest of the income, to the children for life, and of the principal to their issue. Gilman v. Reddington, 24 N. Y. 10; Manice v. Manice, 43 id. 378.

NOTE 2.—"The interests carved out of the trust are separable and distinct, and the will is to be construed as though in terms it had created a separate trust for each child and the issue of each child, in one undivided seventh part of the estate. Savage v. Burnham, 17 N.Y. 571; Everitt v. Everitt, 29 id. 39; Stevenson v. Lesley, 70 id. 512; Monarque v. Monarque, 80 id. 320.

The children of A., living at the death of the testator took distributively, and the share of each vested at once, subject to the life estate of their mother, and liable to be diverted by death in her lifetime; and therefore there was not a suspension of ownership for more than two lives. *Bliven* v. *Seymour*, 88 N. Y. 469.

The creation of a trust in real estate does not *ipso facto* suspend the power of alienation; it is only suspended when a trust term is created either expressly or by implication, during the existence of which a sale by the trustee would be in contravention of the trust.

Although the time when a power of sale shall be exercised is in the discretion of the trustee, and he is meantime to receive the rents and profits, or although it be the duty of the trustee to postpone sale for a more favorable market, the power of alienation is not suspended; although the interest of the beneficiaries is inalienable by statute

during the existence of the trust, this does not suspend the power of alienation.

If the limitation of the interests in the proceeds of sale be void, the power of sale to accomplish that purpose may be void. (Van Vechten v. Van Veghten, 8 Paige, 124.)

R., by will, directed his executors to sell his real estate; that in this state at public sale in New York city, after three weeks' published notice, and other real estate in such places and manner as executors should deem best. After directions as to disposition of proceeds this followed: "In view of the present great depression in real estate, it is my will that my executors * * exercise their discretion as to the time to sell the same, not longer than three years after my decease." The executors were to divide semi-annually the rents, income and profits up to final distribution, "among those to whom the bequests are made," in given proportions.

Construction:

Whether executors took a trust estate, or were simply donees of a trust power, there was no suspension of the power of alienation, as they could, at any time after the testator's death, convey an absolute fee in possession; there was no suspension of the power of alienation, and there was an absolute conversion of the real estate into personalty.

Same will:

The executors were directed, after disposing of the residuary estate, and deducting expenses and legacy to wife, to divide the remaining proceeds into fifty equal parts, to pay twelve parts to son C., if then surviving; if dead before such distribution, then to his lawful issue. Twenty-eight of such parts were given in similar language to three other children, and the remaining ten shares to an incorporated college. The college was restricted to the use of the income of its portion, and in case of its discontinuance, its trustees were directed to apply the fund to certain religious purposes specified.

Construction:

The restriction did not create a perpetuity (Wetmore v. Parker, 52 N. Y. 450), and if the provision in case of discontinuance was void, an absolute title vested in the corporation.

Same will:

In case any child died before the testator, the will gave "such legacies, estate, share or proportion of the one so dying unto his, her or their lawful issue, such issue to take the estate or share his, her or their parent would have been entitled to if living."

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Construction:

The children took the absolute title to their respective shares, subject to a limitation over in case of death before distribution, and the ultimate vesting could in no event be postponed longer than the life of the parent.

Direction to deduct all charges appearing on the testator's books of account against any legatee from his share was valid. *Robert* v. *Corning*, 89 N. Y. 225, aff'g 23 Hun, 299.

From opinion.—NOTE 1.—*Devise by implication.*—To constitute a devise by implication, the intention must be clear. (237.)

NOTE 2.—*Power in trust favored.*—This rule has also been frequently applied in cases involving questions under our statute of uses and trusts, where a trust estate, if held to result from the language and dispositions of a will, would render it illegal and void. In such cases the courts, for the purpose of sustaining the will, construe an authority and duty conferred or imposed upon executors, where it is possible to do so, as a mere power in the trust, although the duty imposed, or the authority conferred, may require that the executors shall have control, possession, and actual management of the estate. Downing v. Marshall, 23 N. Y. 366; Post v. Hover, 33 id. 593; Tucker v. Tucker, 5 id. 408. But there are many authorities tending to sustain the proposition, that a trust will be implied in executors, when the duties imposed are active, and render the possession of the legal estate in the executors, convenient and reasonably necessary, although it may not be absolutely essential to accomplish the purposes of the will, and when such implication would not defeat, but would sustain the dispositions of the will. Craig v. Craig, 3 Barb. Ch. 76; Bradley v. Amidon, 10 Paige, 235; Tobias v. Ketchum, 32 N. Y. 329; Vernon v. Vernon, 53 id. 351; Morse v. Morse, 85 id. 53. See, also Brewster v. Striker, 2 id. 19."

NOTE 3.—*Incidental delays.*—"The statute of perpetuities is not violated by directions which may involve some delay in the actual conversion or division of property, arising from the necessity of giving notice, or doing other preliminary acts. Manice v. Manice, 43 N. Y. 303. Such delays are not within the reason or policy of the statute. The statute was aimed against the creation of inalienable trust estates, or contingent limitations, postponing the vesting of titles beyond the prescribed period. The act of 1837, ch. 460, sec. 43, provides that sales of real estate made by executors in pursuance of an authority given by any last will, unless otherwise directed therein, may be public or private. A public sale implies prior notice. The direction that the sale should be public was clearly valid, and it can make no difference upon the point now in question, whether the length of the notice (if reasonable) is prescribed by the testator or is left to the judgment of the executors."

NOTE 4.—*Whether legacy is vested or contingent.*—"Where there is no direct gift, and words of condition such as *if* or *upon* are used, in connection with a direction for payment at a future time, the time is regarded as of the substance of the gift, and the legacy is contingent and not vested. But the question is generally one of intention, and the whole will is to be considered in determining the intention of the testator. * * * The postponement of the payment, where it is made for the convenience of the estate, is consistent with the vesting of the legacies, and the gift of the intermediate income, indicates an intention to vest the *corpus* from which the income is to be derived. Packham v. Gregory, 4 Hare, 396; Hanson v. Graham, 6 Ves. 239; Davies v. Fisher, 5 Beav. 201; 1 Jar. 843; 1 Rop. on Leg. 573; 2 Wms. on Exrs. 1243."

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V., by will, gave a bequest to her executors of $30,000 in trust "to pay over the net income of $10,000, part of such sum," to each of the three unmarried nieces of the testatrix who were named "so long as each remains single; upon the marriage of either to pay over to her $1,000 of the principal of which she has enjoyed the income;" and to pay over the residue of the $10,000 to the surviving nephews and nieces of the testatrix.

Construction:

There was no undue suspension of the power of alienation and the provision was valid.

Each legatee had a life interest in $10,000 of the trust fund, and upon her death or marriage the title to the same would immediately vest. *In the Matter of the Will of Verplanck*, 91 N. Y. 439, mod. and aff'g 27 Hun, 609.

The Revised Statutes (723, sec. 17) declaring that "when 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," refers only to vested, not to contingent remainders, and executes the remainders in possession only in favor of such ascertained persons as, except for the void life estate, would under the will or deed be entitled to the immediate possession.

Hence, when the gift in remainder is upon a contingency which has not happened *at the time of the death of the second tenant*, the provision does not apply, and the gift is invalid.

D., by will, gave his real estate to his sisters J. and C. "during their respective lives," and after their deaths directed it to be sold by the executors, the proceeds to be invested, and the income to be paid by them to E. for her life, and the principal to be divided equally among any children "she may leave;" if none, then the principal to go to other persons. The two sisters and E. survived D. J. died before C., and E. survived them.

Construction:

Sisters took, as tenants in common, life estates with cross remainders; each took a distinct and several freehold for life in one-half of the farm. The remainder given to the children of E. was contingent.

Upon the death of J. and the consequent termination of her life estate, a second life estate vested in C., and upon her death the limit of

the statute, as to that share, was reached, and hence the third attempted life estate in E. was void.

The remainder, as to the one-half in which J., had a life estate, to E.'s children or others could not take effect at the death of C., because it could not be ascertained until the death of E., who would take, and hence the remainder was void, and the title to the undivided half of the land subject to the power of sale descended to the heirs at law. In re Ryder, 11 Paige, 185; Savage v. Burnham, 17 N. Y. 571; Carmichael v. Carmichael, 4 Keyes, 346.

The devise to E. was valid as to the share of C., as upon her death but one life estate therein had run, and she was entitled to the income from one-half of the proceeds during life, and the remainder limited thereon was valid.

A remainder in fee is not invalid because limited in favor of persons not in being when the limitation is created, or not ascertainable until the termination of the precedent estate, provided the contingency upon which it depends must happen within or not beyond the prescribed period for the vesting of estates. Gilman v. Reddington, 24 N. Y. 9; Manice v. Manice, 43 id. 303.

Purdy v. *Hayt*, 92 N. Y. 446.

From opinion.—"The construction that section 17 applies only to vested remainders, is, moreover, sufficiently plain upon its language. The remainder, the section says, is to take effect in the same manner *as if* no other life estate had been created. Where the remainder was contingent when the life estate commenced, and remains so at the death of the tenant of the second life estate, it would not vest, although no other life estate had been created, and the statute gives effect to remainders only in the same manner as if limited upon two life estates instead of three. It is plain, we think, that the statute only executes the remainder in possession in favor of such ascertained persons as, except for the void life estate would, under the terms of the will or deed, be entitled to the immediate possession. See Knox v. Jones, 47 N. Y. 397; Smith v. Edwards, 88 id. 104. * * *

"The question as to whether the remainder can be sustained as to the share of the sister of the testator, last dying, in view of the statute of perpetuities, is in one aspect a novel one. It is apparent that the power of alienation was suspended by the contingent limitation in remainder, and such suspense could not lawfully exceed two lives, and in a single case, a minority in addition. There was, under the will, a limitation for three lives as to the share of one of the two sisters of the testator, but upon which share that limitation would operate, could not be known until one of the sisters should die, and that event would render it certain that the unlawful limitation in remainder, was of the share of the sister so first dying. The question therefore arises, whether it wholly defeats the remainder, that it could not be ascertained, until one life estate was spent, which of the shares would be unlawfully suspended. We perceive no good reason why such a result would follow. The rule is well settled that where by the terms of the instrument creating an estate, there may be an unlawful suspension of the power of alienation, the limitation is void, although it

turns out by a subsequent event, as by the falling in of a life, no actual suspension beyond the prescribed period, would take place. Hawley v. James, 16 Wend. 121. But this rule relates to cases where, if the limitations take effect, in their order, as contemplated by the grantor or devisor, some of the estates limited will not vest within the prescribed period, and they are cut off as too remote, although it may happen that the estates so cut off, would, by events subsequently happening, take effect within two lives.

"The case here is not, we think, within this principle. In the one case the vice affects the whole limitation, and in the other, the limitation of a part only of the property devised, the only uncertainty being as to the part the title of which will be unlawfully suspended, and this will be ascertained within the period of a single life. Where the precedent or particular estate is given to several persons as tenants in common, the remainders limited upon the estates of a part of the tenants in common, may fail, without affecting the remainders limited upon the estates of the others. Fearne on Rem. 193; Hawley v. James, *supra*. We think, therefore, the unlawful suspension under the will in question, affected only the share of the estate give for life to the testator's sister Jane."

NOTE 1.—The construction of the will was necessary to determine the questions arising on the accounting, and in such a case jurisdiction of the surrogate to construe a will attaches as incident to that proceeding. (450.) Riggs v. Cragg, 89 N. Y. 479; In re Verplanck, 91 id. 439.

NOTE 2.—Joint tenancy and tenancy in common considered. (452–3.)

NOTE 3.—A cross remainder was here raised by implication.

NOTE 4.—The remainder to E.'s children was not to them as a class. (454.)

M. devised real estate to his executors in trust, to hold one-third part thereof for the benefit of each of his three daughters during life, and upon the death of a daughter leaving a husband and lawful issue, the executors should stand seized of her one-third from and immediately after her death, in trust for the sole use and benefit of such issue; in case of the death of a daughter unmarried, in trust for such persons as she may by will appoint, and in default thereof, for the benefit of her next of kin.

Construction:

The power of appointment related to the remainder in fee and in each event provided for the trust in the executors upon the death of a daughter would be passive, the remainder vesting in the beneficiaries.

Same will:

One of the daughters died unmarried and leaving a will, by which she gave her real and personal estate to her two sisters, who survived her, and to the survivor of them, and to the heirs, executors and administration of such survivor.

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Construction:

This was a valid execution of the power of appointment as to the one-third of the real estate, and the limitation in devise to the survivor did not unlawfully suspend the power of alienation. *Mott* v. *Ackerman*, 92 N. Y. 539.

M., by her will, gave the bulk of her estate to three persons, who were her lawyer, her doctor, and her priest, absolutely as tenants in common. It was not intended by her to give to the persons named any beneficial interest, but her design was to devote the property to certain charitable purposes; this she was advised could not be done by express provision in her will, but only by an absolute gift to individuals, to whose honor she could confide the execution of her purpose. She signed a letter of instructions, contemporaneous with the will, addressed to the legatees and devisees, stating the reason for the gift and dictating the purpose, which was in substance that during their lives, and after their deaths by some permanent arrangement to be made by them, the income of specified portions of the fund should be given to indeterminate persons of their selection, and any surplus of income to such charities as they might select. The will was executed in reliance upon a promise of the legatees to apply the fund faithfully and honorably to the charitable uses so specified. In an action to establish a trust which, failing as to the beneficiaries, should result to the heirs at law and next of kin, *held*, that the gift could not be sustained as an absolute one to the persons named, as this would be a fraud upon the testatrix; that the secret trust attempted to be created could not be enforced, nor would equity permit it to be carried out, as it was in violation of the statute against perpetuities, but would impose a trust upon the fund for the benefit of the heirs and next of kin; and that therefore the action was properly brought. *Matter of Will of O'Hara*, 95 N. Y. 403.

A., a citizen of, and dying in Massachusetts, left a will admitted to probate in that state. After providing for the payment of life annuities to twelve different persons, the will directed that the residue of the eatate should remain in the care and custody of his executors and trustees, and be invested until the death of the last survivor of the life annuitants, and that it should then be divided among grandchildren *per stirpes*. The will was valid under the laws of Massachusetts; it contained no express direction for conversion or sale of the real estate. The testator left real estate in New York and real estate and personalty in Massachusetts.

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Construction:

There was no provision for equitable conversion and no title could vest in the beneficiaries until the final division; and as to the real estate in the state of New York, the validity of the will was to be determined by the laws of that state, whereby it worked an unlawful suspension of the power of alienation and was void. It seems, if the power of sale could be implied, it would not validate the will. *Hobson* v. *Hale*, 95 N. Y. 588.

Grant to trustees in antenuptial contract, then a devise executing power of disposition to children and provision that in case either or any of children living at testatrix's decease should die before coming of age without issue, his share shall vest in the survivors or survivor, was valid, as upon the death of the testatrix there were persons in being, viz., her children, by whom an absolute title could be conveyed. *Beardsley* v. *Hotchkiss*, 96 N. Y. 201.

K., by will, devised to his executors real estate in trust, to receive the rents and profits and out of the same to pay to each of two grandsons $700 when he became of age, and in case either died before majority the survivor to take the whole $1,400; the trust to continue until K's son C. was of the age of twenty-five, or sooner died. If C. reached that age he was to have the net income less the $1,400, during life, and "If he should die leaving any lawful children the said real estate * * * is to become theirs in fee when they arrive at the age of twenty-one, and the same is devised accordingly."

Construction:

The provision for the grandchildren, conceding it was to be considered as a trust, was simply a mode of securing the payment of the legacies, not a provision for the maintenance of infants, and so did not render the estate inalienable; the interests of the *cestui que trust* were assignable, the trust being for the payment of a sum in gross. (1 R. S. 730, sec. 63.) The meaning of the will was, when C. was twenty-five years of age the trust should cease, he thereafter taking the income as tenant for life, charged with the payment of any amount unpaid of said legacies, the remainder in fee being devised to his children, if he have any, when they come of age; C., as owner of the next eventual estate, was entitled to any surplus of income arising during the trust term: if C. died without issue, the fee would vest in testator's heirs; if he should have a child or children, they would take fee absolutely, and in case of their death under age, the fee would vest in their heirs; there was therefore, no unlawful suspension of the power of alienation. It is only a trust to

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accumulate the rents and profits and apply them to the use of a person generally, or a trust to accumulate them for the benefit of one or more infants, which renders the estate inalienable. (1 R. S. 729, sec. 55.) Had the trust continued through the life of C. there would have been no unlawful suspension of the power of alienation.

Had there been a contingent remainder, limited on the fee, to take effect in case of the first devisee dying before twenty-one, the estate would have vested in the first devisee, defeasible by condition subsequent. Manice v. Manice, 43 N. Y. 380; Roome v. Phillips, 24 id. 463; and the suspension of the absolute power of alienation during the minority of the first remainderman would be authorized by statute. 1 R. S. 723, sec. 16.

Radley v. *Kuhn*, 97 N. Y. 26, mod'g 28 Hun, 573.

NOTE 1.—It was erroneously claimed that the trust was void as it was contended that it must continue until $1,400 was realized for the grandsons. (31.)

NOTE 2.—Even if the direction to accumulate the rents could be construed to be for a longer term than the minority of the beneficiaries, the excess only would be void. (32.)

The statute of uses and trusts (1 R. S. 728, sec. 55), does not require a trust to be limited, as to its duration, upon the lives of beneficiaries alone; it permits rents and profits to be received and held for the benefit of any number of persons during their lives, or for "a shorter time;" and, under the statute against perpetuities (1 R. S. 723, sec. 15), it is immaterial whether the two designated lives, beyond which the power of alienation may not be suspended, are strangers or beneficiaries.

A devise, therefore, in trust to receive and apply rents and profits during the lives of more than two beneficiaries, but terminable in any event upon the expiration of the lives of not more than two persons who are strangers to the trust, meets the requirements of both statutes. Rapallo, J., dissenting.

Accordingly, held (Rapallo, J., dissenting), where a devise was to a trustee, during his life, to receive the rents and profits and apply them at his discretion to the support and education of the children of the testatrix, nine in number, with remainder to them, that the devise was valid.

C., in 1845, devised real estate to a trustee for the benefit of M., his married daughter, during her life, with the expressed intention that the same should not be subject to or liable for any of her husband's debts, and that in no event should he have any estate or interest therein. Said devise, however, was declared to be upon the condition "and subject to the power and authority" of M. to dispose of the estate, both real and

personal (the real estate in fee simple) "by grant or devise," and in case M. failed to so dispose of it, the remainder was given to the children of M., living at her decease.

Construction:

If the two provisions, one creating a trust and the other conferring power to the *cestui que trust*, should be deemed so inconsistent and irreconcilable that both may not stand, the trust must yield to the power; but in this case the power operates alone upon the remainder, and the trust relates to the life estate, and both are valid and operative.

Same will:

In 1855 M. procured a conveyance to herself of the trust estate under the act of 1849 (chap. 375, L. 1849). M. did not convey the same, but devised all her real estate to her husband during his life, in trust, to receive the rents and profits and apply them, in his discretion, to the support and education of their children, with remainder to them in fee, with power to convey the real estate "either in fee or lesser estate," the consideration to be invested and disposed of for the benefit of the children in the same manner as provided for in relation to the original estate.

Construction:

This was not a simple delegation of the power to convey, given M. by her mother's will (C.'s will), but was a full and complete disposition of the whole estate by will as authorized.

It seems, that even if the provision were simply a delegation of the power to convey, it would be valid, for such power is general and beneficial, having in it no element of trust or confidence, and so may be delegated. Ingram v. Ingram, 2 Atk. 88; Berger v. Duff, 4 Johns. Ch. 368, distinguished.

The power granted by the will of M. was not invalidated by the fact that the donee (her husband as trustee) was authorized to sell not only the fee but "a lesser estate."

If the power authorized the creation of a third life estate, this was alienable at the moment of its creation, and so did not work an unlawful suspension of the power of alienation. If three successive life estates preceding the remainder were inadmissible, the only effect would be the destruction of the last. The "lesser estate" might be for the life of the trustee, and as thus a lawful estate might be created, it was not to be assumed that an unlawful one was intended to be authorized. Root v. Stuyvesant, 18 Wend. 257, questioned. *Crooke* v. *County of Kings*, 97 N. Y. 421.

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Notes from opinion.

1. "In Cutting v. Cutting, 86 N. Y. 536, the meaning and construction of the absolute power of disposition specified in sections 81 to 85, inclusive, of the statute relating to powers, was settled with a care and precision which leaves us at liberty to take and depend upon the result without repetition of the analysis which led to it."

2. "In view of the language used, and the cases bearing upon its interpretation which were quite elaborately considered and digested in City of Portsmouth v. Shackford, 46 N. H. 423, I incline to the opinion that each of the nine children was entitled, during the trustee's life, to an equal share of the income, either in support and education, or in unexpended surplus, payable with the remainder, and that the sole discretion of the trustee was to determine and control how much of each child's share should go to that child in support and education, and how much accumulate for such child as unexpended surplus."

3. "The estates created under the will of M. must, in considering the question of the suspension of the power of alienation date back to the will of C., the mother."

4. "Notwithstanding Root v. Stuyvesant, 18 Wend. 257, we are not to assume, when a lawful estate can be created under the power, that an unlawful one was intended to be authorized."

5. "The trust for the benefit of Mrs. Crooke, but for the reasons hereinafter given, would have been valid and effectual. It was not rendered illegal or invalid, simply because it could not be terminated at her will by the exercise of the power of disposition given to her; such a trust may be created for the life of the beneficiary or for any shorter term. 1 R. S. 728, § 55, sub. 3. The term less than life need not be a definite one. The purpose of the statute is answered if it can not extend beyond the life. Within the limits of life, the duration of the trust may depend upon the will of the trustee or of the *cestui que trust*; and it may be terminated by the exercise of a power of sale by the one or the other. Such a power is not necessarily repugnant to the trust, nor is the conveyance under the power any violation of the statute which makes trust estates inalienable. Belmont v. O'Brien, 12 N. Y. 394. A sale in such case, by the trustee, is not in contravention of the trust, and hence is not prohibited by section 65, 1 R. S. 730. A sale by the *cestui que trust* is not a sale of his beneficial interest during the trust term, and hence condemned by section 63. It is a sale of the *corpus* of the trust estate, according to the will of the creator of the trust, by which the trust is terminated.

"Section 60, 1 R. S. 729, provides that 'every express trust valid as such in its creation, except as herein otherwise provided, shall vest the whole estate in the trustee in law and equity, subject only to the execution of the trust.' This does not mean that the entire absolute fee shall be vested in the trustee, but simply so much of the estate as is put in trust and as is necessary to feed the trust. The remainder of the estate may remain in the creator of the trust, or may be disposed of by him in some other way or to some other person. The trustee takes a legal estate commensurate with the equitable estate, the legal estate being essential to uphold the trust. It is the whole trust estate that is vested in the trustee. An estate may be so vested subject to remainders and other future estates, and subject to the execution of a power of sale on the part of any person who may terminate the trust. But during the continuance of the trust, the entire legal estate must be vested in the trustee. Embury v. Sheldon, 68 N. Y. 227; Stevenson v. Lesley, 70 id. 512."

6. "The same section provides that the person for whose benefit the trust is created shall take no estate or interest in the lands, but may enforce the performance of the trust in equity. This is to be construed as having reference to so much of the estate

as is put in trust; such estate being vested in the trustee, the beneficiary of the trust can have no interest therein, but can simply have the right to enforce the trust. A beneficiary may, however, have a remainder, either contingent or vested, subject to the trust; and so he may have an estate that precedes the trust to be enjoyed by him before the trust shall take effect; and so, too, subject to the trust term, the beneficiary may be the donee of a power or even a trustee for some other person in a valid trust."

7. "But here the power of disposition was to be exercised absolutely for her own benefit, at her own will, and not for the benefit of any other person whatever. Such a power is general because it authorizes the alienation of the land in fee to any person whatever. 1 R. S. 733, § 77."

8. "The power is also beneficial, because the donee alone was interested in its execution. (Sec. 79.) She could execute the power by giving, selling or devising the property, and she could thus terminate the trust when she came to exercise the power of sale. She was not bound to convey the land in fee simple; the words in parenthesis, 'the real estate in fee simple,' were inserted only to show the extent of the power, the quantity of the estate which she could convey, and not to limit the power. She could convey less than a fee, and then the interest not conveyed would pass under the limitations over to her children. So she could convey one interest at one time and another at a subsequent time until she had conveyed the fee simple, and thus completely executed the power. Cunningham v. Anstruther, L. R., 2 Scotch App., 223; 4 Cruise's Dig. 245, secs. 34, 37."

9. "It is provided in the will that in case the power was not executed, the estate was, at the death of Mrs. Crooke, to vest in and become the absolute property of such children as she should leave at her death. This as to the real estate is a valid limitation over by way of an executory devise, as it would have been called at common law, or a contingent remainder, or conditional limitation under the Revised Statutes, taking effect in possession at the instant of Mrs. Crooke's decease. 1 R. S. 723, secs. 9, 10, 13; 725, secs. 24, 27; Pell v. Brown, Cro. Jac. 590; Jackson v. Edwards, 22 Wend. 498; Chrystie v. Phyfe, 19 N. Y. 345; Gilman v. Reddington, 24 id. 16; Terry v. Wiggins, 47 id. 512, 518. At the death of Mrs. Catin the children took an expectant future estate, which was their property, alienable, descendible and devisable as such, and as such protected by the law. 1 R. S. 725, sec. 35; Ham v. Van Orden, 84 N. Y 257."

10. "Under the power Mrs. Crooke had the right to dispose of the entire fee of the land as she willed, for her own benefit, either in her lifetime or by will at her death. Hence, she had an absolute power of disposition, within the meaning of section 85, 1 R. S. 733, which provides that '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.' Therefore, she took the fee of the land, subject to the future expectant, contingent estate limited to her children, and so far as the will attempted to create a trust which would otherwise have been valid, it was inoperative. It is provided by section 82, 1 R. S. 733, that where an absolute '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 estate that may be limited thereon, but absolute in respect to creditors and purchasers.' Here no estate in the land was, by the terms of the will, limited to Mrs. Crooke. 1 R. S. 729, sec. 60."

11. As to power of donee to delegate the exercise of the power, see p. 453, *et seq.*

B. devised his residuary real estate to his executor in trust, to receive the rents and income, to divide the same into four parts, and pay each

of said parts to beneficiaries named, during the lives of the two persons designated, who were strangers to the trust.

Construction:

There was no unlawful suspension of the power of alienation, and the trust was valid. Downing v. Marshall, 23 N. Y. 366, distinguished and limited.

Same will:

By a previous clause B. devised to his wife, in lieu of dower, the use and income of a house and lot during life, and upon her death, to become a part of the residuary estate.

Construction:

There was no unlawful suspension of the power of alienation; upon refusal of the widow to accept, the provision became inoperative. *Bailey* v. *Bailey*, 97 N. Y. 460.

From opinion.—"It is insisted that the title to the house and lot did not vest until the death of three persons, the widow, Thomas Bailey, and Webster Mabie, and hence there was an illegal suspension of the power of alienation, and the devise was void. The gift of the use and income was equivalent to a devise of the land itself during the life of the widow, and she had a legal title and was entitled to possession of the same. 3 Washb. on Real Prop. 450; 2 Jarman on Wills, 534; Monarque v. Monarque, 80 N. Y. 324; Craig v. Craig, 3 Barb. Ch. 76.

"Under the circumstances, the estate devised to the widow was a life estate and was transferable, not being within the provisions of 1 R. S. 729, sec. 63. The fee in the house and lot was vested in the persons named in the seventh clause of the will, and being a future expectant estate upon the death of the testator, they could immediately convey the fee. 1 R. S. 723, secs. 8, 9 and 13.

"It should be remarked that the widow, to whom the devise of the house and lot was in lieu of dower, refused to accept the same, and they thus passed into the hands of the executor and trustees with the rest of the estate devised by the sixth clause of the will. She having thus elected to take her dower, this provision was of no avail, and it must be considered as if it had never been made, and the house and lot became a part of the residuary estate from the beginning, and the devise was not liable to the objection that the power of alienation was restrained during the life of the widow."

The will of E. gave her residuary estate to her executors in trust to divide the same into six equal parts, to invest four of them, and to receive and pay the net income thereof in equal shares to four children of the testator, named, during their lives, and upon their deaths, respectively, "to transfer the share of the one so dying to his or her child or children upon arriving at the age of twenty-one, and to the lawful issue of any child who may be deceased." The will then provided, "if any

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such children should die before the age of twenty-one, and without having lawful issue, then the share or portion of the one so dying shall become and form part of my residuary estate for the benefit of all my children." At the time the will was executed, all but one of the four children were of age, and at the time of the death of the testatrix, all were of age. Action for the construction of the will.

Construction:

The will created a separate trust as to each of the four shares, to continue during the lives of the beneficiaries respectively, with remainders to their respective children or issue; and the disposition was thus far valid; the words "such children" in the last clause referred to the children of the beneficiaries named, not to the beneficiaries themselves; but in any event, as the ulterior contingent limitation so created was separable from, and merely incidental to, the primary trust, its failure did not affect the validity of such trust.

Same will:

In the event of the death of either of the sons of the testatrix so named as beneficiaries, leaving a widow, the will provided that the net income of the share of the one so dying should be paid to his widow during her life, etc. One of the sons was unmarried at the time of the death of the testatrix.

Construction:

If the contingent limitation over after his death was void, the primary disposition in trust for his benefit was not disturbed, nor were the other dispositions of the will thereby affected; and, therefore, the share, to the income of which said son was entitled, was not alienable during his life, and a deed thereof from him conveyed nothing. *Tiers* v. *Tiers*, 98 N. Y. 568.

The will directed the executors to invest $9,000 on bond and mortgage, $200 of the interest received thereon to be paid annually to E., and $200 to L. during life; the surplus of interest the testator gave to a charitable association named, unless his sister should become a widow; if this event happened the surplus thereafter he gave to said sister during life. After the death of said three legatees he directed the principal to be paid to said association.

Construction:

The bequest of the principal was void, as there was an illegal suspension of the power of alienation.

Shipman v. *Rollins*, 98 N. Y. 311.

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From opinion.—"The remaining question relates to the right of the Woman's Hospital Association to the payment of a portion of the interest of a legacy of $9,000 and the payment of the principal after the death of the testator's sister, daughter-in-law and sister-in law. As this bequest was not to be paid over until after the termination of three lives in being at the death of the testator, there was an illegal suspension of the power of alienation beyond two lives, and the bequest, together with the bequest of the income of the fund, is void. 3 R. S., 7th ed., 2256, secs. 1, 2; id. 2176, secs. 14, 15.

"The provision in the will creating the trust is not capable of being separated into different parts so as to render a portion of it valid and another portion void. It is claimed that this legacy is subject to the provisions of sections 18 and 19 of 3 R. S., 7th ed., 2176, and hence is valid, but we think that these sections are not applicable to a case of this character."

W. died leaving his widow and four children him surviving, two of whom were minors. By his will he gave his residuary estate to his executors in trust, the net income to be paid to his widow and children in certain proportions, until all of his "said children, or the youngest survivor of them, shall have attained the age of twenty-one years." The principal then to be divided, one-third thereof to be set apart for, and the net income thereof to be paid to the widow during life, the remainder to be divided amongst his children, the shares of two of them to be paid over to them, the other two shares to be held in trust, and the income to be paid to the beneficiaries during their lives respectively; one of these was a minor.

Construction:

The division was to take place only after both the minor children should reach their majority; the suspension therefore, would be for two minorities, the equivalent for two lives; as to the two shares which then vested absolutely the trust was lawfully limited, so also as to the share to be held in trust for the minor, although there was a further suspension during her life, because the period of her minority and the added period of her life constituted in the whole but a single life, but as to the fourth share, there was, within the statute, a suspension for three lives; and so it was unlawful and the trust void, and as to that portion of the estate, the testator died intestate (Post v. Hover, 33 N. Y. 593); also, as to set aside the trust in favor of the beneficiary of this share, while sustaining that in favor of the other three children, would seriously interfere with the intention of the testator that the children and their issue should share equally, no portion of the trust attempted to be created should be sustained. Savage v. Burnham, 17 N. Y. 562; Knox v. Jones, 47 id. 390.

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Same will:

By the will, power was vested in the executors to sell the residuary real estate "if they should deem it expedient for the purpose of making such division * * * or for carrying into effect all or any other of the purposes and trusts."

Construction:

This power, at least so far as it was vested for the purpose of making the distribution, was dependent upon the validity of the trust and fell with it; and therefore, an action was not maintainable on the part of the executors, to enforce the specific performance of a contract made with them for the purchase of a portion of said real estate, the sale of which was made by them for the purpose of division and distribution. *Benedict* v. *Webb*, 98 N. Y. 460.

Devise to A. and B., or the survivor, if one died without issue; upon death of both without issue to children of H., did not unduly suspend power of alienation. *Nellis* v. *Nellis*, 99 N. Y. 505.

By the will of B., and a codicil thereto, his residuary estate was left in trust for the benefit of his children and grandchildren, the interest thereon to be invested and kept together for ten years after the death of the testator, at which time the estate was directed to be divided; the portions given to his children "to be held for and during their natural lives, respectively;" remainder to their children.

Construction:

The trust was in contravention of the statute prohibiting a suspension of the power of alienation for a longer period than two lives in being at the creation of the estate, 1 R. S. 723, sec. 15; and as the accumulated fund furnished the only support for the devises subsequently made, the whole scheme of distribution failed, and the title to the residuary real estate upon the death of the testator vested in his heir at law, as in case of intestacy. Hone's Ex'rs v. Van Schaick, 20 Wend. 564. *Rice* v. *Barrett*, 102 N. Y. 161.

By the will of M., and a codicil, his executors were directed to pay his debts out of his estate as soon "as shall by them be found convenient." To each of his two sons he gave $10,000 to be paid to them in money or property on arriving at the age of thirty years. The testator also made provision for the support of his mother, an aunt and sister, and directed that so much as should be necessary for that purpose should be paid to them out of the property. He gave "the use and income" of all his real and personal property to his wife "during her life," or

until after his death she marries, in which case he gave to her $10,000 in lieu of all dower, to be paid to her by his executors, who were in terms authorized to dispose of the property to pay this sum or the legacies given to his sons, and the executors were authorized to change investments of the testator's property or "dispose of all or any part of it," and invest the proceeds as specified. By the codicil the testator nominated and appointed the executors named in the will as his trustees "for the purpose of carrying out any of its provisions."

Action to obtain a judicial construction of the will.

Construction:

A valid trust was created to continue during the life or widowhood of the testator's widow.

Same will:

After the provisions above stated the will contained this clause: "Upon my wife's decease the use and income of all my estate, subject to the above provisions, to my two sons, share and share alike; and upon the decease of my sons, I give, bequeath and devise to their heirs, should both have heirs, their father's portion only; * * * and in case of one having no heirs, then to the heirs of the other; * * * and if both shall have no heirs then as the law directs."

Construction:

The provision was void, as it unlawfully suspended the power of alienation for a period beyond two lives; and the residuary estate remaining after the death of the testator's widow should be divided as in the case of intestacy. *Ward* v. *Ward*, 105 N. Y. 68.

Citing, Knox v. Jones, 47 N. Y. 389; Colton v. Fox, 67 id. 348; Smith v. Edwards, 88 id. 92; Bailey v. Bailey, 97 id. 460; distinguishing, Monarque v. Monarque, 80 id. 320; Wells v. Wells, 88 id. 323.

M. died leaving eight children, seven of whom were married and had children. By her will she gave the whole of her residuary estate to her executors, in trust, to pay over the rents, income and profits to her children equally during their natural lives, and after their decease to their respective wives or husbands during their lives, or until they should remarry. The will then provided: "If any of my children should die without issue, or without leaving a husband or wife him or her surviving, then I give, devise and bequeath his or her share to the survivor or survivors of them. * * * If he or she leaves a husband or wife him or her surviving, then I give, devise and bequeath his or her share

to the survivor or survivors of my said children * * * after the decease or remarriage of said husband or wife." The executors were authorized to sell any of the residuary estate and invest the proceeds.

Construction:

The trust was valid and there was no unlawful suspension of the power of alienation; the words husband and wife, as used in the will, referred to those living at the death of the testatrix, and so the limitation as to each part of the devisable trust ran for two lives in being at its creation.

The power of sale conferred upon the executors did not effect an undue suspension of the power of alienation. Schettler v. Smith, 41 N. Y. 328, distinguished.

Same will:

The residuary clause also provided that, in case any of the testator's children should die leaving issue, "said issue shall represent their parents *per stirpes* and not *per capita*, and receive their parents' share" of the rents and profits after the death or remarriage of their surviving parent until they become of age, when their interest shall be given to them.

Construction:

Upon the death of any child, and of the husband or wife of that child who was living at the time of the death of the testatrix, the portion or share of such child vested at once in his or her children, each one of whom taking his or her proportion in fee, subject only to a postponement of possession during his or her minority, and to the execution of the trust upon the rents and profits during that period; and there was, therefore, no lawful suspension of the power of alienation; the fact that the issue of each child were to take *per stirpes* does not make them joint tenants as the statute fixes how they shall take as between themselves (1 R. S. 127, sec. 44), and makes them tenants in common, in the absence of an express provision for a joint tenancy. *Van Brunt* v. *Van Brunt*, 111 N. Y. 178.

V. died seized and possessed of a large estate, most of it realty. He left four children and a grandchild, daughter of a deceased son. By his will, after directing the payment of debts and funeral expenses, he gave the residue of his estate to his executors in trust, "to set apart" and invest $20,000 and apply the rent and income to the support of said grandchild, or pay the same to her during life; and to invest

the residue in such manner as a majority of his children may approve, and pay over one-fourth of the income to each of his children "during the term of the respective lives of said children." The will then provided that in case of the death of "any one" of said children the executors should "set apart one undivided fourth" of said residue, or in case of the death of the grandchild should take the sum "so set apart for her benefit" and invest the same for the use of the issue of the decedent "until it or they shall respectively arrive at the age of thirty years, when the whole of the principal so set apart, or such part thereof as they may be respectively entitled to (if the issue shall consist of more than one), shall be paid over to it or them, to have and to hold the same to it or them, to its or their sole use and behoof forever." In the event of the death of "any one" of the children or of the grandchild without issue, then the will directed that the income "to which he or she would have been entitled to if living shall be divided between his surviving children and the lawful issue of any deceased child," and that "the principal shall form part of the common fund to be divided among the lawful issue" of said children "whenever such issue shall arrive at the age of thirty years, as above mentioned."

Construction:

It was the intent of the testator to create five separate and distinct trusts, each measured by its own terms and terminable by itself at its own date, and so there was no unlawful suspension of the power of alienation; each of the five primary beneficiaries took an equitable estate in his or her several shares, with a remainder over to his or her issue, which vested, if not at the death of the testator, at least at the death of the life tenant, and so at the termination of one life in being; the intent of the provision creating substituted remainders in case of the death of one or more of the life tenants without issue, was to add the primary share of the child so dying, in equal parts, to the remaining primary shares, and to subject the added propositions to precisely the same limitations as already governed the original shares; while the result might be to add a second life in being to the period of the suspension in each case, the substituted remainder of each secondary share would vest, as did the primary shares, at the death of the parent, and, therefore, at the end of two lives; in case of the death of one child without issue and then of one other, while upon the death of the first his or her original share would go into the common fund as directed and a part of it in the form of a secondary share would be enjoyed by

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each of the other children during his or her life, and vest accordingly, it was not to be presumed, in the absence of express direction, that it was the testator's intent that the fractions of that secondary share, when set free by the death of the second child, should again go into the common fund, but that the fraction so added to the life estate of each of the other children would vest in each case on the death of that owner, and so become alienable at the end of two lives in being. *Vanderpoel* v. *Loew*, 112 N. Y. 167.

NOTE.—The case is one in which the whole income of each share, from the death of the parent to the time of payment, is bequeathed to the remaindermen, a circumstance to which we have invariably given great weight as denoting an intention to vest the remainder from the time at which the income begins to accrue. Warner v. Durant, 76 N. Y. 133; Smith v. Edwards, 88 id. 103; Bushnell v. Carpenter, 92 id. 270. Whether or not the trust continued up to the time of payment it is not necessary to consider, for, in either event, the fact would not prevent the vesting of the remainders at the death of the respective parents. Embury v. Sheldon, 68 N. Y. 227; Robert v. Corning, 89 id. 225. (181.)

The will of McJ. gave his library and the proceeds of his residuary estate "to the mayor of the city of New York, the president of the New York Academy of Medicine, the president of the College of Physicians and Surgeons of the city of New York and their successors, * * * in trust forever," for the purpose of "the establishment and maintenance, perpetuation and improvement" of a free library "without admixture or amalgamation with any other library, collection or institution."

Construction:

The trust attempted to be created was invalid, as an unlawful suspension of the power of alienation; the gift was to the individuals who should from time to time occupy the official positions named, not to the corporations of which they were officers. *Cottman* v. *Grace*, 112 N. Y. 299.

Citing, Adams v. Perry, 43 N. Y. 487; Williams v. Williams, 8 id. 525; distinguishing Manice v. Manice, 43 id. 314, 387.

Limitation over to such of the issue of a deceased child as "shall be living at the time of such partition" (discretionary partition by executor that could be delayed by him for five years after testator's death) was void, as it would prevent the absolute vesting of the share in the issue of a deceased child at the time of the parent's death, but, as it was consistent with earlier provisions of the same clause and unnecessary to the testamentary scheme, it could be cut off and other provisions preserved. No unlawful suspension of the power of alienation

was created by discretionary power to executor to delay partition of estate for five years, there being no equitable conversion. *Henderson* v. *Henderson*, 113 N. Y. 1; 46 Hun, 509, digested p. 636.

In 1853, C., in contemplation of marriage, executed a trust deed of all her estate real and personal, to certain trustees to hold the same during coverture or until her death, if she should "not survive her said coverture," and apply the profits and income "as received, and not by anticipation," to her sole and separate use. In case of her death during coverture the deed provided that the trustees should convey and deliver all the trust estate remaining to such devisees, and in such shares as she should by will direct, and in default of any such direction unto such person or persons "being her heir or heirs at law as would be entitled to take the same by descent from her in case the same was land belonging to her, situate in the state of New York." The contemplated marriage took place, and C. died during coverture, leaving two children, the issue of the marriage, surviving her, also leaving a will, by which she gave all of her estate to the executors in trust to apply the rents and profits to the maintenance of, or pay the same over to, her children in equal parts during their lives, with remainder, on the death of either, of his share, to his heirs and next of kin. In case of the death of either child during minority and without issue, the whole estate to be held in trust for the survivor during life, with remainder to his heirs and next of kin. In case of the death of both children during minority and without issue, the whole estate was given absolutely to designated beneficiaries.

Construction:

The trust deed created a valid trust (1 R. S. 728, sec. 55, sub. 3), which neither settlor alone, nor in conjunction with the trustees, could abrogate; the power of disposition reserved in the deed was not an absolute power equivalent to absolute ownership (1 R. S. 733, sec. 85); the will, therefore, was not an exercise by the testatrix of the "*jus disponendi*" incident of ownership, but simply the execution of a power of appointment, and therefore the question as to the validity of the trusts in the will was to be considered in view of the trust deed and the statute of powers (1 R. S. 732, sec. 73, *et seq.*), and the period during which the right of alienation might be suspended was to be computed "from the time of the creation of the power" (sec. 128), and so considered, the trusts created by the will were in contravention of the statute against perpetuities, as they were limited upon and made possible a suspension of the power of alienation of the real estate and the

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absolute ownership of the personal property for three lives, two of them not in being at the time of the creation of the power.

The difficulty was not removed by the provision of the married woman's act (sec. 2, chap. 375, Laws of 1849), providing that a trustee, holding any property for a married woman, may convey the same to her, on her written request, accompanied by a certificate of a justice of the supreme court that he has examined the property and made due inquiry as to the capacity of the married woman to manage and conduct the same; assuming the trust in question was within that act, the disability imposed upon the trustee of an express trust by the general statute was not removed until the prescribed certificate was obtained; but the act did not apply; it was applicable only to nominal trusts, the sole object of which was to secure a married woman in the enjoyment of her separate estate. *Genet* v. *Hunt*, 113 N. Y. 158.

The will of D., and a codicil thereto, gave his residuary estate to his executors in trust, to apply it, or the proceeds of sale, which they were empowered to make, to the establishment and endowment of a charitable institution, whose object and the class of persons to be relieved and benefited thereby should be the same as a charitable institution named. The executors were authorized and directed to apply for and obtain from the state legislature "as early as practicable," an act of incorporation of such an institution, and to do this, if possible, within ten years after his decease. In the event that the gift "should be adjudged or proved invalid or its execution be impossible, either by judicial decision or from any other cause," the testator directed that all his residuary estate should be sold and the proceeds equally divided among certain existing religious and charitable corporations named, all of whom had capacity to take.

Construction:

The primary gift was invalid, as there was contemplated a period measured by years, not by lives, during which there would be no person in existence by whom an absolute estate in possession could be conveyed, and so there was an unlawful suspension of the power of alienation; also, the gift was not saved by the fact that an institution, such as contemplated by the testator, could have been incorporated under the general law, as such a corporation was not intended or directed, but one formed under a special charter; also, if the will should be construed as working an equitable conversion of the real estate into personalty this would not affect the question, because considering it as personalty, the prohibition of the statute against a suspension of the absolute ownership of personal property for more than two lives would apply.

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But the alternative and substituted gifts were valid; and they took effect and the property vested in the beneficiaries named at the death of the testator. *Cruikshank* v. *Home, etc.*, 113 N. Y. 337.

Citing, Bascom v. Albertson, 34 N.Y. 584; Leonard v. Burr, 18 id. 107; Dodge v. Pond, 23 id. 69; Beekman v. Bonsor, id. 306; Rose v. Rose, 4 Abb. Ct. App. Dec. 108, distinguishing Shipman v. Rollins, 98 N. Y. 311; Burrill v. Boardman, 43 id. 254; Robert v. Corning, 89 id. 225.

B., by will, gave her estate, real and personal, to her executors, in trust, with power and directions to sell and distribute the proceeds to her brother, and sister S., each one-third; the income of the other one-third to be paid to her sister A., during the joint lives of herself and her husband; if A. survived her husband she should take the principal of the fund; if she died before him, leaving lawful issue, the income to be paid for their benefit until the youngest should reach the age of twenty-one years; and then the principal to be paid to them; in case of the death of A. without leaving issue, or if all of such issue should die before reaching the age of twenty-one, then the fund to go to the brother and S.

At the death of the testatrix A. had no children living; one of the executors died and the survivor, who was the brother of the testatrix, with his sister S., conveyed all their interest in the said premises to A. Shortly after the supreme court discharged the surviving executor as trustee under the will and appointed A. trustee. She, as trustee, conveyed such premises to J., who re-conveyed to her, and she then, individually, conveyed to the plaintiff. W. objected that the plaintiff's deed did not convey a good title of one-third of the premises.

Construction:

This claim was untenable. By the will there was an equitable conversion. The provision therein as to the children of A. was void on account of the undue suspension of the absolute ownership of personal property, and the testatrix died intestate as to that part of her estate; by the conveyance to A. from her brother and sister, she acquired the entire beneficial interest therein; as the beneficiaries could officially elect to have a re-conversion into realty and take it as land, rather than the proceeds of it, and as all the parties having any beneficial interest had joined in a conveyance of it so that no occasion remained for an exercise of the power of sale, the exercise of that power might be deemed dispensed with and defeated, and therefore the deed conveyed to the plaintiff a good title. *Greenland* v. *Waddell*, 116 N. Y. 234.

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By the will of C. he gave his real estate to his widow for life, and after her death to his children, six in number, "share and share alike, * * * during the terms respectively of their natural lives," and upon the death of a child "the share of such child" was given "to his or her heirs in fee forever." The concluding clause of the section was as follows: "My intention being that my widow shall have a life estate in said lands, and after her decease each of my then living children a life estate in the same, and at their decease their children, if any, shall hold the same in fee." Two of the children, a son and daughter, died intestate, each leaving children, and thereafter the widow died.

Construction:

The design of the testator was to give successive life estates first to his widow in the whole real estate, then to each of the children in one-sixth part thereof, with the remainder in fee to their heirs; there was no suspension of the power of alienation for more than two lives in being at the death of the testator; upon such death the plaintiffs became vested in fee as purchasers, by virtue of the remainder so limited to them, with one-sixth of the real estate, subject to the two outstanding life estates; subject, also, to open and let in afterborn children. Monarque v. Monarque, 80 N. Y. 320; Moore v. Littel, 40 Barb. 488; 41 N. Y. 66; House v. Jackson, 50 id. 161. Upon the death of the father and the widow their fee became absolute, as did also that of the children of the deceased daughter; and the four living children of the testator at the death of the widow took a life estate in the four-sixths remaining, and on the death of either their heirs at law take a fee absolute in their portion. *Surdam* v. *Cornell*, 116 N. Y. 305.

Where a clause is susceptible of two constructions, one of which will render it valid and the other invalid, the former will be adopted.

F. died leaving but one child, a married daughter, her surviving, who, at that time, had five children living. By her will, F. devised all her "real and mixed estate" to her executors in trust during the respective lives of G., her son-in-law, and of B., her youngest grandchild, with power to lease the real estate, to receive and invest the net income and the accumulations arising therefrom in productive real estate for the benefit of the grandchildren of the testatrix living at her death, and of such others as should thereafter be born of her daughter, "during their respective minorities," with directions to apply to the use of the grandchildren so much of the income as the executors should deem sufficient for their education and support during their respective minorities, but no payment to be thus made unless the executors should be satis-

fied that there was not sufficient income for the purposes specified from the estate of the daughter. The will then provided that on the arrival of the "youngest grandchild" at the age of twenty-one and on the death of G. all the real estate of which the testatrix died seized, and such as the executors may have purchased after her death, should be divided equally among her grandchildren then living; in case of the death of a grandchild leaving lawful issue, such issue to take the parent's share. The executors were also directed to pay over to each grandchild, as he or she arrived of age, in case the youngest grandchild and son-in-law were then still living, "a proportionate share of the rents, issues and profits * * * during the lives of said grandchildren and son-in-law."

Construction:

The words "youngest grandchild," in the limitation upon the trust, referred to B., the youngest grandchild then living; and so, there was no unlawful suspension of the power of alienation, as the trust expires upon the death of G., and the arrival of B. at the age of twenty-one, or his previous death; the scheme of the testatrix was to create a trust term for as long a period as it could be done for the benefit of all her grandchildren, both those born and to be born, and, at the expiration of the term, to provide for a division, although a grandchild born after the death of the testatrix should then be under age; the provisions as to accumulations were to be construed as providing that any of the grandchildren who came of age before the termination of the trust term should receive his or her proportionate share, including a share of the real estate purchased by the executors, and which represented a part of the original rents and profits; the provision as to a distribution of the real estate so purchased, upon termination of the trust, referred only to so much thereof as may be left after a distribution to the grandchildren previously coming of age; and, as so construed, the provisions were valid, as is also the provision for the payment of the share of a deceased grandchild in the accumulations to his or her issue, or, failing issue, to the survivors, and the provision prohibiting payments by the executors for the benefit of the grandchildren, unless satisfied that the income from the estate of their mother was insufficient for their support.

The will gave to the trustees no power to sell the real estate devised. *Roe* v. *Vingut*, 117 N. Y. 204.

S. died leaving his wife and six children, three of them minors, him surviving. By his will he devised and bequeathed all his property to his wife in trust, to use so much of the income and principal as she

might deem necessary for the support of herself and children until the "youngest child now living shall arrive at the age of twenty-one years or would arrive at that age if living." At that time a division of the estate among the testator's "legal heirs then living" was directed the same as if the testator had died intestate. The widow was appointed executrix with authority to sell the real estate.

Construction:

The discretion vested in the widow was not personal, but one to be exercised by her as trustee; the will sought to create but one trust, which was not limited upon the life of the widow, but was to continue until the date when the youngest child would, if living, arrive at age; therefore, it was violative of the statute against perpetuities, and so void; and the testator's estate passed as if he had died intestate.

It seems, where a will contains separate trusts or various limitations of estates, not dependent upon each other or essentially connected, some of which are legal and some illegal, the illegal portions may be stricken out and the other portions permitted to stand in order to carry out the testator's intention.

In determining the validity of limitations of estates under the Revised Statutes (1 R. S. 723, sec. 15; id. 773, sec. 1), it is not sufficient that the estates attempted to be created may, by the happening of subsequent events, be terminated within the prescribed period; if such events might so happen that such estates might extend beyond such period, they must be so limited that in every possible contingency they will absolutely terminate within such period. Schettler v. Smith, 41 N. Y. 328.

While, as the power of sale conferred upon the widow was absolute, it can not be said the power to alienate the real estate was suspended, yet as the proceeds, whether regarded as realty or personalty, are tied up by the trust in violation of the statutes, such power did not save the will from condemnation.

As the estate vested upon the testator's death, not in his children but in the widow as trustee, and at the termination of the trust what remained was to vest in the testator's legal heirs then living, there were no persons in being at his death, assuming the trust to be valid, who could convey an absolute title to the estate. *Haynes* v. *Sherman*, 117 N. Y. 433, rev'g 51 Hun, 585.

Certain premises were conveyed to a trustee in trust to pay the rents and profits to M. during the life of her husband, and upon his death to convey to her; if he survived her, then upon the further trust to con-

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vey to such person or persons and in such manner as she by will might appoint. In case M. died without having made such a will, the deed declared that the premises should belong to her children and the issue of such as died before her. M. died leaving her husband, and seven children, four sons and three daughters, surviving, and leaving a will, which contained a provision declaring it to be the will of the testatrix, that the said premises should be "held and enjoyed" by her husband and three daughters so long as any two daughters should remain single and unmarried, and for the space of one year after the marriage of the daughter who should be married second. At the expiration of the year the executor and trustee named in the will was authorized and empowered to sell the premises and divide the proceeds as specified. M.'s husband thereafter died, leaving the three daughters surviving.

Construction:

The power of sale given by the will to the executor was a general power in trust, which was imperative (1 R. S. 732, sec. 74, *et seq.*) and so, it operated to suspend the vesting of the fee until the power was executed or the estates terminated. Delafield v. Shipman, 103 N. Y. 463; Delaney v. McCormack, 88 id. 174. The estate sought to be given was a life estate in each of the beneficiaries as tenants in common with cross-remainders, determinable upon the marriage of two of the daughters, and in case that contingency did not happen, the estate terminated upon the death of all the life tenants; as the will was but the execution of the power of appointment given by the trust deed, the period during which the absolute power of alienation was suspended was to be computed from the date of the deed (1 R. S. 737, secs. 128, 129), and as so computed the suspension was for more than two lives then in being; the estate attempted to be created being void, the power so authorized to take effect at its termination was inoperative and void; and, therefore, upon the death of M. the absolute fee vested, under the deed, in her children and the issue of such as were dead. *Dana* v. *Murray*, 122 N. Y. 604.

Distinguishing Henderson v. Henderson, 113 N. Y. 1.

NOTE.—The provisions of section 17 of the statute, to the effect that when 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, doubtless refers to estates in which the remainder is vested and is not contingent. In such estates the power of alienation is not suspended. Purdy v. Hayt, 92 N. Y. 446-451. (618.)

W. devised his residuary estate to his three sons, as trustees, to pay certain pecuniary legacies to the wife and sister and to hold the residu-

ary estate for six years after his decease, and after the payment of the legacies and taxes, and manage the property for the joint benefit of the three sons, with power to sell the realty, but not to partition or divide the same for six years. At the expiration of that period the residuary estate should belong to the trustees, but the trustees, in case of an exigency, were authorized to mortgage the real estate to pay the legacies.

Construction:

The general devise in trust was applicable to the trust created for the testator's wife and sister, which was valid, and this vested the trustees with a requisite and legal estate. The remaining trusts sought to be created were invalid, as was the inhibition against the partition or division and the restriction upon the power of alienation. The devise vested in the three sons upon the death of the testator an estate in fee, subject to the payment of the legacies, etc. (1 R. S. 728, sec. 47.) *Greene* v. *Greene*, 125 N. Y. 506, aff'g 54 Hun, 93.

Direction for a trust fund to be perpetually kept by the executors and trustees and successors, for cemetery purposes, was void. *Read* v. *Williams*, 125 N. Y. 560.

Devise to a town in trust to perpetually keep and pay income to the poor was void. *Fosdick* v. *Town of Hempstead*, 125 N. Y. 581, digested p. 864.

The will of V. directed his executors to purchase land and to erect thereon a suitable structure for an orphan asylum; they were also directed to procure the passage of an act by the legislature incorporating the asylum, and after the completion of the building, to convey said premises to the corporation, also to assign and transfer to it a sum specified for a permanent fund for the maintenance of the asylum. In a codicil, the testator stated that since making the will, he had purchased certain real estate specified, and he directed his executors to devote this property to the purposes of the asylum. In an action for the construction of the will it appeared that about four months after the death of the testator, the executors procured the passage of an act incorporating the asylum, as directed in the will.

Construction:

The attempted gift was both executory and contingent, and the devisee and legatee not being in existence at the time of the death of the testator, the gifts were void as suspending the power of alienation for an indefinite period not measured by lives in being. Leonard v. Burr, 18 N. Y. 107; Cruikshank v. Home for the Friendless, 113 id. 337

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No trust in the executors was created and no trust estate vested in them, but they held the property simply as executors; the duty of paying over the legacy was merely the duty of an executor and not the execution of a power; but, assuming that to some extent there was a special authority which affected the personal estate and could be treated as a power, and assuming that the asylum was to get its title to the real estate from the execution of a power of transfer given to the executors, and that the fee of the land and the title to the fund descended to the heirs and next of kin, subject to the execution of the power, this would not cure the objection or validate the provision.

A perpetuity can not be created by means of a power in trust any more than by a direct limitation. (1. R. S. 737, secs. 128, 129.)

Same will:

The will also gave a legacy to an incorporated church, "provided said church shall raise a sum sufficient, with this legacy," to pay off a mortgage and its other debts within two years after the testator's death; and it was further provided that "in case of failure to do this, then this legacy shall lapse and go into the residuum" of the testator's estate.

Construction:

The condition was a condition precedent to the vesting of the legacy, and the bequest was invalid.

Same will:

The will contained a residuary clause by which the residuary estate was given to said asylum "when incorporated," and to two other institutions named "equally, share and share alike." Following the residuary clause was this provision: "In case any of the gifts or devises hereinabove given shall be adjudged void or illegal for any reason, then I give and devise the property mentioned and described in such void and illegal gifts or devises to my executors hereinafter named, in trust, for them to carry out and accomplish the things and objects designed by me in such void and illegal gifts and devises."

Construction:

The provision quoted was illegal and ineffective as a devise or legacy; but the testator's meaning was to carry over to his executors only such dispositions as utterly failed, and not those which, failing in one direction, were yet within the scope of the residuary clause; and so, it was not restrictive of the residuary gift; the void gifts fell into and became

part of the residue; the two beneficiaries named in the residuary clause, who had power to take, each took one-third of the residue thus increased; but, as the gift of the other third to the asylum failed, the third was undisposed of by the will and passed to the heirs and next of kin of the testator. *Booth* v. *Baptist Church*, 126 N. Y. 215.

When, by the terms of a testamentary gift in trust of property, its ownership must be necessarily uncertain for a period of time not measured by lives, the statute against perpetuities intervenes and condemns it.

As to whether a gift may be sustained where the delay is merely incidental and caused by the formalities and details of incorporation of the body to take, and its creation is possible and certain to be effected under a general law in accordance with the testator's direction, *quære*.

It seems, that the non-existence of a corporate body, at the time of a testator's death, of an institution intended by him as an object of his bounty, will not alone defeat a testamentary gift, and an executory bequest to the use of an institution directed to be incorporated within the period allowed for the vesting of future estates, may be upheld as valid. Burrill v. Boardman, 43 N. Y. 254; Shipman v. Rollins, 98 id. 311; Cruikshank v. Home of the Friendless, 113 id. 337; Bascomb v. Albertson, 34 id. 584.

Where, however, no such limit is fixed to the time of the incorporation, but it is left dependent upon the will of the legislature, the gift is void.

W., by his will, gave his residuary estate to his executors, in trust, to create and endow a benevolent institution, and he directed them, upon his decease, to apply to the legislature for an act incorporating it. The will defined the purposes and object for which said institution should be created and intrusted with the property which the executors were directed to convey to it upon its incorporation; the executors were appointed its "sole and permanent trustees," and it was provided that "they be inserted in any act of incorporation as such trustees," and that they should fill vacancies occurring in their body "so long as such institute shall exist as a corporate body, or otherwise." By a codicil W. directed "that the devise and bequest * * * with regard to the founding" of such institute "be changed and the provisions thus made therefor be applied to the founding of a musical institution;" he directed "that appropriate legislation and means be adopted to perfect the incorporation and general plan of the institution as near or similar to the plan or method given" in the will with regard to the formation of the benevolent institute.

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Construction:

The only effect of the codicil was to change the name of the beneficiary mentioned in the residuary clause of the will and to apply it to the same provisions as to incorporation, and plan of corporate management; and the provisions of the will and codicil were void, as they contravened the statutes, limiting the power of alienation.

Same will:

It was claimed that the institution provided for by the codicil could be incorporated under the general act of 1875 (ch. 176, Laws of 1875), passed before the codicil was executed; this requires that the corporation to be created must have not less than seven trustees. The will appointed three executors; the number was increased by the codicil to four.

Construction:

The restrictions of said act make it inappropriate to the testator's design; even in case said act might be modified by the legislature so as to permit of the incorporation desired by the testator, a delay would ensue, dependent upon the will of the legislature, not upon lives, and so the objection was not obviated. *People* v. *Simonson*, 126 N. Y. 299.

Citing Cruikshank v. Home, etc., 113 N. Y. 337.

NOTE.—"In the present case it is contended that, as at the time of testator's death, a general law had been enacted and was in existence, authorizing the kind of corporation mentioned by the testator, there was no necessity of applying to the legislature for a charter. The law referred to is contained in chapter 176 of the Laws of 1875, and was passed by the legislature before the making of the codicil, and undoubtedly comprehended the several objects designed to be promoted by the testator by the use of his residuary estate. If the bequest were to a corporation to be created by the trustees of the will, and which could be at once incorporated and organized under that general law, a new and interesting question would be presented. It might very well be said in such a case, that as it would be the duty of the trustees of the will to act at once, in procuring the incorporation, the delay in the incorporation would be but a mere incident to a certain result. Robert v. Corning, 89 N. Y. 225; Cruikshank v. Home of the Friendless, 113 N. Y. 337. The argument of appellant's counsel upon this subject would find some apparent support from the reasoning in the opinions in the cases of Burrill v. Boardman and Cruikshank v. Home of the Friendless." (308.)

Where a trust is created by which the possession of personal property and the legal estate therein is vested in trustees during the continuance of the trust, the absolute ownership of such property is suspended, and to validate the trust, the duration of such suspension must be limited to two lives in being; not to a term of years, however short.

The will of C., as modified by a codicil thereto, after certain specified bequests, directed that his executrices should take possession of the

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residuary estate, real and personal, and convert the real estate into money at such time as they might deem proper, during a period not exceeding ten years after the death of the testator's widow; that during the lifetime of the widow and until the real estate should be sold, the executrices, two daughters of the testator, should collect the income of the estate and apply the same to the use of the widow and to their own use, or the survivor of them, and after her death, if the real estate was not then sold, to their own use or the survivor of them until such sale; that immediately thereafter the estate should be divided into four equal shares, one of which each of the executrices should receive personally, the remaining two shares to be retained by them in trust, the income of one share to be paid to U. during her life, at her death the principal to go to her heirs, the income of the other share to be paid to B. during her life, at her death the principal to go to her heirs. Action brought by U. and B., who were also daughters of the testator, to procure the partition of the real estate of which C. died seized, or if partition could not be had, to obtain a construction of the will and codicil.

Construction:

The real estate was on the death of the testator converted into personalty, the legal title to which was vested in the executrices in trust; during the continuance of the trust the absolute ownership was suspended; as the trust attempted to be created for the benefit of the testator's daughters was not limited by lives in being, but upon the life of the widow and an indefinite period thereafter, which might be of ten years' duration, it was violative of the Statute of Perpetuities, and so, void.

As the trust created for the life of the widow was separable from the others, their invalidity did not affect it, and the trust for her benefit should be permitted to stand; and except as to the estate created for her life, the testator died intestate. *Underwood* v. *Curtis*, 127 N. Y. 523.

Attempt to create a trust that suspended the absolute power of disposition of proceeds of sale, for more than two lives in being, was void. *Fowler* v. *Ingersoll*, 127 N. Y. 472, digested p. 359.

A valid devise or bequest may be limited to a corporation to be created after the death of the testator, provided it is to be and is called into being within the time allowed for the vesting of future estates. *Tilden* v. *Green*, 130 N. Y. 29.

Perry on Trusts, 372, sec. 736; Inglis v. Trustees of the Sailor's Snug Harbour, 3 Peters, 99; Burrill v. Boardman, 43 N. Y. 254.

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A testator may, in the creation of a trust, suspend the absolute power of alienation of the trust estate for a period of two selected lives then in being, and with this limitation, during that period, he may provide for the distribution of the annual income among as many different persons and for as many successive lives as he sees fit.

So, also, a testator may limit a trust estate for an arbitrary period of time, provided a termination at an earlier period is called for by the expiration of two lives in being at the creation of the trust.

Where the testator provides for two contingencies, it is not essential to the validity of the trust that the two lives which govern the duration of the trust in one contingency should be the same as those which govern it in the other.

The statute in any case is satisfied if the trust by no possibility and in no contingency can endure longer than during the existence of two lives in being when it was created.

Income and principal given in equal shares out of one fund kept *in solido* for more convenience of investment, may be severed and independent trusts created for the several beneficiaries, and thus the shares and interests will be severed, even though the fund remain undivided. Vanderpoel v. Loew, 112 N. Y. 167; Colton v. Fox, 67 id. 348; Ward v. Ward, 105 id. 70.

The will of C. gave his residuary estate to trustees in trust, to pay one-third of the income thereof to his wife; to pay to the guardian of his infant son J. during minority for his support, etc., a yearly sum not exceeding an amount specified; to J., after his arrival of age, a specified sum yearly until his arrival at the age of twenty-five; after such payments, the remainder of one-third of the net yearly income to be held and invested by the trustees and the accumulations to be paid to J. on his reaching the age of twenty-five, and thereafter during the lifetime of the testator's wife to pay to J. one-third of the whole net income; to pay the other third to the testator's daughter K. during the life of the wife.

Upon the death of the wife, in case the two children survived her, the trustees were directed to pay to K., during her life, one-half the net income, the other half to be paid to J. in case he had then reached the age of twenty-five, if he had not, then such moiety to be subject to the previous directions as to the disposition of his one-third until he reached that age. When J. arrived at the age of thirty, in case the testator's wife died before that time, and if not, upon her decease thereafter, the trustees were directed to pay over to him one-half of the trust estate with the accumulations thereof as provided for. In case J. did

not survive the wife, or surviving her did not reach the age of thirty, upon his death and that of the wife it was provided that his share should pass as appointed by his last will, or in default thereof to his lawful issue him surviving. Upon the death of K., in case she survived the wife, if not, upon the decease of the latter, one-half of the trust estate to pass as appointed by K.'s will or in default thereof to her lawful issue her surviving. In case of the death of J. or K. during the lifetime of the wife, then the trustees were directed to pay one-half of the net income to the wife and the other to the survivor of the children, to be paid in the same manner as prescribed in regard to the one-third. Upon the death of the wife, in case K. died before that time without lawful issue her surviving, the whole estate to be paid over to J., if then of the age of thirty. If J. died without lawful issue before the death of the wife, upon her death the whole net income was directed to be paid to K. during life, and upon her death the whole estate to pass as provided for in reference to her one-half. In the event of the death of both the children before the wife, intestate and without lawful issue, then upon her death the will directed the whole estate should pass to the testator's brother.

Construction:

The will created a trust estate for the life of the testator's wife, the income to be divided into three parts, one to be paid as provided to each of the three beneficiaries; upon the death of the wife the estate to be divided into two independent trusts, one for the benefit of each of the children, each limited by two lives, that of the wife and of the beneficiary. Everitt v. Everitt, 29 N. Y. 40; Stevenson v. Lesley, 70 id. 512–516; Monarque v. Monarque, 80 id. 324; Vanderpoel v. Loew, 112 id. 167. In regard to J. there were two contingencies provided for, one that of his surviving his mother, the other that of his dying before her; in the former case the trust in his favor is bounded by her life and his own or his arrival at the age of thirty; in the latter case the trust is measured by the life of the mother and of K., so that in any case there was no suspension of the power of alienation for more than two lives in being; while the will did not in terms provide for the event of the death of J. intestate and without issue, after his mother and before his arrival at the age of thirty, the intent was that his interest in the one-half of the trust estate should pass to and vest in his heirs and next of kin freed from the trust; and, therefore, aside from the provision as to the accumulation of the surplus income in favor of J., the will was valid; this provision was void, and J., as presumptively

entitled to the next eventual estate, was entitled to this surplus. *Schermerhorn* v. *Cotting*, 131 N. Y. 48.

Distinguishing, Colton v. Fox, 67 N. Y. 348; Ward v. Ward, 105 id. 68.

NOTE 1.—A limitation of a trust estate for an arbitrary period of time, such as fifty years, is valid, provided a termination at an earlier period is called for by the expiration of two lives in being at the creation of the trust. If provision be made for such termination, the income of the estate may in the meantime be divided among any number of successive lives. Phelps v. Pond, 23 N. Y. 69. (58.)

NOTE 2.—This gift of the immediate income to the son or to his guardian for his benefit, indicates an intention to vest in the son the *corpus* from which such income is derived. Robert v. Corning, 89 N. Y. 225, 241. (59.)

Will of resident of Rhode Island creating trust in personal property to be administered in New York for benefit of residents therein, in contravention of statute of this state against perpetuities was governed by law of the domicil, viz., Rhode Island. See Conflict of Laws; *Cross* v. *United States Trust Company*, 131 N. Y. 330, digested p. 1327.

A new trustee will not be appointed in place of one deceased where it clearly appears that the trust or power in trust is void.

B., by his will, gave his wife one-third of all his real and personal estate and divided the residue among his eight children and one grandson, and provided that their shares should be paid to them within one year after the youngest child should become of age; five of the children were at the time of the testator's death minors. The will gave to the wife, as executrix, a discretionary power of sale, but expressly directed that it should not be exercised until the majority of his youngest child. The widow qualified, and after having acted as executrix and trustee under the will for several years died.

Construction:

The power in trust was void, and an application for the appointment of a new trustee was properly denied.

While a valid testamentary trust may be relieved from the peril of some unlawful incident or limitation by disregarding it, this can only be done where the vicious provision is clearly separable from the valid devise or trust and may be disregarded without maiming the general frame of the will or the testator's substantial and dominant purpose. *Matter of Will of Butterfield*, 133 N. Y. 473, aff'g 59 Hun, 153.

The provision of the Revised Statutes (1 R. S. 773, sec. 1), prohibiting the suspension by will of the power of alienation for a longer period than two lives in being at the death of the testator, does not, nor do the statutory provisions invalidating testamentary gifts to certain corporations, unless made a certain time before the testator's death, where he

has a wife, children or parents, interdict bequests within the prohibition, made in another country to take effect here, and such bequests, if valid at the domicil of the testator, are valid here. Those statutory provisions apply to domestic wills which by their provisions are to be executed here. *Dammert* v. *Osborn*, 140 N. Y. 30, digested p. 1331. motion for reargument denied, 141 id. 564.

Citing Hollis v. Drew Theo. Seminary, 95 N. Y. 171; Cross v. U. S. Trust Co., 131 id. 330; Hope v. Brewer, 136 id. 126.

H. died, leaving seven children him surviving, of whom defendant M. is the last survivor; none of them ever married except the father of the plaintiff; at the death of H. his children became tenants of a farm which they mutually agreed to own together as joint tenants, and upon the death of either the farm should pass by devise or descent to the survivors; they all lived together until the marriage of plaintiff's father, who thereafter moved away, prior to which time they had made valuable improvements; after the birth of plaintiff, at a family meeting of all said children, a mutual agreement was entered into, reaffirming the prior agreement, and further agreeing that upon the death of the last survivor, the farm should, by devise or descent, pass to plaintiff; this agreement was kept and performed until, by the death of the others, the title became vested in defendant M., against whose disposition of the property through the undue influence of other defendants the action was aimed. The absolute power of alienation is not suspended because there were at all times persons in being who could convey an absolute fee in possession. All the brothers and sisters uniting with the plaintiff could at any time have conveyed a perfect indefeasible title to the real estate. *Murphy* v. *Whitney*, 140 N. Y. 541, aff'g 69 Hun, 573.

The will of B. gave his residuary estate to his executors in trust to divide the net income equally between a daughter-in-law and two cousins of the testator, "the survivor or survivors of them during their natural lives." In case the cousins died before the daughter-in-law "the *corpus* of said trust estate" was given to the latter; if she died before the cousins, it was given to the person or persons she should designate by will. Action for the construction of the will.

Construction:

These provisions did not violate the statute against perpetuities, and were valid, as in no event could the estate be tied up longer than during the lives of the two cousins. *Bird* v. *Pickford*, 141 N. Y. 18, rev'g 71 Hun, 142.

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NOTE.—It is not sufficient to condemn these clauses that the absolute power of ownership and of alienation may be suspended for three lives or for many lives, provided that such suspension be bounded by two designated lives in being at the death of the testator. Crooke v. County of Kings, 97 N. Y. 421; Bailey v. Bailey, id. 460. (20–21.)

The will of M. contained this clause, "if, after all the legacies are paid in full, there should be anything left of my estate, the same to be divided and paid to the Methodist Episcopal churches in the ninth ward of the city of New York, according to the number of members, to buy coal for the poor of said churches." It was conceded that the churches designated were duly incorporated, with power to take by bequest for the relief of the poor.

Construction:

The testator contemplated no trust, but simply made a bequest to the churches, and the same was valid. *Bird* v. *Merklee*, 144 N. Y. 544, rev'g 75 Hun, 74.

Distinguishing Fosdick v. Town of Hempstead, 125 N. Y. 581.

The law of Maryland allows the suspension of the power of alienation of an estate during lives in being at the creation of the estate, and twenty-one years and a fraction beyond, in case of minority. Testing the suspension in this case by the Maryland rule, the final vesting of the estate was not unlawfully postponed. Thomas v. Gregg, 76 Md. 169, distinguished. *Hillen* v. *Iselin*, 144 N. Y. 365; 76 Hun, 444.

The absolute ownership and power of disposition of a testator's real estate is not suspended because the executor, to whom the will gives an imperative power of sale, may require a period of time not measured by lives to execute the power and convert the real estate into personalty. Such a suspension results only in a case where there are no persons in being by whom an absolute estate in possession may be conveyed. Robert v. Corning, 89 N. Y. 228; Hope v. Brewer, 136 id. 126.

The will of W., dying in 1890, directed his executor to sell certain real estate, during the spring months of 1891, at public auction to the highest bidder and to invest the proceeds for the benefit of certain of the legatees named in the will. Upon settlement of the accounts of the executor it was claimed that said provision violates the statute against perpetuities, as by fixing a time of sale it suspended the power of alienation for a period not measured by lives.

Construction:

Untenable; the direction as to the time was advisory, intended to

facilitate the sale, not to restrain or limit the power of absolute disposition. *Deegan* v. *Wade*, 144 N. Y. 573, aff'g 75 Hun, 39.

The holographic will of S. contained a clause which, after a bequest to a son of the testator of certain shares of stock, proceeded as follows: "To be held in trust by my executors ten years from and after my decease, then to be delivered and transferred to them; if deceased, do and continue the same to his son William, now in his eighth year; if both are deceased before the ten years have expired, then transfer and deliver the said shares to my daughters." The clause then named two daughters and provided that if either was deceased her portion should be transferred to the survivor, and in case of the death of both, to a daughter-in-law named or her heirs.

Construction:

There was no unlawful suspension of the power of alienation; the suspension was not for an arbitrary and fixed period, nor was the trust so limited, but both inevitably terminated upon the expiration of the two named lives, and could only run for the ten years on condition that one or both of the selected lives continue so long. *Montignani* v. *Blade*, 145 N. Y. 111, modifying 74 Hun, 297.

The testator gave to M., a daughter, a house and lot with the furniture therein "for her occupancy and use," the same "to be held in trust by my executors seven years from and after my decease." also certain shares of stock, the dividends to be collected and paid to the daughter. At the expiration of the seven years it was provided that "the foregoing bequests shall be transferred and delivered to" M. If M. should die before the expiration of the seven years it was provided that "these bequests shall be delivered to or disposed of" as a daughter and son of the testator named "shall request and direct," the proceeds to be paid to three persons named.

Construction:

The trust was valid, as it only ran for one life or the shorter period of seven years within that life; although the testator described his disposition as "bequests" it covered the real as well as the personal property; the provision giving some power or authority to the son and daughter could not be construed as a power of appointment or as conferring upon them any estate, but simply made them arbitrators in case of any disagreement between the three beneficiaries as to an actual division or a sale and division of the proceeds. *Montignani* v. *Blade*, 145 N. Y. 111, modifying 74 Hun, 297.

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By will certain shares of stock were given to a daughter-in-law of the testator to be held "in trust seven years" from his death for the benefit of the daughter-in-law and her daughter, and then to be transferred and delivered to the latter. In case of the death of the grandchild before the expiration of the seven years, it was provided that "this bequest to her shall be given and transferred to her mother;" if both die, then "to the heirs" of a son of the testator.

Construction:

The trust was measured by two lives in being at its creation, and so was valid; by the provision for the ultimate vesting of the stock in the "heirs" of the testator's son, those who would be next of kin if he were dead were intended. *Montignani* v. *Blade*, 145 N. Y. 111, modifying 74 Hun, 297.

A suspension of the power of alienation as to real estate and of absolute ownership as to personal property occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed.

A contingency attached to a legacy which will render it void as an unlawful suspension of the power of alienation, must be one that relates to the person who shall take, and who may not come into being or gain capacity to take and hold within the two prescribed lives, whereby it may happen that there is no one who can alienate within that time.

The will of S. contained a legacy payable to C. in case he paid during the testator's lifetime all assessments, dues and premiums upon any insurance on his life, taken for the benefit of, and payable to A., his adopted son, and in case such insurance or some part thereof should be actually paid to A. one year from the testator's death. The testator's residuary estate he gave to his executors in trust to pay the income thereof to A. until he arrived at the age of thirty-five years, and upon his arrival at such age to pay the principal of said rest, residue and remainder, over to the said A.

Construction:

The bequest to C., although future and contingent, vested as a right upon the testator's death, and so was alienable by him; while the trust covered the entire residue except the contingent estate bequeathed to C., and there was a suspension of the power of alienation during the existence of the trust, the suspension was merely for the life of A. or for a shorter period; and, therefore, there was no unlawful suspension

of the power of alienation, and the bequest was valid. *Sawyer* v. *Cubby*, 146 N. Y. 192, rev'g 73 Hun, 298.

NOTE 1.—"The statutory test of what constitutes a suspension of the power of alienation as to real estate, and of absolute ownership as to personal property, is that it occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed. Murphy v. Whitney, 140 N. Y. 545." (196.)

NOTE 2.—"The cases cited on behalf of the respondents do not hold any different doctrine. In one there was a legacy to a corporation not existent or in being, and to a church upon a special trust to pay off a mortgage where the legacy was necessarily made inalienable in the hands of the legatee. Booth v. Baptist Church, 126 N. Y. 215. In another the corporate legatee had not come into being and the executors held in trust. Rose v. Rose, 4 Abb. Ct. App. Dec. 108. In a third there was, first, a trust and then a devise to those who at the death of the widow should prove to be testator's living heirs. Haynes v. Sherman, 117 N. Y. 433. By these cases it is established that a contingency which results in there being no person in existence or capable of taking or of alienating who is yet the intended legatee does not work a suspension of ownership since there is no one to give a complete title. That is not the case here. The contingency is an event and not dependent upon the existence or capacity of a person." (199.)

The test of alienability of real or personal property is that there are persons in being who can give a perfect title (1 R. S. 723, sec. 14; 773, sec. 2); and where, through there being living parties who have unitedly the entire right of ownership, there is a present right to dispose of the whole interest, even if its exercise depends upon the consent of many persons, there is no unlawful suspension of the power of alienation.

An agreement in writing between the promoters of a corporate enterprise owning ninety-nine one-hundredths of its capital stock as tenants in common, to partition their holdings after first placing in the treasury one-fifth of all the stock, to be sold to provide working capital, and, in order to prevent a sacrifice thereof, providing for the deposit of their individual stock certificates with a trust company, each agreeing that he would not withdraw the same for six months except by mutual consent, unless enough treasury stock should be sooner sold to realize a sum named, in which event any one could withdraw his certificate on five days' notice to the others, does not constitute an unlawful suspension of the power of alienation, and is not against public policy as being in restraint of trade. *Williams* v. *Montgomery*, 148 N. Y. 519.

From opinion: "No restriction was placed on the power of any stockholder to sell, but he could not deliver the certificates for six months, except in either of the contingencies named. There was no suspension of absolute ownership, because the statute expressly declares that 'the power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed.' (1 R. S. 723, sec. 14.) While this applies primarily to real estate, by a subsequent chapter it is made applicable to personal property also. (1 R. S. 773, sec. 2.) The test of alienability of real or personal property is that there are persons in being who can give a

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perfect title. Genet v. Hunt, 113 N. Y. 158–172; Nellis v. Nellis, 99 id. 505–516; Robert v. Corning, 89 id. 225, 235; Gott v. Cook, 7 Paige, 521; affirmed, 24 Wend. 641; Bolles on Suspension, 2. Where there are living parties who have unitedly the entire right of ownership, the statute has no application. Norris v. Beyea, 13 N. Y. 273, 289. The ownership is absolute whether the power to sell resides in one individual or in several. If there is a present right to dispose of the entire interest, even if its exercise depends upon the consent of many persons, there is no unlawful suspension of the power of alienation. The ownership, although divided, continues absolute.

"The agreement in question, therefore, which expressly reserved the right to sell by mutual consent, did not violate the statute, because there was no time, when an absolute title to the stock, or any part of it, could not have been transferred by the joint action of the four parties to the contract."

A will of real and personal property, attacked on the ground that it violated the statutory limitation upon the suspension of the power of alienation by creating a trust for a greater period than two lives in being at the death of the testator, held to be saved from such objection by provisions therein directing the division of the estate, for which three life beneficiaries were designated, into two distinct and separate funds and shares, one share for the benefit of one of the life beneficiaries and the other for the benefit of the two other beneficiaries, and disclosing an intention to create two valid and distinct corresponding trusts, the first for one life and the other for two lives in being.

A testamentary trust for a period in excess of the statutory limitation upon the suspension of the power of alienation is not saved from the condemnation of the statute by the fact that the trustee is empowered to sell the trust property and to invest and re-invest the proceeds, where, notwithstanding the power of sale and its incidents, the estate remains fettered by the trust. *Allen* v. *Allen*, 149 N. Y. 280, aff'g 63 Hun, 635.

The testator devised property, both real and personal, to trustees, to receive the rents, etc., thereof, divided the same into fourteen equal parts, and directed that the rents, etc., of each part should be paid over to different persons named in the will, the trust, as to each part, to terminate upon the expiration of two lives in being at the time of the testator's death. The fact that the due execution of the trust would require some of the parts to remain in the hands of the trustees after the trust had terminated, and the ultimate right vested, as to them, did not invalidate the trust by creating an unlawful suspense of the power of alienation. *Meserole* v. *Meserole*, 1 Hun, 66.

A testator directed that his executors should receive and collect the rents, issues and profits of his estate, and, after paying therefrom certain legacies and annuities, pay over the remainder to his widow for and during her natural life. Upon her death the executor was directed to pay out of the rents, etc., of the real estate, and out of the personal estate and the proceeds of the sale of the real estate to a son and daughter of the testator $1,000 to each, in two annual payments; the first to be made at the expiration of one year from the death of the wife, and the same sum to a grandchild if he should arrive at lawful age (though it was not in any event to be paid over to him until one year after the wife's death), and an annuity was given to said grandchild during his

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minority: that "after the payment and discharge" of these legacies, the real and personal estate, "as speedily as the same can be converted or divided," should be divided between the son, daughter, and grandchild.

Construction:

The trust estate terminated upon the death of the wife, at which time the legacies to the children and grandchild vested in them, and from and after that time they were entitled to the possession and enjoyment, as tenants in common, of the undivided property, subject to the power of conversion, division and sale, and there was, therefore no unlawful suspension of the power of alienation. *Matteson* v. *Armstrong*, 11 Hun, 245.

Defendant's testator devised his real estate to his wife so long as she remained his widow; upon her death, he directed his trustees to sell the real estate and invest and reinvest the proceeds thereof and the interest thereon, "except so much thereof as may be necessary for the support of my children until they reach the age of twenty-one years, or of my said daughters until they shall respectively marry." And upon the youngest of his four daughters, Mary A., Clara, Florence N. and Louisa, attaining the age of twenty-one years, he directed his estate to be divided among the children, the shares of the daughters to be then paid over; the shares of the sons to continue to be held in trust until the youngest son arrived at the age of twenty-one and then be paid over to them.

Construction:

The trust was valid, and the power of alienation was not illegally suspended.

The trust was not to continue until each and all of the children arrived at the age of twenty-one years, nor until the youngest son and youngest daughter each attained their majority, but only until the majority of the youngest child.

Even if the power of alienation were suspended during the lives of the widow, the youngest of the daughters and the youngest of the sons, still the trust for the life of the widow would be sustained. *James* v. *Beasley*, 14 Hun, 520.

A testator gave one-third of his estate to a son for life, and directed that on the son's decease such third should be added to the other two-thirds of which the interest was directed to be paid to the testator's grandchildren, share and share alike, and further provided by his will, "and then from and after the decease of my grandchildren, I direct my executor to pay the amount remaining after paying all expenses of settlement and disbursements thereof to each of my great-grandchildren, share and share alike."

Construction:

The gift to the grandchildren was to each of them in severalty and not to them jointly, and on the death of each grandchild his share would pass directly to the great-grandchildren as absolute owners. Therefore, as to the one-third of the estate given to James for life, the power of alienation was not suspended for more than two lives in being, and as to the remaining two-thirds of the estate for only one life.

The will provided that in case certain of the grandchildren neglected to support their parents, "the said legacy in payment to them to be stopped and the said payment shall revert to the general fund for the benefit of my other grandchildren and great grandchildren as hereinbefore mentioned."

Construction:

The effect of a failure on the part of the grandchildren to support their parents, would be to work a forfeiture of the remainder of their life estates and transfer such

life estates to the other grandchildren, who would hold such forfeited estates only during the lives of the grandchildren by whom they had been forfeited, and on the death of the latter such interests would pass to the great-grandchildren. *Bingham* v. *Jones*, 25 Hun, 6.

A testator gave "to the town of Columbia, in its corporate capacity, the sum of one thousand dollars to be forever invested by the town board or officers of said town having charge of the financial matters of said town from time to time, and at all times hereafter on real estate worth at least double the amount loaned thereon, the interest to be regularly collected and applied annually by the town officers of said town towards the support of the poor who are supported by the said town, the intention that the said interest shall form part of the poor fund of said town."

The bequest was void as creating an unlawful suspension of the absolute ownership of personal property.

Chapter 317 of L. 1866, providing for the election of three trustees for any lodge or chapter of Free and Accepted Masons, and authorizing them to take, hold and convey real and personal property, relieves them from the effect of the general statutes of the state against perpetuities.[1]

A testator, by his will, gave and bequeathed to the school district in which he resided, "the sum of three hundred dollars, to be forever loaned by the town officers mentioned in item sixth, and the interest thereon to be annually paid by such officers to the trustees of said school district, to be by them applied towards the support of the school in said district." By the sixth item of his will he directed the money to be invested by the town board or officers having charge of its financial matters. The bequest was valid under section 16 of chapter 555 of L. 1864. It was the intention of the testator to authorize the supervisor of the town to invest the fund and pay over the income to the school district, and that the executor should pay over the legacy to him. *Iseman* v. *Myres*, 26 Hun, 651.

Citing, Kennedy v. Town of Palmer, 1 T. & C. 581; Coggshall v. Pelton, 7 Johns. Ch. 291; question in King v. Woodhull, 3 Edw. Ch. 92, both of which last cases were overruled in Bascomb v. Albertson, 34 N. Y. 584.

A testator gave and bequeathed to his executors bonds and stocks amounting at their par value to the sum of $150,000, to be distributed and applied to such charitable and educational uses, and in such manner as should be specified and directed in a codicil to his will, which he was not then prepared to make. In case no such codicil was made, then, upon trust, to distribute the said sum to and among such incorporated societies, organized under the laws of the state of New York or the state of Maryland, having lawful authority to receive and hold funds, upon permanent trusts, for charitable or educational uses, as his executors, the survivors or survivor of them, should select, and in such several sums as they should determine. The distribution was to be made and completed in the lifetime of the longest liver of two persons named in the will, and, at any rate, before the expiration of three years from the testator's decease. The testator died without having made the codicil referred to in the will, and thereafter stocks and bonds of the par value of $150,000 were transferred to the executors. The direction authorizing them to distribute the fund among such of the corporations named as they should select, was valid. All interest received upon the stocks and bonds after the expiration of one year from the death of the testator should be included in and distributed with them. *Prichard* v. *Thompson*, 29 Hun, 295, rev'd 95 N. Y. 76.

A testator devised all his estate to his executors in trust, giving them a power of

[1] See Chaplin's Susp. 257.

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sale and directing them to invest all the property in securities, and to pay the income in such sums as they deemed proper to his six children until they, respectively, reached majority, for their maintenance and education. He further directed that the interest of each of the four sons should cease at majority, both in the income and in the principal. The will further provided that when the youngest son, named Daniel, reached majority, the income should be equally divided between the two daughters during their lives; that if either died leaving issue, one-half of the whole estate should be disposed of as the daughter dying should direct by will; that if one or both of the daughters died without issue, the one-half or the whole estate, as the case might be, should be equally divided between the sons. At the time of the testator's death all the children were living, and only one, a son, had reached majority. Action brought to obtain a construction of the will.

Construction:

There was no separate trust for each child, nor any definite share of the income allotted to it, but all the property was to be held in one trust, each child to receive so much income as the trustee thought proper.

Whether the estate was to be regarded as real or personal property, and, assuming that the word "minority" was equivalent to "life," the trust was void, because a final distribution was made dependent upon more than two lives in being at the death of the testator. *Walsh* v. *Waldron*, 63 Hun, 315, aff'd 135 N. Y. 650.

Testator, directed that his estate should be divided into two parts, one for each child who survived him, and the issue of any deceased child to have one share, and directed his executors to pay over the shares when the legatees reached majority. By a codicil to his will he gave his executors power to postpone, for any period not illegal, the payment to any legatee of the principal of his share after he had reached majority, provided the executors deemed such postponement best for the legatee, and that, in the meantime, the executors should keep the postponed share invested and pay the legatee the income. He appointed his executors guardians of his minor children.

Construction:

The provisions of the codicil did not suspend the power of alienation during the lifetime of the survivor of the three minors.

Its effect was to suspend that power as to each individual share only during the life of its beneficiary. *Foote* v. *Bruggerhof*, 66 Hun, 406.

A will contained the following provisions:

"(1) I give and bequeath unto my beloved wife all the real and personal property I may die seized and possessed of, nevertheless, until my youngest child may become the age of majority.

"(2) I hereby direct that my executors hereinafter mentioned shall, at the time when any of my child or children shall marry, to give to such child or children the sum of $5,000; and I direct that when, in the discretion of my executors hereinafter named, they deemed it is necessary, they shall give to any such child or children the sum of $5,000, but when the estate shall be divided the sum that any such child or children may have received shall be deducted, and the balance or residue, shall be divided equally, share and share alike among my said children, except one-third of the entire estate shall be given to my wife as her right of dower.

"(4) But, in case my wife shall remarry, I direct that my executors hereinafter named shall give unto my wife as her interest and for the support of my children the sum of $1,800 a year and the possession of the premises she now occupies, rent free."

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Construction:

The suspension of alienation during the minority of the testator's youngest child, created by the first clause, was valid. *Stehlin* v. *Stehlin*, 67 Hun, 110.

A will gave the residue of the testator's property to his children; by another clause, the executors were authorized, at any time in their discretion "after the lapse of one year, but not over two years from the date" of the testator's death, to sell a certain parcel of the testator's land, and were directed to deduct from the proceeds the taxes and assessments then due, and a sum then owing to the testator by a person named, and to pay the balance to such person; the power of sale was executed after one year and within two years after the testator's death.

Construction:

There was no suspension of the power of alienation, and the power of sale was valid, and a title acquired thereunder was good. *Buchanan* v. *Tebbetts*, 69 Hun, 81.

A devise of the use of land to the testator's three daughters for their lives, and to the survivor of them and after their deaths in fee to another, in case he survived them, but in case of his death before that of the last survivor of the testator's three daughters, then in fee to such last survivor, is void, as being in violation of the statute in restraint of alienation. *Sanford* v. *Goodell*, 82 Hun, 369.

S. died in 1883 and left a will by which she bequeathed certain premises to H. and C. for life, with remainder in fee to G.; she gave the same persons the use of her personalty and made a similar disposition of any residue left at the time of their death; she further provided that if G. died without heirs before the death of H. and C., all her property should pass to certain persons named, to whose rights defendants succeeded. H. died in 1886, C. in 1894, G., without heirs, in 1892. The defendants insisted that upon the death of C. they became absolute owners of the real estate and what was left of the personal estate.

Construction:

Defendants' claim was correct; the will did not violate the statutes relative to perpetuities; the absolute power of alienation was only suspended during the lives of H. and C.; upon the termination of their life estate the fee vested in G., if living, or if dead, in his heirs, if he left issue, or, if he died without issue, the fee then vested in the defendants' grantors.

As G. died without heirs while one of the life tenants was living, he had no right, title or interest in the property, nor any which he could convey to a purchaser. *Hinckley* v. *Mayborne*, 92 Hun, 473.

T., a resident of Massachusetts, by the twelfth clause of his will devised his residuary real estate, wherever situated, to the plaintiffs, his executors, in trust, to hold and manage the same for the term of five years from the day of his death, and for a longer term if in their judgment they deemed it best, and gave to his executors "full power and authority to sell all his real estate situate in Framingham, Massachusetts, at any time before the expiration of said five years, if in their judgment it was best to do so, * * * and at the expiration of said five years, if my wife shall have died before the expiration thereof, or at her death if she shall live longer than five years, I direct said trustees and the survivor of them, to sell all said real estate not then sold, * * * and I give them a like and the same power and authority to sell and deed said real estate in New York after the expiration of said five years."

Construction:

This latter provision of the will relative to the real estate situate in the state of New

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York was void, in that it illegally suspended the power of alienation for an absolute period of five years.

In so far as the foreign will attempted to dispose of real estate situated in the state of New York, its validity must be determined by the laws of this state.

As the power to sell the real estate situated in the state of New York did not come into existence until after the expiration of five years, there was a violatiou of the statutory provision directing that such power of alienation could not be suspended for more than two lives in being at the death of the testator.

As there was no absolute direction to sell, the power being discretionary, there was no equitable conversion of the real into personal estate.

A sale of the real estate here could not be made until after the expiration of five years, and during those five years there could be no equitable conversion.

Assuming that there was an absolute direction of sale and a consequent equitable conversion, conversion could not occur in this case until the time when, by the terms of the will, the sale must be made.

The devise was void as a trust and could not be upheld as a power in trust.

Viewed as a power in trust, it improperly suspended the power of alienation, as the proceeds of the sales were to be divided among the children and grandchildren of the testator who should be living at the time when the several sales of the real estate situated in the state of New York were made, aud it could not be ascertained until the time of each sale what grandchildren would be in existence who would be entitled to the proceeds of the particular sale when it was made, and, hence, there was no one in existence during the five years before a sale could be made who could release the proceeds of that particular sale and give an absolute title to the land and its proceeds. *Trowbridge* v. *Metcalf*, 5 App. Div. 318.

The will of C., by its first clause, gave his son R., a single man, a life estate in the homestead, with remainder over to his sister E., in case the son died without issue; by its second clause certain specific personal property was given absolutely to the son, and the third or residuary clause devised the remainder of the estate to his executors and their successors in trust, to pay one-half of the income of the trust estate to the son until he attained the age of forty-five years, at which time the *corpus* was to be transferred to him if the executors considered that he was then a sober man and fit to be intrusted with the property; in case the son died before reaching the age of forty-five years and left issue surviving, the executors were directed to transfer his share to such issue. In case he died before reaching the age of forty-five years and left a widow, but no child or children, the will provided as follows: "Then she is to have and I devise and bequeath to her (the widow) one-half of the income of said half of the rest, residue and remainder of my said property so long as she shall remain his (the son's) widow."

The son married soon after his father's death and died before reaching the age of forty-five, leaving no children, hut leaving a widow, who, not having remarried, claimed to be entitled during her life or widowhood to the income of one-quarter of the residuary estate set apart for the son.

Construction:

The provision devising a quarter of the income of the residuary estate to the widow during her widowhood was void, as it attempted to create an illegal suspension of the power of alienation, by limiting the period of the trust upon a life possibly not in being at the time of the testator's death, inasmuch as the son did not marry until after the death of his father and might have married a woman born after the testator died.[1]

[1] Schettler v. Smith, 41 N. Y. 328; Burrill v. Boardman, 43 id. 259; Knox v.

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A construction which would withdraw the provisions for the widow from the trust and treat it as an absolute legacy of a one-fourth part of the income of the testator's estate was not admissible.

It was the general intention of the testator to secure to his own children for their lives, and ultimately to his grandchildren, the *corpus* of the estate, and to this end to embrace in the trust estate the entire residuum.

Such was the effect of the gift to the executors prefacing the residuary clause, which was not limited by any succeeding words which, in express terms, withdrew any portion of the residuum from the trust estate. *Durfee* v. *Pomeroy*, 7 App. Div. 431.

A will gave to testator's mother a life interest in his real and personal estate and directed the executor to pay her the income during her life, and gave the estate equally to his brother and sister should they survive the mother, or to their children should either of them die, and if either should die without issue, the whole to the survivor. *Held*, that there was no suspension of alienation beyond the life of the mother. *Case* v. *Case*, 16 Misc. 393.

By will the use of a certain house was given to testator's sister and brother, and after their deaths the rest and residue of the estate was directed to be held by the executors for the benefit of two grandchildren until the youngest arrived at the age of twenty-five years, when it was devised to said grandchildren or the survivor. By a codicil the residue of the property not affected by the will was given to the executors to pay taxes, repairs and insurance, and to be otherwise used for the benefit of said sister and brother.

Construction :

The attempted trust in favor of the grandchildren, was void as unduly suspending the power of alienation, but as they were the sole heirs and next of kin, they took a vested remainder in the real estate and were entitled to the balance of the personalty remaining unexpended at the death of the life tenants. *Finch* v. *Wilkes*, 17 Misc. 428.

From opinion.—"The trust for the benefit of the life tenants is entirely separate and distinct from that attempted to be created for the benefit of the grandchildren, and while the latter falls, it does not stand in the way of the execution of the former. Kennedy v. Hoy, 105 N. Y. 134; Underwood v. Curtis, 127 id. 542; Brown v. Richter, 76 Hun, 469."

Suspension during the life of the widow and the minority of her youngest child, was void. *Dorland* v. *Dorland*, 2 Barb. 63.

The absolute ownership of property was suspended for the life of H. and F. with limitation over to surviving issue of F., to be at their disposal as soon as they shall have, respectively and severally, attained the age of twenty-five years; the interest in the meantime to be paid to them, and in the case of the death of F. before H., gift over to be divided at the death of H. amongst such surviving issue of F. as soon as they should respectively attain the age of twenty-five years. There was no undue suspension. *Burrill* v. *Sheil*, 2 Barb. 457.

A gift in a will to three persons and the survivor of them of the interest of $1,000, to be paid so long as they or either of them shall live, is void as suspending the power of alienation for more than two lives. A gift of the principal sum of $1,000 upon the death of the last survivor of the three legatees to whom the interest of that sum is given, is void. *Banks* v. *Phelan*, 4 Barb. 80.

Jones, 47 id. 397; Smith v. Edwards, 88 id. 104; Tiers v. Tiers, 98 id. 573; Haynes v. Sherman, 117 id. 437; Underwood v. Curtis, 127 id. 540.

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A conveyance of personal estate to trustees to invest the same and pay the interest to specified persons for life, with a limitation to children of each, may be valid as to the first taker although the limitations over be void. *Depre* v. *Thompson*, 4 Barb. 279; 5 id. 537.

A trust did not terminate until the expiration of four minorities, and a limitation over was too remote. *Vail* v. *Vail*, 7 Barb. 226, aff'd 10 Barb. 69.

A testator, by his will, which took effect in 1836, after sundry bequests to his wife, children, and others, devised as follows: "I give and bequeath all the rest and residue of my estate, after payment of my debts, funeral charges and legacies above mentioned, unto my said children (naming them), their heirs and assigns forever, equally to be divided between them, share and share alike, and to the descendants of such of my children as shall have died, in equal portions, that is, such descendants to take the same to which their ancestor would have been entitled if living; but no division to be made until ten years after the death of my said wife." By an agreement made between the plaintiff C. and his wife M. A. C. (his intestate), who was a daughter of the testator, and the executors, on the 4th day of May, 1840, C. and his wife, in consideration of $7,000, a part of the residue of said estate then advanced to them by the executors, sold and transferred to the executors, all their share in the residuary portion of the estate belonging to them or either of them, under the will of the testator or otherwise, to have and to hold till a final division of the estate should be made, when the sum then paid, with interest, was to be deducted from their share. And they covenanted that they would not, during the life of the widow, claim, demand, or sue for their share of the estate, nor do any act to impair the will of the testator. In a suit by C., as administrator of his deceased wife, against the executors, heirs at law, and next of kin of the testator, for an account by the executors, and to recover his wife's share of the residuary estate;

Held, 1. That by the will, the children of the testator, living at his death, and the descendants of those who had then died, took a vested interest in the residuary estate, at the death of the testator.

2. That the devise both of the real and personal estate was valid, as vesting a present interest in the beneficiaries.

3. That the condition annexed to the devise, that no division should be made until ten years after the death of the widow, was void, as to the personal estate, as suspending the absolute ownership thereof for a period beyond the time prescribed by the statute. *Converse* v. *Kellogg*, 7 Barb. 590.

Devise to daughter M., and such of her children as shall at her decease be living and shall have attained, or shall thereafter attain the age of twenty-one years, gave M. only a life estate with contingent remainder to such of her children as should survive her and should have attained or should after her decease attain the age of twenty-one years. Intermediate the death of M. and a time when all the children became of age, the property vested in the heirs at law, liable to be divested on the happening of a contingency upon which the remainder depended, and when the contingency occurred by the eldest son becoming of age, the remainder vested in him, subject to be divested, so far as to let in, to their shares respectively, such of the other children of M. as should become twenty-one years of age. The estate being limited to M.'s life and five minorities, and being inalienable during such limitation, the contingent remainder to M.'s children was void, and, as a consequence, the moiety of the estate thus disposed of descended to M. as heir at law of the testator, and united with her life estate. A limitation upon minorities is a limitation on lives. *Taylor* v. *Gould*, 10 Barb. 388.

Testator gave to P. E. Society (a corporation) for promoting religion and learning

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in the state of New York, $5,000, the accruing income to be applied to the support of the rector, for the time being, of Christ church (incorporated) in G., and any interest accruing during a vacancy of the office of rector to be paid to the clergyman next to fill the office.

Testator gave the same society a farm *in trust*, and if not authorized to hold the land, then to his executors to sell the farm and pay the proceeds to the society for the same purposes as the $5,000. The testator ordered the rest of his property to be sold and, subject to a life estate in his wife, the proceeds paid to said society, to be held as a fund for the support of missionaries in the diocese of New York, and that such fund should be left to increase to $10,000 and the income thereof paid to the disposable fund of the Education and Missionary Society of the P. E. C. in the state of New York (an unincorporated and finally extinct association) for the support of missionaries in the diocese of New York.

For a number of years and since the testator's death the church or corporation had had no rector, nor any religious exercises, other than occasional missionary services by the rector of another parish.

Construction:

The devise in trust of the $5,000 was void as unduly suspending the power of alienation and as directing an undue accumulation of income. The provision as to the farm was void.

(1) Because the corporation could not take by devise.

(2) Because the trust was unauthorized.

(3) Because the power of alienation was unduly suspended for an indefinite time not measured by years.

The bequest of the remainder of the property, after the life estate, in trust to accumulate the interest until the fund reached $10,000, etc., was invalid.

The farm descended to the heirs at law; the $5,000 to the next of kin; the rest of the property, after the expiration of the life estate, was undisposed of. *King* v. *Rundle*, 15 Barb. 139.

The application of rents and profits through a trust to the use of a man's family, is an application to his use, and if confined to his life and to a designated living person, is valid; although the use be exclusively for the wife and children, as it can not last longer than the life of the father, there is no undue suspension. *Rogers* v. *Tilley*, 20 Barb. 639.

Although the absolute power of alienation be suspended by the nature of the trust and by the contingent remainder in favor of unborn children, yet, as the suspension from either cause could by no possibility continue longer than during one designated life in being, it is valid. *Rogers* v. *Tilley*, 20 Barb. 639.

A provision whereby the testator directed that the principal of his estate should not be paid over or delivered to the grandchildren until they respectively attained the age of thirty years, was valid. *Fowler* v. *Depau*, 26 Barb. 224.

It does not follow that the power of alienation is suspended because the right of immediate partition and division is withheld. *Doubleday* v. *Newton*, 27 Barb. 431, citing, 7 Paige 521, 7 Barb. 595.

At most the division of an estate was suspended until the devisees, respectively, arrived at the age of twenty-one years. *Doubleday* v. *Newton*, 27 Barb. 431.

Donations to incorporated religious societies are exempt from the provisions of revised statutes to prevent perpetuities. *Wilson* v. *Lynt*, 30 Barb. 124.

The trustees of an incorporated religious society have not capacity to take property devised or bequeathed to them in trust for their societies. *Wilson* v. *Lynt*, 30 Barb. 124.

Provision in a will that all the testator's property should be kept and remain undis-

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posed of for the use of his wife and children under age and unmarried during the life of his wife or until she should marry again, could not continue longer than her life and was lawful, but the further provision that after the death or marriage of the widow the property should remain and be kept undisposed of for the use of such of his children as should then be under age and unmarried, was not valid, but this did not affect the provision to continue during the life of the widow. *Williams* v. *Conrad*, 30 Barb 524.

A will and codicils were construed to mean that testator intended that the final division of a general fund out of which annuities were to be paid should be postponed until after the death of the three annuitants. This postponement of the division, or possession of the fund did not prevent the estate from vesting absolutely on the death of the testator. *Forsyth* v. *Rathbone*, 34 Barb. 388.

After the decease of his son and daughter-in-law the testator gave the residue of the estate "to all of my grandchildren to be equally divided between them, share and share alike." The testator meant by "all my grandchildren" the four children of his deceased son who survived the testator. *Forsyth* v. *Rathbone*, 34 Barb. 388.

Gift to son J., and to his heirs and assigns forever, of all testator's property, provided J. "ever has any lawful heirs that shall arrive at the age of twenty-one years," and the further order and direction that in case J. never have any legal heirs that shall arrive at the age of twenty-one years, the property should be equally divided among the testator's brothers and sisters' children. J. took the devise of the lands in fee upon a condition. The condition was not precedent but a conditional limitation, the effect of which would be not to suspend the vesting of the interest devised or bequeathed but to divest it and send the property over in the event of the non-fulfillment of the condition. As J. C. might have any number of children the title to the property would be suspended not only during his life but during the lives of each one of such children who should die under the prescribed age and until some one of them should attain that age; hence the limitation over was forbidden by the statute and the estates in remainder were void. *Brown* v. *Evans*, 34 Barb. 594.

The absolute ownership of an estate was not suspended by direction to pay or apply the interest to four nephews during the minority of J., as the infants took an absolute interest in the legacies given to them respectively, and such legacies were certain or capable of being rendered certain in amount and payable at a definite period, although the exact amount that they should receive could not be determined until that period arrived. *Titus* v. *Weeks*, 37 Barb. 136.

Although the power of an executor to convey was suspended for the term of three years, the remainder, subject to the execution of the power, remained vested in the heirs at law. *Persons* v. *Snook*, 40 Barb. 144.

Testator directed his personal property to be sold and the proceeds to be disposed of, except a legacy of $25, as follows: To be divided equally between his living children F., C., S., L., R., and Rhua, and the heirs of Rebecca and Maria, deceased children; making eight shares; Rhua to take immediately and absolutely; the first five to have only the use or interest of their respective shares during life and on the death of either of them, his or her share to go to his or her heirs, if any living, otherwise to the testator's children then living, but the said first five surviving to have only the use during life. As to the seven shares, after paying Rhua's share, nothing was intended to be given to any of the five children named, except an interest for life. This brought the disposition of the personal property within the prohibition in regard to the suspension of the absolute ownership of personal property for a period of more than two lives in being at the death of the testator. The grandchildren living at the death of the testator did not take a vested interest in the shares of their

parents, subject to open and let in afterborn children, and their interests were contingent and dependent upon their surviving their parents. The disposition of each share of the personalty was void. *Persons* v. *Snook*, 40 Barb. 144.

Testator directed that all his estate, after payment of expenses and legacies, should remain in the hands of his executor or under his control for the use of his wife and children while under age, and if his youngest grandchild should not arrive at the age of twenty-one years, he directed the same to be divided among his children, share and share alike. The power of alienation was not unduly suspended. The executors took no estate in trust, and although they were directed to convert the estate into money and hold and manage proceeds, the wife and minor children took the interest of the estate and each child had a share in the property while a minor, and the estate of such child ceased on its reaching its majority, and the share held by such child thereupon vested in the other children who were minors, and the wife. A daughter of the testator who was of full age at the time of his death, and who died before the youngest child arrived at the age of twenty-one years, never had such estate in the lands of the testator as to vest in her husband as a tenant by the curtesy, as she was not entitled to any possession until the youngest child became of age. *Burke* v. *Valentine*, 52 Barb. 412.

From opinion.—"It is evident from the whole frame of the will that the testator never contemplated the possibility of any of his children dying before arriving at the age of twenty-one years. He made no provision for the inheriting of grandchildren in case of such death, nor any disposition of the share of any child in case of such an event. He selected his youngest child and made the estate to the widow and minor children limited on the minority of the youngest child. Under this construction, the limitation would be dependent on the life or minority of that child, and would vest at once in all the children living when either event happened. Butler v. Butler, 3 Barb. Ch. 310; DuBois v. Ray, 35 N. Y. Rep. 165.

"This construction of the limitation is warranted by Hawley v. James, 16 Wend. 119, where Ch. J. Nelson says: 'Youngest of my children and grandchildren standing alone might well never refer to the youngest of each class'; and a class in the will in that case was held bad, because it in addition said 'the youngest living and attaining the age of twenty-one years,' by which the intention to apply it to all the children was apparent."

A trust was illegal and void by reason of a limitation upon its existence and continuance, which the testator had imposed upon it for the payment and extinction of mortgages, which might unduly suspend the absolute power of alienation. *Killam* v. *Allen*, 52 Barb. 605.

By a trust deed the trustees were required to collect and receive moneys, proceeds and income and make disposition of the property granted, to invest the same, collect and receive interest and income, and from the moneys so arising to pay the expenses of the trust and apply the balance of the income and principal, so far as in their judgment might be required, to the support and maintenance of the grantor's wife and children, and on the arrival of the youngest of such children, then living, at the age of twenty-one years, or upon the decease of M. and A., the two youngest children, should they die before that time, to convey to the children then living and to the grantor's wife, or to such of them as should survive, and to the descendants of any of such as might be dead, said property in equal shares, and descendants of the deceased children, to take the share their parents, if living, would have taken. The trust was for the benefit of the grantor's wife and five minor children. The power of alienation was not unduly suspended. *Levy* v. *Hart*, 54 Barb. 248.

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A devise and bequest by a testator, of all his estate real and personal, to his brother and to twelve nephews and nieces, in trust to pay over and divide the rents and profits of his real estate (after satisfying certain specific legacies and annuities) to and among the same twelve nephews and nieces, during their natural lives, and to the survivors and survivor of them, equally to be divided between them, or such of them as should from time to time be living, share and share alike, is a void trust.

So that the testator having directed that after the death of all his said nephews and nieces, all his estate then remaining should be equally divided among all the children of his said nephews and nieces, and the surviving children of such of them as might then be dead, in equal proportions, *per stirpes* and not *per capita*, such distribution not to be made until two years after the decease of all his said nephews and nieces, the limitation over of the ultimate remainder, was also void.

The principal trusts created by the will being adjudged void, and thus the main intent and object of the testator defeated, certain life estates in particular lands, given by a codicil executed by the testator, to one of his nieces and two of his grand-nephews, for whom provision was made under the principal trusts, were also void, and the whole estate passed to the heirs at law of the testator. *Coster* v. *Lorillard*, 14 Wend. 265, rev'g 5 Paige, 172.

The creation of a trust term by will to continue until the youngest of a testator's children and grandchildren, attaining the age of twenty-one years, shall have attained that age, where the number exceeds two, unduly suspends the power of alienation.

The power of alienation can be suspended in no other way than that recognized in the fifteenth section of the act, *i. e.*, during the continuance of one or two lives in being at the creation of the estate; and consequently such power can not be suspended for a moderate term of years, for an average duration of lives, whilst certain specified minorities continue, or by any other limitation that may by possibility extend such suspense beyond two specified lives in being.

A testator created a trust term, directed his trustees at the expiration of the period prescribed for the continuance of the trust, to divide his estate into twelve equal parts, and to allot, distribute and convey to certain of his children and grandchildren severally, certain portions of the estate for life, with power to the grantee to devise the same in fee to his or her lineal descendants in such manner or proportions as he or she might think proper; and in the event of such grantee either leaving no descendants or omitting to made a valid disposition of the same in execution of such power, then with remainder in fee to such person or persons as by the statute of descents would have been entitled to inherit the estate, had the grantee, having derived the same from the testator, died intestate, lawfully seized thereof in fee.

[1] Construction:

The estate in remainder was an estate which suspended the power of alienation contrary to law, and the estate in remainder, the life estates and all the contingent remainders depending thereon, were void; and the real estate of the testator descended to his heirs at law, free, and discharged of all conditions, devises, directions, authority, power or control of the trustees—saving, however, from the operation of the decree affecting the lands of the testator situate in the state of Illinois.

Annuities for life having been given by the testator to two of his sons, and no other provision having been made for them by the will, and it having been adjudged that the trust term and the remainders suspended thereon, were void, and that the estate descended to the heirs at law of the testator, such sons were bound to elect within a given period whether they would accept the annuities, or renounce them, and take as heirs at law and representatives of the testator.

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Notwithstanding that the trust term and remainders were adjudged to be void, numerous annuities and legacies given by the will were good and valid, and the trustees in their character of executors, were directed to carry into effect the directions of the testator in respect to such annuities and legacies. *Hawley* v. *James*, 16 Wend. 61, modifying 5 Paige, 318.

A devise, void as to the limitations created thereby, is void also as to the directions for the apportionment of the estate among the beneficiaries, where such apportionment is different from the rules established by the statute of descents.

How far a will, invalid as to some of its provisions, can be sustained as to others not in conflict with the statute regulating the devise of real estate; and when a will will be avoided *in toto*, on the ground that by declaring void portions of it, the main intent of the testator is defeated, are considered and discussed. *Salmon* v. *Stuyvesant*, 16 Wend. 320.

From opinion:—"The power of appointment was rendered void as to estates for life, to be devised to objects of the power not living at the time of the testator's decease, but not as to those who were then *in esse*; and it may still be effectual to pass a fee to either. Secs. 17 and 129. Suppose there had been a direct limitation to a son for life, remainder to and among his children as tenants in common, viz., as to those living at the testator's death, for life, remainder to the children of each in fee; and as to those born after the testator's death, in fee; the first would be valid within the seventeenth section; and no doubt the second would be good, which is for a single life in being, directly followed by a contingent remainder in fee. Alienation is here suspended for only one life in being. In the former case there would have been but two successive lives in being, followed by a similar remainder. There is no doubt that two successive lives may so run for each share in common to each child. Now the power given, I admit, if it should be executed by the grantees in its utmost verbal latitude and in its broadest construction, might attempt to give a life estate to a child or nephew or niece born after the death of the testator; but for aught we know, none has been or will be born after his death; and if there should be, it does not necessarily follow that the grantees of the power will try to abuse it. Should they do so, the law will frustrate the attempt, and I should suppose we ought rather to intend that the power will be executed within due limits. I do not understand the statute to declare a trust power to be absolutely void, because it is so framed as, in one view, to authorize an appointment of an estate such as the will could not create, provided that in another view it can create estates within reach of the original devise. In estimating the suspension of alienation, you must, to be sure, date from the will. Sec. 128. You are then to look at the estate actually created by the power. If that does not exceed the legal limit of suspense, counting from the time of the testator's death, all is well. The 129th section is, that 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 is granted.' We are, therefore, to look within the compass of the power, which may easily be confined to lives in being, or even brought down to a simple fee in all the appointees. It will be time enough to look to the execution of this power, and nullify that, when we see the appointment of a life estate to a relative who was unborn when the testator died, or other estate created beyond the legal scope of the power. So far we have been speaking of the power to devise, which is not beneficial but in trust. That comes under the 129th section alone in regard to its extent and validity. And so I should suppose, in respect to the term for years, were it not for section ninety-two. A lease, though bad for sixty-three years, would be good for twenty-one years within the

statute, and might avail for that time if expressly so limited; sec. 87; but section 92 declares that no beneficial power, other than such as is enumerated and defined by the statute, shall be valid. It appears to me, therefore, that the leasing power for years is destroyed by the statute."

Where a testator, by will made in 1828 and republished in 1833, devised all his real estate to executors, in trust, to make partition among his children, and to convey their several proportions to each for and during his natural life, with power to make leases for a life or lives in being, or for a term of sixty-three years, and by last will and testament to devise and appoint the land conveyed to him, to or in trust for any one or more of his children, grandchildren, nephews or nieces, for such estates and subject to such powers as he should think fit; and for want of such appointment, the land to go to the children of the son dying without making such appointment; and if he left no child or grandchild, then to the right heirs of the testator; it was held by the chancellor, inasmuch as by the republication of the will after the Revised Statutes went into operation, the power to execute leases for the period of sixty-three years, was reduced to the execution of leases for only twenty-one years; but in view of the peculiar situation of the property devised, the carrying of the will into effect according to its terms, would defeat the principal intent of the testator, and that therefore it ought to be declared void, except as to the direction of the proportions in which the children should take, and the power of partition given to the executors; and he accordingly decreed that the children of the testator should take the property as heirs at law with the exceptions above stated, and declared the powers in trust to appoint the remainders and also the limitations over void. On appeal, this decision was affirmed in the court for the correction of errors, by a vote of twenty-five members of that court; seven only dissenting. *Root* v. *Stuyvesant*, 18 Wend. 256.

A devise of real estate to executors in trust, to receive the rents and profits, and pay over the same to the children of the testator for the term of twenty one years, is void; so, also, a power in trust to make partition at the end of such term, is void.

Where, by the same will, the testator gave to each of his grandchildren, who should be living at the time of his death, the sum of $6,000, to be paid upon their attaining the age of twenty-one, or marrying, such payment, however, to be subject to the approbation of the parents of the grandchildren, and the time of payment to be fixed by them; it was *held*, that the legacies were vested and not contingent, and that the power given to the parents did not prevent the vesting of the legacies.

The bequest of the legacies to the grandchildren being in itself free from objection, and having no necessary connection with the trust adjudged to be void, it was held, that the will in respect to such legacies, should be carried into effect, notwithstanding that the trusts created by the will were declared void; this decision is in accordance with Hawley v. James, 16 Wend. 61, though not with Root v. Stuyvesant, 18 id. 257. *Hone's Ex'rs* v. *Van Schaick*, 20 Wend. 563, aff'g 7 Paige, 221.

The statute in regard to estates in personal property treats only of accumulation of interest or income and of expectant estates. The mode of directing accumulation, so as to be valid, the statute specially points out. The suspension of absolute ownership is limited to two lives; and in all other respects, limitations of future or contingent estates are the same as if the subject were real estate. *Kane* v. *Gott* 24 Wend. 641.

Where a testator, by will, bequeathed annuities to five of his children, and directed that on the death of either without issue, the annuity bequeathed to the child dying should be equally divided among the survivors; but if there was issue, then the annuity to be paid to such issue during the lifetime of the wife of the testator, and on her death the principal of such annuity; that upon the decease of any of the five children, after the death of the wife of the testator, a like portion of the principal of

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his estate should be paid to the issue of the child so dying, and that a final distribution and settlement of his estate among his grandchildren should be had immediately after the death of the survivor of his children. The vesting in possession of the several portions of the estate was not postponed beyond two lives in being at the time the will took effect, and the will was valid. *Bulkley* v. *Depeyster*, 26 Wend. 21.

Where a testator devised his estate to trustees to receive and apply the rents and profits, which as to its object was a valid trust under the third subdivision of section 55, but which trust was to continue until the testator's youngest child would, if living, attain the age of twenty years, the devise was void, for suspending the power of alienation for a period not limited by the continuance of two lives in being at the creation of the estate.

The utmost limit for the continuance of the estate must be bounded by life, and no certain term for its continuance, however short, can be supported. *Boynton* v. *Hoyt*, 1 Denio, 53.

Where the sister of the testator, at the time of the making of his will and at his death had but one child, and he devised the residue of his real and personal estate to such sister, to hold the same to her and her children forever, with a devise over, in case she should die, and all her children should die, leaving no children, under the Revised Statutes, the sister took an estate for life in the property, and the child took a vested remainder in fee, subject to open and let in afterborn children; and the limitation over after the death of all the children of the sister without issue was void, being too remote as to the afterborn children. *Hannan* v. *Osborn*, 4 Paige, 336.

Where the testator directed the investment of his estate in the purchase of lands for the benefit of his three infant children, upon an express trust to receive the rents and profits of their several shares thereof, for their use, until they should attain the age of twenty-one or twenty-two, in the discretion of the trustee, with cross remainders between themselves if they died before they came into possession of their several shares without issue, and with remainder to their heirs of the blood of the testator, if hey all died before that time without issue, the ultimate limitation over to their heirs was too remote and void. *Wood* v. *Wood*, 5 Paige, 595.

Where the testator by his will, after providing for the payment of his debts, and making certain specific bequests, gave the residue of his real and personal estate to his executors in trust to lease his house and lot on Market street, and to lease and sell and convey the rest of his property, and apply the proceeds and income thereof as follows: one-fifth to his son in fee; three-fifths to the support of his daughters, E., G., and H., respectively; and one-fifth to the support of his daughter A., free from the control or debts of her husband; and should any of his daughters die leaving issue, the share given for her support to be applied to the support and education of such issue; but in case either of his said daughters should die without leaving issue, the use and income of her share which should then remain to be divided among his surviving children or their heirs, except the share thereof to which his daughter A. would be entitled, which was to be vested in his executors, subject to the trust relative to her fifth of the estate; *Held*, that under the provisions of the Revised Statutes, the devise of the testator's house and lot on Market street was inoperative and void; as the trust to receive the rents and profits during the lives of his four daughters would suspend the power of alienation for more than two lives.

Construction:

The devise of the residue of the real estate was valid as a power in trust to the executors to sell such estate for the benefit of legatees, and convert the same into personalty for all the legal purposes of the will; and to invest the share of each daughter

as personal estate, and to receive the interest or income thereof for her use. But as the power to lease such real estate and receive the rents during the lives of the four daughters might suspend the alienation beyond the limits allowed by law, the trust to lease the same and receive the rents thereof as real estate was therefore void; and the land descended to the heirs at law of the testator, subject to the right of the legatees to have the same immediately converted into personal estate by the execution of the power in trust to sell. *Van Vechten* v. *Van Veghten*, 8 Paige, 103.

The testator directed that if any of his five children to whom life estates were given should die without issue, the income of his or her share should go to the survivors for life, with remainder to their children, after the death of the widow; the limitation over to the survivors and to their children was void, as it *might* suspend the absolute ownership for more than two lives in being at the death of the testator. *DePeyster* v. *Clendining*, 8 Paige, 294.

Where real estate is devised to a trustee, upon a valid trust, during the continuance of two lives in being at the death of the testator, with a further limitation in trust which would have the effect, if executed as a trust, to suspend the power of alienation beyond the time allowed by law, the last limitation as a trust is void, and the estate of the trustee will cease when the valid trusts shall have been executed. And as the particular intent of the testator, in continuing the estate in the trustee for a longer period, can not take effect, the legal title must therefore vest in the *cestui que trust* if consistent with the general intention of the testator in relation to the disposition of his property; or if it can not so vest consistently with his intention, it will belong to the heirs at law of the testator, or to other devisees under the will. *Parks* v. *Parks*, 9 Paige, 106.

Where a power in trust, to executors, to lease the real estate of the testator until it can be sold, would have the effect to suspend the power of alienation in such real estate beyond the time allowed by law, it is void. But the power in trust to sell, in such a case, will still be valid. And the real estate, in equity, will be considered as converted into personalty immediately; where such a conversion is necessary to carry into effect the will of the testator, and to prevent injustice to any of the objects of his intended bounty. *Haxtun* v. *Corse*, 2 Barb. Ch. 506.

C., by her will, directed her property to be converted into money, and invested at interest; and, after giving legacies, ordered as follows: "That all such residue of such interest money, or other profits as there shall be, after such payments as above mentioned, be equally divided among my children, or the survivor or survivors of such as shall die childless, yearly, and every year, share and share alike, during their natural lives; and that if either of my said children shall die leaving a child or children, then the part or share of which the parent of such child or children was receiving the interest during his life, shall immediately vest in and be the property of such his child or children as shall be living at his death." There was no undue suspension of ownership. *Cromwell* v. *Cromwell*, 2 Edw. Ch. 495.

Testator directed executors to invest $100,000 on real estate and divide the net income among his eight children, or the survivors of such as should die during their respective lives. The children were not to dispose of their share without the consent of a majority of the executors. The shares of the children dying should go to their children, to be equally divided, share and share alike. The trust was void. The $100,000 was to go as real estate among the heirs and not into the residue. *Thorn* v. *Coles*, 3 Edw. Ch. 330.

A testator directed a division of his estate to be made at the expiration of seven years from his death, provided his daughter had then been dead two years, and gave, out of a fourth part, the sum of $500 to a legatee, and that the residue should be

paid to a trustee, to keep the same invested, and pay the income to S. M., until the eldest child of the said S. M. should arrive at the age of twenty-one years; then, to divide it among the children of said S. M.

The eldest child living at the death of the testator was about nine years old, and the youngest six months—one was subsequently born.

Held, that even assuming the term "eldest child" could be limited to the eldest living at the testator's death, the devise was void, as alienation would be suspended for a certain period of twelve years.

Held, that the term meant the child which should first arrive at age.

Any limitation which may, by possibility, produce a more extended suspension than for two lives in being, is void.

The dispositton of the income being for a period not permitted, was also held invalid. *Butler* v. *Butler*, 1 Hoff. Ch. 344, aff'd 3 Barb. Ch. 304.

By a postnuptial settlement, the husband conveyed to trustees all his interest in the real and personal estate of the wife, in trust, to receive the income and apply it to the separate use of the wife for life, and after her death to apply the same to the support, etc., of her issue, until they should attain the age of twenty-one years, and then to divide the estate among the issue.

The trust was valid as to the real estate, and as to the personalty, so far as the wife's trust interest was concerned.

The trusts in the personalty, after her death, were void, as unduly suspending the absolute ownership.

The interest of the wife in the prior settlement was not a future or expectant estate, and did not fall within the provision of the Revised Statutes, which makes the interest of the beneficiary in a trust, inalienable. *Grout* v. *Van Schoonhoven*, 1 Sandf. Ch. 336.

A testator devised his real estate to his executors in trust, to lease the same and receive the rents and profits, and to improve and build on the same, and for these purposes to mortgage any part of it. When either of his children arrived at lawful age, the trustees might sell all or any part of the real estate, if in their opinion it was then advantageous to do so, and the conduct and character of such child in their opinion justified them in selling. He directed that in any event, the whole of his real estate should be sold by the trustees, by the time his youngest child should arrive at lawful age. Upon such sales being made, the trustees were to pay and divide all the income and profits and proceeds of the sales, to and among the testator's four children by his then wife, and such other children as she might bear to him thereafter, their heirs and assigns equally; the issue of such as were dead, to receive the share of their parent. The trustees out of the estate or the income, were to pay as might be necessary, for the support and education of the children, during their respective minorities.

The testator then gave the residue of his personal estate to the four children and such others as he should have by his then wife, to be paid and distributed to them equally, at the time of the sale or sales and distribution of his real estate.

He directed that his whole estate should be kept constantly accumulating, as much as could be, until the sale and division of his real estate; and he authorized his trustees to use and apply the whole or any part of the personal estate and its income, towards building on and improving, any of his real estate.

At the death of the testator the four children were infants; and he had no issue after the date of the will.

Construction:

1. By the devise in trust, the power of alienation of the real estate might be sus-

pended for more than two lives in being at the death of the testator, and it was therefore void.

2. The trust for accumulation was void.

3. The bequest of the personal estate unduly suspended its absolute ownership.

4. The trust to mortgage, was valid, as a power in trust for the benefit of legatees.

5. The real estate having descended to the heirs, and a partition being sought, the trust power was directed by the decree to be extinguished, on a suitable provision being made for the legatee.

6. The testator gave a legacy to one of his heirs, who was excluded from the real estate by the will. On the devises being declared void, the heir was put to an election between the legacy and her share as an heir at law. *Thompson* v. *Clendening*, 1 Sandf. Ch. 387.

NOTE.—The limit may be for any term of years, or on any contingent event, expressing that it is on condition that the two lives shall so long continue. (395.)

A testator gave to his wife for life all the income, rents and profits of his real and personal estate; and after her death gave the like interest to T. for life, out of which she was to support three infants, W., J. and E. Next, he gave the whole rents and income after her death to W., J. and E. for life, as joint tenants; and then gave the residue of his estate to E. absolutely and in fee, first providing for her $50,000 when she should arrive at age. Then followed a provision that if E. should die without children or issue, that the whole residue of his estate should go to his cousins.

Construction:

1. The first two life estates in the income and profits were valid.

2. The subsequent gifts of the personal estates were void as suspending the absolute ownership more than two lives in being at the death of the testator. *Emmons* v. *Cairns*, 2 Sandf. Ch. 369; 2 Barb. 243; see Jansen v. Cairnes, 3 Barb. Ch. 350.

A devise of real estate to, and for the benefit of four minor children, not to be sold or divided until the youngest survivor shall become of age; and if either of them should die his share to be divided among the survivors; is void as suspending the absolute power of alienation, contrary to law.

A power in trust, to receive the rents and profits and apply them as directed, including a division of the surplus among such four children, was coequal in duration with the limitation of the division and vesting of the estate, and therefore void, on the same ground. *McSorley* v. *Leary & Hoey*, 4 Sandf. Ch. 414.

Testator devised his estate to his executors as trustees for a term of three years and directed them to accumulate the rents and profits and income during that period and at the expiration of the three years, if the money should not be applied to the erection of the statue to Washington or should be found inadequate for that purpose, he directed an equal distribution among three institutions. The trust and the limitation in favor of the charitable institutions were void, and the real estate descended to the heirs at law and the personalty to the next of kin, save the payment of legacies and expenses. *Morgan* v. *Masterton*, 4 Sandf. 442.

Will took effect before the Revised Statutes; the testator gave his personal estate to his executors in trust to pay certain annuities from the income, an annuity to his son for life, and if he should marry and die before his wife then to pay her annuity for life and accumulate the surplus income, and on the death of the son to set apart and secure the annuity to his widow surviving him, and the residue to be transferred to all or such one or more of the son's children or grandchildren at such time and age and in such manner and in such shares and proportions as the son should appoint by

will, and in default of his appointment, to his children and grandchildren *per stirpes*, and if none, to the testator's brothers and sisters and their issue. The son, having married and died, left a widow and two sons, the eldest being nineteen years of age. By will he directed that one-half the estate should be kept by the trustees until the son became forty-five years of age or his death before that age, applying the income for his benefit, and on his arriving at that age to transfer the capital to him absolutely. If he died before that age to transfer the estate to his next of kin. Like provision was made for the younger son in respect to the other moiety. The will and the appointment by his son were to be construed, in respect to the validity of the latter, as if they were contained in the same instrument and were the single disposition of the estate and the appointment was void as suspending the absolute ownership of the personalty bequeathed beyond the period allowed before the revised statutes took effect, and the will and the appointment combined tied up the personalty during several specified lives and for more than twenty-five years thereafter. *Thomson* v. *Livingston*, 4 Sandf. 539.

In computing the period of suspension, the lives of annuitants are not to be added to the term of the minority. When the will directs that capital shall be set apart for the payment of annuities there must be a distinct share of the sum for each annuity, and hence the suspension can not exceed a single life in addition to the minority. *Lange* v. *Ropke*, 5 Sandf. 363.

An express trust suspended during minority is determined by the death of the minor under age; if it is to continue during more than two minorities it is void as suspending alienation beyond two of the lives upon which it depended; but it is valid where it appears that it can not exceed a single minority. *Lange* v. *Ropke*, 5 Sandf. 363.

Where the trust unduly suspends the power of alienation it is void, but its invalidity as a power in trust never deprives the beneficiary of the benefits intended. *Lange* v. *Ropke*, 5 Sandf. 363.

See this case followed in Lang v. Wilbraham, 2 Duer, 171.

M. devised his estate to his wife "for her own behoof and the maintenance of his children, and upon his son John (the youngest child) becoming of age, the whole estate to be equally divided among his seven children (naming them)", and that should death take either from the world, it should be equally divided among his survivors. This suspension could not exceed a single life in being at the death of the testator. *McGowan* v. *McGowan*, 2 Duer, 57.

Direction to trustees to invest and from the interest accruing during twelve years pay legacies to certain religious societies unduly suspended absolute ownership. *Matter of Starr*, 2 Duer, 141.

Will gave the testator's widow a life estate in lands at M. and to his three children "an equal undivided one-third portion each of all my real estate at F," and after the wife's death "each one-third portion of the estate left to my wife during her life," and provided that if either of his two sons should "die leaving a widow" the latter should use the interest of the estate or money left to the son alone, the principal, on her death, to go to the son's children. The testator's wife died before him. Each son took a life estate; the second intended life estate to the son's widow was for the son's issue and might be a person not in being at the testator's death, and therefore the limitation over on the widow's death was void, and the testator died intestate as to the residuum after each son's life estate, and the same would therefore descend to whoever were testator's heirs at the time of the death of the sons respectively. *Stevens* v. *Miller*, 2 Duer, 597.

Devise to executors in trust to pay rents to father for life and after his death to pay

23. SUSPENSION OF POWER OF ALIENATION OR OF ABSOLUTE OWNERSHIP.

an annuity of $3,000 to his mother for life, and the residue to his sister M., and after the death of mother to pay the whole income to the sister during life, and after the decease of father, mother and sister to pay the income to three children of his sister (naming them) as soon as the youngest should attain the age of twenty-one years, during their lives. As soon as the youngest child, or any of them, should attain the age of twenty-one years to sell the property and divide the proceeds among the children of the children named in the will, as specified. The devise to the executors was void as an entirety, or valid only during the lives of the father and sister of the legatee, and upon either supposition the children of the sister became entitled upon her death, as her heirs at law, to the property. *O'Brien* v. *Mooney*, 5 Duer, 51.

Devise in trust to apply rents as may be necessary for the support and maintenance of wife during her life and divide the residue among his three children named in the will during their lives. Two only of the children survived the testator. There was no suspension beyond the lives of the two children living at the testator's death. The provision for the wife was in the nature of an annuity and therefore a legacy and within the meaning of subdivision two of section 55 of the statute of uses and trusts, and it was to this subdivision of section 55 that the trust (created for the use specified) must be referred. *Griffen* v. *Ford*, 1 Bos. 120.

The words "on my youngest child attaining the age of twenty-one years" were construed as if the name of the youngest living at the testator's death were inserted. It was held that whether the words be read thus or as intending the youngest who should attain majority, was not material to the validity of the will, for in either case the remainder over in the case of a child dying without issue before majority of the youngest child would be a future estate vested as to the person, but contingent as to the event which, by the revised statutes, would not be inalienable; so there was no illegal suspension of the power of alienation and the executor's agreement of sale after the youngest child attained majority could be inforced against the purchaser under the facts of the case as presented. *Eels* v. *Lynch*, 8 Bosw. 465.

Direction that executors invest a sum in the purchase of real estate in their own names in trust and apply income for support of widow during life and support and education of two infant children until they became of age, unduly suspended power of alienation. Such a provision is not valid by a subsequent provision that upon the death of the widow the sum so directed to be invested should become residuary estate. *Scott* v. *Monell*, 1 Redf. 431.

Testator, by the second clause of his will, gave to his wife the net income of his property for her life and after her death to three children in equal shares for life, the principal after their death to grandchildren; by the third clause he gave certain legacies payable out of the income, and by the fourth clause appointed a trustee to carry the will into effect. So much of the second clause as suspended the absolute ownership was void and so much of the same clause as bequeathed income to the wife was inseparable from the illegal portion and failed with it; the remainder of the will including bequests in the third clause were valid, and in other respects the testator died intestate. *Richards* v. *Moore*, 5 Redf. 278.

Testator gave the residue of his estate in trust to pay one-sixth of the net income equally to each of his six descendants for life and on the death of any one of them to transfer his share absolutely to his issue, or in default thereof, to the survivor of them *per stirpes*. There was no suspension of the absolute right of ownership or power of alienation. *Dickie* v. *Van Vleck*, 5 Redf. 284.

A will created a trust for the support of widow during life and for the support of infant children, and directed accumulation of surplus income until youngest child arrived at age, each child receiving at his majority his surplus accumulation, but no

division of the principal fund was to take place until the widow's death and majority of the youngest child. The trust and suspension were undue, but a direction for the accumulation of the income of A.'s share until B. should arrive at age was bad. *Estate of Ruppert*, Tucker, 480.

A testator gave his wife certain legacies and the income of certain leasehold property for her support and the support of his minor children and directed that a house and lot be sold and one-half the income of the proceeds be paid to his wife until his youngest child *then* living attained majority, and that the other one-half of such income accumulate and that the entire principal and accumulation be divided "between my said children who shall be *then* living and the lawful issue of any who may have died leaving children, equally when my youngest child *then* living shall be twenty-one years of age, and in case any of my said children shall die before my youngest child *then* living shall be twenty-one years of age, leaving lawful issue, such issue shall take the share of his deceased parent." Six children survived the testator.

On an application during the minority and lifetime of three of them by the widow to compel payment of the portion of the trust fund for the infants' support, the adult children not being made parties, it was held that the order must be refused for lack of necessary parties, viz., the adult children, who, if alive at the attainment of majority by the youngest child, would be entitled to share in the funds, and the possible issue of such children as should die before such an event, whose right, during the life of the trust, was not extinguishable by any consent or waiver; and that as to whether the time intended in the words "youngest child *then* living" was that of testator's death so as to entitle at least one infant to an advance from the funds, or that of an attainment of majority by such children as should in fact live to be twenty-one years of age and be the youngest child then living, thus avoiding the statute as to accumulations, *quære*. *Schmitt* v. *Kahrs*, 1 Dem. 114.

Testator directed that after the payment of certain legacies his executors should deposit the remaining proceeds of his estate in the bank and after the expiration of fifteen years from his death the same should be divided among his four grandchildren named, share and share alike, and in the case of the death of either of the grandchildren before such time, its share should be appropriated to its funeral expenses. There was no illegal suspension as, at the death of the testator, one equal undivided one-fourth part of the property vested in each grandchild, and the term of years mentioned by the testator was not absolute but qualified, so that as to each share it must be determined at the end of the life of the legatee entitled to it. *Clancy* v. *O'Gara*, 4 Abb. N. C. 268.

Testator, dying in 1858, left surviving, his widow Sarah and two sons, Henry and William M. He made the widow executrix and gave her all his estate during her natural life, or so long as she remained his widow, and provided that in case of her marriage that thereupon she should receive $3,000, and the possession and management of the estate should pass to his sons subject to the following restrictions: "The principal to remain entire until my son William M. shall have reached the age of forty years, which will be in 1866; should both my sons die before their mother, leaving no children, then at their death the estate shall be sold and the proceeds divided into two equal parts, one-half to my widow to be distributed as she may have by will directed, and the other half to be shared equally by" two sisters named. Henry died in 1863 unmarried and without issue and William M. died October, 1869, unmarried and without issue, and the widow died in 1871. It was the intention to provide that in case Sarah remarried and William M. lived until he was forty years of age, the estate should not be sold until he should arrive at that age, and the limitation was only intended to apply in case William M. attained the age of forty years, and such limita-

tion did not unduly suspend the absolute power of alienation, for, if it had been intended that the limitation should extend to 1866 (which would be within the statute) William M.'s name would not have been mentioned. *American Bible Society* v. *Stark*, 45 How. Pr. 160.

A trust term will be implied where there were directions to sell real estate and convert all the testator's property into money, invest the proceeds for a term of years for the purpose of accumulation and then pay specified legacies and divide the residue, if any, among other legatees, and the trustees would take legal title.

Where a trust was impliedly given to executors it was not sustained where it was limited for five or ten years.

Legacies dependent upon a void trust fell with it. Gifts in one clause of a will being separable from void legacies and from a void trust scheme, may be sustained since the statute against perpetuities, only where it is for estates limited to take effect, after a prescribed limit. *Bean* v. *Bowen*, 47 How. Pr. 306.

A gift in a will to the poor of the town of Scriba was on impossible conditions and failed.

A bequest "to my wife's father and mother each $300 per year, and after that the same to my wife M. for and during her life" was a valid annuity to each as to the father and mother, and upon their decease, respectively, the widow took the amount bequeathed to each annuitant during life. *Matteson* v. *Matteson*, 51 How. Pr. 276.

The testator gave to his widow M. one-half of all the income of his estate for a term of fifty years from his decease to use as she thought proper. As it only gave her the income and not the *corpus* it did not unduly suspend the power of alienation. *Matteson* v. *Matteson*, 51 How. Pr. 276.

A will provided as follows: "I do hereby give and bequeath the income, or incomes, arising from all my estate, to my children living at the time of my decease, to have and to hold the same during the term of each of their natural lives, and at the decease of my said children I give and bequeath to my grandchildren all my said real estate, share and share alike, to have and to hold the same forever. And it is my will and desire that my said real estate shall not be sold during the lives of said children." The absolute power of alienation was unduly suspended, as the testatrix left her surviving four children and several grandchildren, and there was a complete division of all the income of all the real estate to these four children to the end of the life of the survivor of them, and the real estate was inalienable before the death of such last survivor, upon which event the devise to the grandchildren was to take full effect, and the grandchildren could not make an effectual alienation for the reason that it could not be ascertained, until the death of the surviving child of the testatrix, who would eventually take the estate, and as there was nothing in the will which would exclude grandchildren born after the death of the testatrix from participating in the devise of the real estate. *Morris* v. *Porter*, 52 How. Pr. 1.

Testator gave the income of his estate to his four daughters, to be divided between them equally "during their and each of their natural lives, with remainder to their respective children and to their respective heirs." The will afterwards provided that if either daughter should die without issue, the share of such deceased daughter should be divided between the survivor or survivors of them, share and share alike. The disposition was void within the statute of perpetuities, as there was no division of the estate into shares, and the real estate vested in the heirs at law, subject to the life estate of the wife. *Monarque* v. *Regua*, 53 How. Pr. 438.

A testator gave to his three minor children portions of his estate, to be paid to them when they should severally attain the age of twenty-one years, and provided that in case of the death of either child before arriving at that age without issue, its share

should go to the survivors or survivor of the children and the issue of a deceased child, and afterwards, in the will, the testator gave to his brothers and sisters the shares of his children in the event that they should all die without issue before arriving at the age of twenty-one years. The gifts to the brothers and sisters depended upon the termination of more than two lives and was void, but such gifts could be dropped without disturbing the valid dispositions of the will. *Thomson* v. *Thomson*, 55 How. Pr. 494.

Testator left surviving him a wife and brothers and sisters, and by the fifth clause of his will gave his real and personal estate to his wife and two other persons, as executors in trust, to collect the rents and from the proceeds, for six years after his death, to pay bequests to the wife, brothers and sisters, and apply the balance of the income to the payment of incumbrances and taxes on the property, and at the end of six years to sell all his estate and divide the proceeds among his heirs and next of kin. The clause attempted to suspend the power of alienation for an absolute term and was void, and the property descended to the testator's heirs at law. The whole trust estate and the remainder limited upon it were void. *Gano* v. *McCunn*, 56 How. Pr. 337.

A trust created over four-fifths of the testator's estate and the proceeds to be continued until the death of the testator's mother and three sisters, was invalid, and the testator died intestate with respect thereto, but the gift of the other one-fifth was held to be suspended for a single life and was valid and separable from the void provision. *Giraud* v. *Giraud*, 58 How. Pr. 175.

Where a trust was void within the statute of perpetuities on account of the suspension for more than two lives, the fact that the persons named died during the testator's lifetime does not cure the invalidity of the devise. *Odell* v. *Youngs*, 64 How. Pr. 56.

See criticisms of this case, Gray's Perpetuities, 164. Chaplin's Perpetuities, 53.

Testator directed one-half the interest from his residuary estate to be paid to A. during life and one-half to B. during life; on the death of A. his share should be divided between C., D. and E., share and share alike, and upon the death of B. her share of the income should also be divided between C., D. and E., for life. At the death of all these beneficiaries the estate should be given to F., if of age, and if he were a minor, should be held in trust until he arrived at his majority. Although, as a whole, the testator's disposition transgressed the rule against perpetuities, yet the several bequests of income being independent, the invalid portion may be dropped and the residue allowed to stand, so that the provisions to A. and B. are valid, and though there may be doubt as to that for C., D. and E., yet, as upon the death of either, his or her share does not go to the survivors, there is no illegal suspension. The provision for F. is void, and after the termination of the interests in favor of A., B., C., D., and E. the testator died intestate. *Leavitt* v. *Wolcott*, 65 How. Pr. 51.

Three sisters, Margaret, Mary and Sarah, were equal owners of personal property. Margaret died in 1862 and by will devised on the death of her surviving sister her lands to executors in trust, until the sale thereof, at such time as they might deem for the benefit of the estate, and gave them the proceeds of her land and personal estate, not otherwise specifically given, to pay legacies to several charities. Mary, dying in 1865, gave her real and personal estate to her executors after the death of her sister, and the rents of the estate to be sold by them were to be applied to the payment of residuary legacies to charities. The legacies in Margaret's will were made payable within four years from the death of the survivor of the sisters. By a codicil Mary directed the legacies to charities to be paid within two years from the death of her sister. These wills did not offend the statute against perpetuities. *Riker* v. *City of N. Y. Hospital*, 66 How. Pr. 246.

24. LIMITATIONS OF CHATTELS REAL.

Real Prop. L., sec. 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."

1 R. S. 724, sec. 23, Banks's 9th ed. 1791, repealed by Real Prop. L., substantially the same.

25. DISPOSITIONS OF RENTS AND PROFITS.

Real Prop. L., sec. 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."

1 R. S. 725, sec. 36, Banks's 9th ed., 1793, repealed by Real Prop. L., substantially the same.

XI. ACCUMULATIONS.

I. STATUTE RELATING TO REAL PROPERTY, p. 499.
II. STATUTE RELATING TO PERSONAL PROPERTY, p. 501.
III. STATUTES RELATING TO TRUSTS FOR ACCUMULATION, p. 502.
IV. RULES AND REFERENCES TO CASES, p. 502.
V. CASES DIGESTED, 506.

I. STATUTES RELATING TO REAL PROPERTY.

Real Prop. L., sec. 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."

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 R. S. 726, sec. 37, Banks's 9th ed. 1793, repealed by Real Prop. L.

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 accumulation of the rents and profits of real estate, except

such as are herein allowed, shall be void. 1 R. S. 726, sec. 38, Banks's 9th ed. 1793, repealed by Real Prop. L.

Real Prop. L., sec. 52 (L. 1896, ch. 547, sec. 52, taking effect Oct. 1, 1896). "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."

1 R. S. 726, sec. 39 (passed Dec. 10, 1828, took effect Jan. 1, 1830, repealed L. 1896, ch. 547, sec. 300).

Same, except "infants" used for "minor" and the "chancellor" may direct, etc., on application of "guardian."

Real Prop. L., sec. 53 (L. 1896, ch. 547, sec. 53, taking effect Oct. 1, 1896). "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."

1 R. S. 726, sec. 40 (passed Dec. 10, 1828, took effect Jan. 1, 1830, repealed L. 1896, ch. 547, sec. 300), same, except "shall be" used instead of "is" and instead of "are."

EXPLANATORY NOTE TO SEC. 53.

"Sec. 41 (sec. 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 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 interim; 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, 260. A still stronger reason for adopting the section, is furnished by sec. 35 of this Article, which prevents a future estate from being defeated by the determination of the precedent estate before the happening of the con-

tingency, 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, etc., may be, and generally are, preserved to the remaindermen, by the intervention of trustees. But to dispense with the necessity of creating such trustees, is one of the benefits we propose to attain." Reviser's Notes; 3 R. S. 578–9 (2d ed.).

II. STATUTES RELATING TO PERSONAL PROPERTY.

Laws 1897, ch. 417 (Genl. L., ch. 47, took effect Oct. 1, 1897), sec. 1. Short title; definition.—"This chapter shall be known as the personal property law. The term 'income of personal property,' as used in this article, means the income or profits arising from personal property, and includes the interest of money and the produce of stock."

Sec. 4. Validity of directions for accumulation of income. "An accumulation of the income of personal property, directed by any instrument sufficient in law to pass such property is valid:

1. If directed to commence from the date of the instrument, or the death of the person executing the same, and to be made for the benefit of one or more minors, then in being, or in being at such death, and to terminate at or before the expiration of their minority.

2. If directed to commence at any period subsequent to the date of the instrument or subsequent to the death of the person executing it, and directed to commence within the time allowed for the suspension of the absolute ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and to terminate at or before the expiration of their minority.

All other directions for the accumulation of the income of personal property, not authorized by statute, are void; but a direction for any such accumulation for a longer term than the minority of the persons intended to be benefited thereby, has the same effect as if limited to the minority of such persons, and is void as respects the time beyond such minority."

1 R. S. 773, 774, secs. 3, 4, Banks's 9th ed. N. Y. R. S. pp. 1857, 1858 (took effect Jan. 1, 1830, repealed by L. 1897, ch. 417).

Sec. 5. Anticipation of directed accumulation. "When a minor, for whose benefit a valid accumulation of the income of personal property has been directed, shall be destitute of other sufficient means of

support or education, the supreme court, at special term in any case, or, if such accumulation shall have been directed by a will, the surrogate's court of the county in which such will shall have been admitted to probate, may, on the application of such minor or his guardian cause a suitable sum to be taken from the moneys, accumulated or directed to be accumulated, to be applied for the support or education of such minor."

1 R. S. 774, sec 5, Banks's 9th ed. N. Y. R. S. 1858, am'd L. 1891, ch. 173, repealed L. 1897, ch. 417.

III. STATUTES RELATING TO TRUSTS FOR ACCUMULATION.

Real Prop. L., sec. 76. Purposes for which express trusts may be created.—"An express trust may be created for one or more of the following purposes:

* * * * * *

"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."

1 R. S. 728, sec. 55, Banks's 9th ed. p. 1797, repealed by Real Prop. L. "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."

IV. RULES AND REFERENCES TO CASES.

1. An accumulation may be directed for the benefit of one or more minors in being.

Kilpatrick v. Johnson, 15 N. Y. 322, 325.

2. An accumulation may be directed for the benefit of minors to come into being.

Manice v. Manice, 43 N. Y. 303, 374, 376; Mason v. Mason's Exrs., 2 Sandf. Ch. 432, aff'd 2 Barb. 229; see Kilpatrick v. Johnson, 15 N. Y. 322, 325.

3. An accumulation can not begin before the minor for whose benefit it is created is in being.

Manice v. Manice, 43 N. Y. 303, 376; Kilpatrick v. Johnson, 15 id. 322; Haxtun v. Corse, 2 Barb. Ch. 518; Cook v. Lowry, 95 N. Y. 103, 107; Cochrane v. Schell, 140 id. 516.

4. Such accumulation must commence and end within the time permitted for the vesting of future estates, viz., two lives in being at the creation of the estate, except as stated in the next rule, and the rules relating to the vesting of future estates are applicable.

Jennings v. Jennings, 7 N. Y. 547; Harris v. Clark, id. 242; Manice v. Manice, 43 id. 305, 375; Garvey v. McDevitt, 72 id. 556; Smith v. Edwards, 88 id. 223; Hobson v. Hale, 95 id. 588; Rice v. Barrett, 102 id. 161; Clemens v. Clemens, 60 Barb. 366; Thompson v. Clendining, 1 Sandf. Ch. 387; Matter of Starr, 2 Duer, 141; Mat-

ter of Masterton, 4 Sandf. 442; Wells v. Wells, 30 Abb. N. C. 225; Bean v. Bowen, 47 How. Pr. 306.

5. In the case of real property, in the single instance provided for in former section sixteen, now a part of section thirty-two, the period of two lives is extended by an additional minority.

Manice v. Manice, 43 N. Y. 305, 374–6.

6. But such provision for an additional minority does not apply to personal property.

Harris v. Clark, 7 N. Y. 242; Manice v. Manice, 43 id. 305, 381–3.

7. Such accumulation must also terminate at or before the expiration of the minority of the person for whom the accumulation is created.

Harris v. Clark, 7 N. Y. 242; Cook v. Lowry, 95 id. 103, 107; Matter of Hoyt, 71 Hun, 13; Estate of Ruppert, Tucker, 480.

8. An accumulation is only permitted for living objects, and hence a direction for an accumulation becomes inoperative upon the death of the minor.

Goebel v. Wolf, 113 N. Y. 405, 415; Bryan v. Knickerbacker, 1 Barb. Ch. 409.

9. When the period of accumulation ceases, the accumulated fund must be released from further restraint and paid over to the person for whose benefit the accumulation is directed.

Pray v. Hegeman, 92 N. Y. 508, overruling Meserole v. Meserole, 1 Hun, 66.
See Robison v. Robison, 5 Lans. 165.

10. But a direction for an accumulation for a longer term than during the minority of the beneficiary shall be void only as to the time beyond such minority.

Gilman v. Reddington, 24 N. Y. 9; Hull v. Hull, 25 id. 647; Hetzel v. Barber, 69 id. 1; Schermerhorn v. Cotting, 131 id. 48, 61; Forsyth v. Rathbone, 34 Barb. 388.

11. But this only applies in case the direction for accumulation is otherwise valid.

Simpson v. English, 1 Hun, 559; Bean v. Bowen, 47 How. Pr. 306.

12. An accumulation must be solely for the benefit of an infant.

Harris v. Clark, 7 N. Y. 242; Kilpatrick v. Johnson, 15 id. 322; Pray v. Hegeman, 92 id. 508; Cook v. Lowry, 95 id. 103; Barbour v. DeForrest, id. 13; Schermerhorn v. Cotting, 131 id. 48; Cochrane v. Schell, 148 id. 516; Matter of Dey Ermand, 24 Hun, 1; McCormack v. McCormack, 60 How. Pr. 196; McGrath v. Van Stavoren, 8 Daly, 454; Gilman v. Healy, 1 Dem. 404; Boynton v. Hoyt, 1 Denio, 53; King v. Rundle, 15 Barb. 139; Matter of Sands, 25 N. Y. St. Rep. 850; Bryan v. Knickerbacker, 1 Barb. Ch. 409; Hawley v. James, 16 Wend. 61, 63.

13. Accumulation to pay off an indebtedness.

Matter of Hoyt, 71 Hun, 13; Bean v. Hochman, 31 Barb. 78; Morgan v. Masterton, 4 Sandf. 442; Wells v. Wells, 30 Abb. N. C. 225.

To erect a statue or building.

Wilson v. Lynt, 30 Barb. 124.

For the benefit of a lunatic.

Craig v. Craig, 3 Barb. Ch. 76.

To found a school.

Yates v. Yates, 9 Barb. 324.

14. Discretionary power to trustees to make a disbursement of income for the preservation or efficiency of trust property, is valid.

Matter of Nesmith, 140 N. Y. 609.

15. A mere contingent limitation of an estate in favor of a minor on his coming of age, will not sustain a trust or direction for accumulation during his minority.

Manice v. Manice, 43 N. Y. 305, 377; Pray v. Hegeman, 92 id. 508, 519; Matter of Estate of Hoyt, 71 Hun, 13.

16. Condition—payment of accumulated income on.

Hull v. Hull, 24 N. Y. 647; Schettler v. Smith, 41 id. 328.

17. Annuities and legacies—ascertainment of amount of, by adding principal to amount of interest which should have been paid to legatee during minority.

Titus v. Weeks, 37 Barb. 136.

18. A legacy given with direction that the income shall accumulate, may be valid, although the direction for accumulation be void.

Williams v. Williams, 8 N. Y. 525; Kilpatrick v. Johnson, 15 id. 322; Dodge v. Pond, 23 id. 69; Pray v. Hegeman, 92 id. 508; Forsyth v. Rathbone, 34 Barb. 388; McCormack v. McCormack, 60 How. Pr. 196; Lange v. Ropke, 5 Sandf. 363; Hawley v. James, 16 Wend. 62, 63; Wells v. Wells, 30 Abb. N. C. 225.

Legacies limited to take effect after a too remote period of accumulation, from the accumulated fund, are void.

Bean v. Bowen, 47 How. Pr. 306.

19. Annuities and legacies—payment of from income.

Dodge v. Pond, 23 N. Y. 69; Radley v. Kuhn, 97 id. 26, 31; Cochrane v. Schell, 140 id. 516; Mason v Mason's Exrs., 2 Sandf. Ch. 477; 2 Barb. 229; Bean v. Bowen, 47 How. Pr. 306.

20. Property given in perpetuity to religious or charitable institutions.

Williams v. Williams, 8 N. Y. 525; Clemens v. Clemens, 60 Barb. 366; Matter of Starr, 2 Duer, 141.

21. Gift to municipal officers.

Iseman v. Myres, 26 Hun, 651.

22. Conflict of laws.

Clemens v. Clemens, 60 Barb. 366.

23. The fund arising from an accumulation can not be held as capital under a trust after the beneficiary reaches his majority.

Brandt v. Brandt, 13 Misc. 431; Pray v. Hegeman, 92 N.Y. 508; Barbour v. DeForrest, 95 id. 13, 16.

See, Meserole v. Meserole, 1 Hun, 66, overruled by Pray v. Hegeman, 92 N.Y. 508;

Greer v. Chester, 62 Hun, 329; Tweddell v. N. Y., L. & T. Co., 82 id. 602; Robison v. Robison, 5 Lans. 165.

24. If the division of an estate be postponed, an accumulation arises by operation of law, if there be no disposition of the rents and profits.

Vail v. Vail, 4 Paige, 317; 7 Barb. 226; Converse v. Kellogg, id. 590.

25. Whether direction for accumulation will be implied.

Kilpatrick v. Johnson, 15 N. Y. 322; Dodge v. Pond, 23 id. 9; Cochrane v. Schell, 140 id. 516; Gilman v. Reddington, 24 id. 9; Hendricks v. Hendricks, 3 App. Div. 604; Craig v. Craig, 3 Barb. Ch. 76.

26. When implied trust to accumulate income was void.

Haxtun v. Corse, 2 Barb. Ch. 506; Craig v. Craig, 3 id. 76.

27. Whether in the case of several minors the accumulation upon the share of each terminated at his majority.

Savage v. Burnham, 17 N. Y. 561.

28. Income accruing without directions contained in the will.

Livingston v. Tucker, 107 N. Y. 549; Hendricks v. Hendricks, 3 App. Div. 604; Craig v. Craig, 3 Barb. Ch. 76.

See Beardsley v. Hotchkiss, 96 N. Y. 201, 217, 218.

29. Income accruing by force of judicial proceedings.

Livingston v. Tucker, 107 N. Y. 549.

30. Provision for payment of income to an infant when of age did not create an accumulation.

Horton v. Cantwell, 108 N. Y. 255.

31. Fact that income is not needed for the support of a *cestui que trust*, and may in fact be invested and accumulated, although there be no direction therefor, is not a case of accumulation contemplated by the statute.

Horton v. Cantwell, 108 N. Y. 255, 265; Hendricks v. Hendricks, 3 App. Div. 604; Craig v. Craig, 3 Barb. Ch. 76; Livingston v. Tucker, 107 N. Y. 549; Gasquet v. Pollock, 1 App. Div. 512.

32. Where direction for accumulation became inoperative as beneficiaries were adults at the testator's death.

Oxley v. Lane, 35 N. Y. 340.

33. Direction to accumulate income on a sum until it reached another fixed sum.

Manice v. Manice, 43 N. Y. 305; King v. Rundle, 15 Barb. 139; Yates v. Yates, 9 id. 324; Wells v. Wells, 30 Abb. N. C. 225.

34. Using income to restore depleted or failing principal.

Livingston v. Tucker, 107 N. Y. 549; Grant v. Grant, 3 Redf. 283.

35. Where the infant died after arriving at majority, the fund accumulated to the time of such death devolves upon his heirs or next of kin.

Barber v. DeForrest, 95 N. Y. 13; Pray v. Hegeman, 92 id. 508; 98 id. 351; Gilman v. Healy, 1 Dem. 404.

36. And so if the infant die under age and there be no other disposition of the fund by the creator of it, it devolves on the infant's heirs or next of kin.

Goebel v. Wolf, 113 N. Y. 405; Smith v. Parsons, 146 id. 116; Gilman v. Healey, 1 Dem. 404; Draper v. Palmer, 27 St. Rep. 510.

37. The testator may provide that in case of the death of the infant before majority, the accumulated fund shall pass to the other beneficiaries.

Roe v. Vingut, 117 N. Y. 504, 217; Smith v. Parsons, 146 id. 116; Willets v. Titus, 14 Hun, 554; Gilman v. Healey, 1 Dem. 404, 408; Bolton v. Jacks, 6 Robt. 166.

38. Where there is no direction or an invalid direction for the accumulation of interest upon money, or of the rents of real property, the income belongs to the persons presumptively entitled to the next eventual estate in the principal.

Kilpatrick v. Johnson, 15 N. Y. 322; Dodge v. Pond, 23 id. 69; Gilmore v. Reddington, 24 id. 9; Schettler v. Smith, 41 id. 328; Manice v. Manice, 43 id. 305 (meaning of next eventual estate); Embury v. Sheldon, 68 id. 227; Pray v. Hegeman, 92 id. 508; Cook v. Lowry, 95 id. 103 (personal property); Radley v. Kuhn, 97 id. 26, 31; Delafield v. Shipman, 103 id. 463, rev'g 34 Hun, 514; Matter of Crossman, 113 N. Y. 503; Cochrane v. Schell, 140 id. 516; Matter of DeyErmand, 24 Hun, 1; Gould v. Rutherford, 79 id. 280; McGrath v. Van Stavoren, 8 Daly, 454; Grant v. Grant, 3 Redf. 283; Matter of Sands, 20 N. Y. St. Rep. 850; Robison v. Robison, 5 Lans. 165.

39. The last rule is applicable in respect to income of personalty only when such income is derived from some specified fund, or is distinguishable from that of all the other property; otherwise the income not validly disposed of goes to the next of kin.

Dodge v. Pond, 23 N. Y. 69.

40. When accumulated fund or surplus income vested in heirs at law or next of kin.

Rice v. Barrett, 102 N. Y. 161; Hendricks v. Hendricks, 3 App. Div. 604; Haxtun v. Corse, 2 Barb. Ch. 506; Yates v. Yates, 9 Barb. 324.

41. A *cestui que trust* for whose benefit income is to be applied has the title of any income not needed for necessary expenses.

Gasquet v. Pollock, 1 App. Div. 512; Hendricks v. Hendricks, 3 id. 604.

42. Although direction for accumulation be void, other independent provisions of the will are not affected.

Lange v. Ropke, 5 Sandf. 363; Bolton v. Jacks, 6 Robt. 166; McGrath v. Van Stavoren, 8 Daly, 454; Grant v. Grant, 3 Redf. 283; Schermerhorn v. Cotting, 131 N.Y. 48, 61; Wells v. Wells, 30 Abb. N. C. 225.

V. CASES DIGESTED.

Where the scheme of the will was that the income of the testator's estate, real and personal estate, after payment of debts, should be applied to the clothing and maintenance of his wife, and the clothing,

maintenance and education of his children by her, and the surplus was to be invested by the wife as trustee for the children; the property was all to be kept together, undivided, until the eldest surviving child, by his present wife, should become twenty-one years old, and then to be appraised, and his or her equal share apportioned, and paid if required; *held*, the statute (1 R. S. 723, sec. 15) was contravened because the three eldest of the four children living at the testator's death might die before the fourth arrived at her majority, and thus the estate would be kept together and the power of alienation be suspended during three lives. *Jennings* v. *Jennings*, 7 N. Y. 547.

Testamentary dispositions by which either real or personal estate is set apart, a portion of the income of which is to accumulate until the happening of a contingency which may not occur at the termination of two lives in being at the death of the testator, are in violation of the Revised Statutes and void.

If of *real estate* they are not authorized by secs. 55 and 37, tit. 2, ch. 1, part 2, and are void as suspending the *absolute power of alienation* for more than two lives. 1 R. S. 723, sec. 15.

If of *personal estate* they are in violation of tit. 4, ch. 4, part 2, as suspending the *absolute ownership* for more than two lives, and also as directing an accumulation not limited in continuance to the minority of the ultimate beneficiaries. 1 R. S. 773, secs. 1, 3, 4.

An accumulation of either real or personal estate which is not for the benefit of minors, and to terminate with their minority, is void.

Where the material provisions of a will are illegal and they can not be separated from the other parts without defeating the testator's general scheme, the whole will be declared void, and the property be disposed of as if the testator had died intestate.[1]

The testator left a legacy of $30,000 to trustees, out of which to pay an annuity of $700 to his sister for life, with remainder to her daughter for life, and to accumulate the residue of the income until the decease of the daughter, when the fund should go to her issue, and in default of issue, to a nephew on his attaining his full age, or to his issue if he died before his full age, and in default of issue, with remainder over to other beneficiaries.

Construction:

This was void, both as suspending the absolute ownership for more than two lives, and as providing for an accumulation not to terminate with the minority of the beneficiaries.

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[1] See pp. 380, 407.

Same will:

He left another legacy of $30,000 to the trustees, out of which to support and educate his nephew and to accumulate the residue of the income and to pay it over to him on his attaining the age of twenty-one years, and in case of his death before that age to his issue, and in default of issue, *then on the death of Lucy Harris* to her issue if any, and if she died without issue, over to other beneficiaries.

Construction:

This was void for the same reasons.

Same will:

He left three other legacies of $5,000 each, to accumulate during the minorities of the legatees and to be paid them on their attaining their full age, but in case of either of their deaths before their full age, the legacies were to accumulate until the death of his sister and her daughter and then be divided between the issue of the daughter and his nephew, with remainder over.

Construction:

This was void for the same reasons.

Harris v. *Clark*, 7 N. Y. 242.

The provisions of the Revised Statutes, "Of accumulations of personal property and of expectant estates in such property," do not affect property given in prepetuity to religious or charitable institutions.

Where a legacy is given to a religious corporation for a purpose authorized by law, but with a direction that it accumulate until it reaches a certain sum before its income shall be expended, the *direction* only is void, and the legacy is not defeated. *Williams* v. *Williams*, 8 N. Y. 525, digested p. 854.

Citing, Lade v. Holford, 1 Wm. Blackstone R. 428; 3 Burr, 1416, S. C.; Thompson v. Thompson, 1 Collier, 381, 400; Lang v. Ropke, 5 Sandf., S. C. R., 363, 371; DeKay v. Irving, 5 Denio, 646; Root v. Stuyvesant, 18 Wend. 257.

A testamentary gift to children, made to take effect upon the termination of a particular estate, or upon the death of a third person, is a bequest to children as a class, and embraces not only the objects living at the death of the testator, but all who may subsequently come into existence before the period of distribution. Therefore, a direction in a will for the accumulation of the interest upon money, during the life of the testator's daughter and that the interest so accumulated should, on the death of the daughter, be paid to her children, is void under 1 R. S. 773, sec. 3, because not made for the benefit of persons in being at the time

of the testator's death, and because the children are not required by the terms of the will to be minors at the death of the testator, or while the interest is accumulating.

Such direction is not the less void because it makes the duty of accumulating the interest contingent upon the lives of the husbands of the testator's daughters, and their ability to support and maintain their wives.

A void trust for the accumulation of the income of personal property does not invalidate a bequest of the principal where the direction for such accumulation does not involve an illegal suspension of the absolute ownership. The *direction* only is void, and the income received belongs to the persons presumptively entitled to the next eventual estate in the principal of the fund. *Kirkpatrick* v. *Johnson*, 15 N. Y. 322.

A trust provided for no unlawful accumulation, as it ceased as to each share upon the sons and daughters attaining their majorities, respectively. *Savage* v. *Burnham*, 17 N. Y. 561, digested p. 415.

A testator, without violating any law, may not only suspend the absolute ownership of his estate during the continuance of any two lives in being at his death, but may dispose of the income annually as it accrues during this period of suspension. He may also give vested legacies, and provide for their payment at future definite periods. It is no violation, therefore, of the statute against accumulations, for a testator, after rendering his estate inalienable for two lives, to give pecuniary legacies, payable at future periods, in such manner as to show that he intended they should be paid exclusively from income as it should accrue, leaving the corpus of the estate to pass unimpaired to the residuary legatee.

If the legacies are so adjusted as to warrant the inference that the testator intended an accumulation of income, although this implied direction to accumulate is void, yet no provision of the will which can be executed independently of it is thereby affected, but it is the duty of the executors to distribute the surplus of income accruing in any year among the persons entitled thereto.

The statute (1 R. S. 726, sec. 40) giving, to the persons presumptively entitled to the next eventual estate, income accruing during a suspension of the absolute ownership, and of which no disposition or valid accumulation is directed, is applicable in respect to the income of personalty only where such income is derived from some specific fund, or is distinguishable from that of all other property.

Accordingly where, as in this case, no interest was given to the residuary legatees in that portion of the estate devoted to the payment of specific legacies, and the latter are payable out of both income and

principal, the surplus accruing in any year belongs not to the residuary legatees, but to the next of kin.

The executors had no power to anticipate the payment of legacies on a rebate of interest during the period in which, according to the testator's intention, the legacies are to be paid from income.

Such bequest is, it seems, also void for indefiniteness as to the object, and because, after the application of the money by the executors, no provision is made as to the ownership of the property into which it may be converted, or for the substitution of competent trustees in place of the executors. *Dodge* v. *Pond*, 23 N. Y. 69; 28 Barb. 121.

The will directed a certain portion of income to be accumulated, without restricting the period to the minority of the children. This provision being void as to the income after the termination of such minority, the surplus goes, it seems, to the children as presumptively entitled to the next eventual estate. *Gilman* v. *Reddington*, 24 N. Y. 9. See Kilpatrick v. Johnson, 15 N. Y. 322.

Bequest of personal property to executors in trust to pay an annuity of five hundred dollars, to be increased in their discretion to one thousand dollars, to the testator's son till he attained the age of thirty, and to pay all that should remain of principal and accumulated income to the son upon the condition that he should then, in the opinion of the executors, be solvent. The executors renounced.

Construction:

The provision for the accumulation of income during the interval between the son's majority and the age of thirty years is void, and the income for that period goes as in case of intestacy. *Hull* v. *Hull*, 24 N. Y. 647.

The residue of the estate, subject to bequest, was given to four sons, but to be kept until the youngest of them, or youngest survivor of them, should become of age, then the use of personal to be paid them, but principal to be forborne for twenty-five years after testator's death, and the real estate to be entered upon and enjoyed, etc. At testator's death the sons were all adults and the direction for accumulation became inoperative. *Oxley* v. *Lane*, 35 N. Y. 340.

The testator vested in his executors a portion of his property, in trust, to pay a fixed sum annually from the rents and an income thereof to his daughter, until her marriage; and on her marriage, in case she do not marry one S., or on the decease of said S., to pay her the whole of said rents and income during her life; and in case she marry the said S., the annuity to cease during her said coverture; the daughter had been paid, for several years, the said fixed sum annually,

and then married the said S. There being no provision for the accumulation of the surplus of the rents and income of the said property over and above the said annual sum, previous to her marriage or the death of S., she was entitled to the same under the Revised Statutes (1 R. S. 726, sec. 40) as the person (before her marriage with S.) presumptively entitled to the next eventual estate in the income. Daniels and Lott, JJ., *contra*. *Schettler* v. *Smith*, 41 N. Y. 328.

Direction to accumulate income of $5,000 until it should be $30,000, is of doubtful validity; the direction is precatory and raises no trust. *Manice* v. *Manice*, 43 N. Y. 305, 387.

By "next eventual estate" the statute does not mean the ultimat estate, but the next estate that will arise upon the happening of the event that shall terminate the preceding estate, during which the accue mulation was to take place. *Manice* v. *Manice*, 43 N. Y. 305, 385.

A mere contingent limitation of an estate in favor of a minor on his coming of age would not be sufficient to sustain a trust or direction for accumulation during his minority.

If the estate limited to the infant is contingent, an accumulation of the income during his minority can not be said to be for his benefit.

But a devise of lands to an infant when he shall become of age, with remainder over, if he die under age, creates a vested estate in the infant, defeasible by condition subsequent, and this is a sufficient title to sustain an accumulation during the minority of such infant, as being for his benefit. *Manice* v. *Manice*, 43 N. Y. 305, 377–379.

Devise to C. for life, remainder to C.'s child, unborn at creation of estate, to C.'s issue if it die under age leaving any. A direction to accumulate the rents during the minority of such unborn remainderman and for his benefit, if he should be in being and an infant when the precedent estate ceases and the accumulation begins, is authorized; but an accumulation for the benefit of an unborn child, to commence before its birth, is never permitted. *Manice* v. *Manice*, 43 N. Y. 305, 374–6.

Upon the assumption that rents and profits were undisposed of, and that no provision was made for their accumulation, they went, by virtue of 1 R. S. 726, sec. 40, to one presumptively entitled to the next eventual estate. *Embury* v. *Sheldon*, 68 N. Y. 227.

Direction for accumulation until a daughter reached the age of twenty-five years was valid only until she arrived of age. *Hetzel* v. *Barber*, 69 N. Y. 1.

Direction to executors to collect rents for four years and then sell land and pay over to B. upon certain trusts, was an attempt to create an active trust and invalid, and could not be maintained as a power in trust. *Garvey* v. *McDevitt*, 72 N. Y. 556.

The testator further directed that $30,000 be "kept invested until my youngest grandchild, now born, or that may hereafter be born before the final distribution of my estate, shall be of full and lawful age," and that his executor should, out of the income thereof, pay for repairs to stones in a cemetery lot, and make up any deficiencies in the funds provided for the payment of legacies, and that they might, from time to time, after five years from the time of his death, make division and distribution of any surplus that might then be in their hands, and also, if they should see fit at the same time, divide and distribute $10,000 of said principal and bonds, thus invested, between his children and grandchildren, and that the remaining $20,000 should be divided among them when the youngest grandchild, born, and that might within twenty years be born, should arrive at full age, or, if a granddaughter, should be sooner lawfully married.

Construction:

The clause involved a violation of the statute against the accumulation of income, and of the statute against the suspension of the absolute ownership of personal property, and, as the part which was good could not be separated from that which was bad, the whole was rejected. *Smith* v. *Edwards*, 88 N. Y. 92, rev'g 23 Hun, 223.

The Revised Statutes (1 R. S. 726, sec. 37; id. 773, sec. 3) authorizing an accumulation of the income of real and personal property for the benefit of minors, requires that the accumulation shall be for the benefit of a minor solely and during his minority, and that, when the period of accumulation ceases, the accumulated funds shall be released from further restraint and paid over to the person for whose benefit the accumulation is directed.

Direction for accumulation during minority, and gift of income of accumulated fund, thereafter to the minor for life and then the principal to others, is void. 1 R. S. 726, sec. 38.

M., by will, gave his residuary estate to his executors, to be divided into shares as specified, a share to be held in trust during the life of each child of the testator who should survive him. After authorizing expenditure of a portion of the rents and profits of such share for the child's support and education, there was a direction that the balance of such income should from time to time be added to the share, and accumulated as principal until the child's majority and thereafter the whole of the income paid quarterly over to the child, and that upon the death of any child the whole of the original share of the one so dying, together with the accumulations, should go to his or her issue, or in default of issue, as provided.

Construction:

The provision for capitalizing the income and paying the income thereof to the child for life and then over, was void; hence, each child took a life estate in the share which would carry the accruing income, and any income accruing during minority belonged to the child and could be reached by his creditor.

Under 1 R. S. 726, sec. 40, providing that when, in consequence of a valid limitation of an expectant estate, there is a suspension of the power of alienation or ownership, during which the rents and profits are undisposed of, they "shall belong to the persons presumptively entitled to the next eventual estate," the provision of the will might be treated as creating an equitable expectant life estate in the same after his arrival at majority, and so constituting the "next eventual estate." *Pray* v. *Hegeman*, 92 N. Y. 508, rev'g 27 Hun, 603.

Overruling, Meserole v. Meserole, 1 Hun, 66; Barbour v. DeForrest, 28 id. 615.

Citing, Hawley v. James, 5 Paige, 318; 16 Wend. 114, 141, 183; Boynton v. Hoyt, 1 Denio, 54; Kilpatrick v. Johnson, 15 N. Y. 326; Manice v. Manice, 43 id. 303; Lang v. Ropke, 5 Sandf. 363; Vail v. Vail, 4 Paige, 331.

NOTE 1. "The statute regulating the accumulation of income of personal property is substantially the same as that relating to the accumulation of rents and profits of land." (513.) (See distinguishing features Manice v. Manice, 43 N. Y. 305, 381–3.)

NOTE 2. "The revisers, as they declare (5 Edm. Stat. 572), intended by section thirty-seven to limit the power of accumulation to one of the four cases specified in the statute of George III, viz., 'during the minority of any person who, under the deed or will directing the accumulation, would then, if of full age, be entitled to such rents and profits.'"

NOTE. 3. "The general policy of our law favors the greatest freedom of alienation of property consistent with the necessities of families, and the making of reasonable provision for the various contingencies which may be expected to arise requiring the postponement of the vesting of estates, and the suspense of the power of alienating the *corpus* of property is permitted only within narrow limits. But the right to direct the accumulation of the fruits and profits of property is much more restricted than the right to control the property itself. It is permitted only in a single case and for a single purpose, viz., during minority, and for the benefit of the minor during whose minority the accumulation is directed. The main purpose of the thirty-seventh section of the statute was not to limit the term of accumulation previously permitted. The legislature intended to uproot the doctrine that the rents and profits of property might be accumulated and the enjoyment postponed, with a single exception. This was accomplished by sections thirty-seven and thirty-eight. The exception in section thirty-seven must be construed in view of the general policy of the legislature, and the particular policy upon which the exception proceeded." (514–515.)

NOTE 4. "The policy and language of the statute require, in order to sustain a direction for accumulation under section thirty-seven, that the accumulation must be for the sole benefit of the minor, and that this can only be true where the accumulated fund is given over to him absolutely when the period of accumulation ceases." (517.)

The provision of the Revised Statutes (1 R. S. 716, sec. 40), declaring that when in consequence of a valid limitation of an expectant estate in lands, there shall be a suspense of the power of alienation or of the ownership, during which the rents and profits shall be undisposed of, and there is no valid direction for their accumulation, such rents and profits shall belong to the person presumably entitled to the next eventual estate, is made applicable to the accumulations of income of personal property by the provision of said statutes (1 R. S. 773, sec. 2), declaring that, save as specified "limitations of future or contingent estates in personal property shall be subject to the rules prescribed * * * in relation to future estates in lands."

The will of L. gave to his executors one-fourth part of his residuary estate, real and personal, to be held in trust during the life of his daughter G., with directions to pay to her the income upon $25,000 thereof, and to invest the residue of the income; upon her death, in case she left issue surviving, he gave the principal and accumulated income to such issue, and in default of issue to his sons. G. married after the death of the testator and is still living; plaintiff is the sole issue of the marriage. In an action for the construction of the will it appeared that a fund had accumulated under this provision, a large portion of which was the income of personal property; *held*, that the direction for accumulation was void (1 R. S. 726, sec. 37; id. 773, sec. 2); that the accumulations belonged to plaintiff as "the person presumably entitled to the next eventual estate."

Vail v. Vail, 4 Paige, 317, and Hull v. Hull, 24 N. Y. 647, overruled; *Cook* v. *Lowry*, 95 id. 103.

W., by will, gave a portion of his residuary estate to his executors, in trust, to receive and apply the income to the use of the plaintiff during life. By a codicil, the executors were directed, if in their judgment the whole of the income was not needed for plaintiff's support, to retain and invest the residue during her minority, the accumulations to be considered and treated as part of the principal.

Construction:

Under 1 R. S. 726, secs. 37, 38; id. 773, sec. 3, the direction for the accumulation was void, and plaintiff was entitled to the whole income. *Barbour* v. *DeForrest*, 95 N. Y. 13, rev'g 28 Hun, 615.

Devise to executors, in trust, to receive rents and profits and therefrom pay 700 to each of two grandsons when of age, in case of death of either, to the survivor; trust to continue until testator's son C. became twenty-five years of age, when he was to have net income less the $1,400 for life; if he left children, estate to become theirs in fee when

of age. C., as owner of the next eventual estate, took surplus of the income arising during trust term; C.'s children, if any, would take fee, and in case of their death under age, the fee would vest in their heirs; if C. died without issue, the fee would vest in testator's heirs. It was erroneously claimed that the trust was void, as it was contended that it must continue until $1,400 was realized for the grandsons. *Radley* v. *Kuhn*, 97 N. Y. 26, 31.

A will, after various legacies and devises, and after providing for the payment of life annuities to twelve different persons, contained this provision: "As to the residue and remainder of all my estate, both real and personal, not herein otherwise disposed of, it is my will that the same be and remain in the care and custody of my said executrix, and executors, and trustees, and their successors, well and safely invested, until the decease of the last survivor of the life annuitants * * * and that then the said residue and remainder with all the accumulated interest thereof shall be divided equally among my grandchildren, *per stirpes*."

Construction:

The said clause was repugnant to the provision of the Revised Statutes prohibiting accumulations, except for the times and purposes therein expressly permitted. (1 R. S. 726, secs. 37, 38.) *Hobson* v. *Hale*, 95 N. Y. 588.

By the will of B. and a codicil thereto, his residuary estate was left in trust for the benefit of his children and grandchildren, the interest thereon to be invested and kept together for ten years after the death of the testator, at which time the estate was directed to be divided; the portions given to his children "to be held for and during their natural lives, respectively;" remainder to their children.

Construction:

The trust was in contravention of the statute prohibiting a suspension of the power of alienation for a longer period than during two lives in being at the creation of the estate (1 R. S. 723, sec. 15); and, as the accumulated fund furnished the only support for the devisees subsequently made, the whole scheme of distribution failed, and the title to the residuary real estate upon the death of the testator vested in his heirs at law, as in case of intestacy. *Rice* v. *Barrett*, 102 N. Y. 161, digested p. 450.

See, also, Lee v. Tower, 124 N. Y. 370; Potter v. McAlpin, 3 Dem. 108; Bean v. Bowen, 47 How. Pr. 306.

The will of L. gave a life estate in two-twentieths of his property to

his widow, the remainder over to his infant daughter M. in case she survived her mother; if not, then to certain other beneficiaries in the order named. In an action for partition of certain real estate of which said testator died seized, commenced during the minority of M., and wherein she was made a party defendant, the judgment directed a sale of the premises. The testator's widow was given the liberty to accept, and did accept, out of the proceeds of sale, a gross sum in lieu of her interest as tenant for life, and the balance of the purchase money of the two twentieths was directed to be paid into court, to be invested by the chamberlain of the city of New York, and, upon the death of the life tenant, the fund "with all accumulations of interest, dividends or income," to be paid to M., if then living; if not, then to the beneficiaries entitled under the will to take. Upon coming of age M. petitioned that the accumulation be paid over to her on the grounds that such accumulation was prohibited by statute (1 R. S. 726, secs. 37, 38), and that she was entitled thereto "as presumptive owner of the next eventual estate."

Construction:

The matter of the disposition of the fund was directly involved in the action and was *res adjudicata;* and, therefore, the petition was properly denied.

It seems that the directions for accumulation were proper, as the will did not contain any directions authorizing it (1 R. S. 726, secs. 37, 38; Pray v. Hegeman, 92 N. Y. 508), and as the income was paid off in advance out of the principal, when subsequently received, it was properly devoted to restoring said principal to the condition it would have been if it had not been thus depleted. *Livingston* v. *Tucker*, 107 N. Y. 549.

Trust to pay the income of the residue to or for the benefit of her daughter C., during life; so much of the income as should be necessary to be applied to her support and education during her minority; and after that time the income to be paid to her; upon her death the remainder to go to her issue.

Construction:

So much of the income, if any, as was not required for plaintiff's support during her minority, was payable over to her when of age, and so there was no direction for accumulation. *Horton* v. *Cantwell*, 108 N. Y. 255.

The provision for accumulation became inoperative as to the share of a deceased minor child; upon his death its share of an estate devolved

upon its heirs at law and next of kin, who were entitled to a proportionate share of the income already accumulated or to accrue. An accumulation is only permitted for the benefit of living objects. (Bryan v. Knickerbocker, 1 Barb. Ch. 409.) *Goebel* v. *Wolf*, 113 N. Y. 405, 415.

The will contained no direction as to the disposition of the income of the residuary estate until H. reached the age of twenty-eight.

Construction:

Under the Revised Statutes (1 R. S. 726, sec. 40), the rents and profits of the real estate were payable as they accrued to H., he being presumptively entitled to the next eventual estate, and so far as the residuary estate was personal, its income belonged to H. as the owner of the *corpus* thereof, and was payable to him as it accrued. *Matter of Crossman*, 113 N. Y. 503.

F. devised property to executors in trust during lives of G., and B., youngest grandchild, with power to lease, to receive and invest net income and accumulations therefrom in productive real estate for the benefit of the grandchildren living at testatrix's death and such others as should thereafter be born of her daughter "during their respective minorities," with directions to apply to the use of the grandchildren so much of the income as the executors should deem sufficient for their education and support during their respective minorities. When the youngest grandchild (construed to refer to B.) arrived of age, and on death of G., all the real estate of which the testatrix died seized, and such as the executors may have purchased after her death, should be divided amongst the grandchildren then living, the issue of any taking a deceased parent's share. The executors were directed to pay to each grandchild as she arrived of age, in case the youngest child and G. were then living, a proportionate share of the rents, issues and profits during the lives of said grandchildren and son-in-law.

Construction:

The provisions as to accumulations were to be construed as providing that any of the grandchildren who came of age before the termination of the trust term should receive his or her proportionate share, including a share of the real estate purchased by the executors, and which represented a part of the original rents and profits; the provision as to a distribution of the real estate so purchased, upon termination of the trust, referred only to so much thereof as may be left after a distribution to the grandchildren previously coming of age; and, as so construed, the provisions were valid, as also was the provision for the payment of the share of a deceased grandchild in the accumulations to his or her issue,

or, failing issue, to the survivors, and the provision prohibiting payments by the executors for the benefit of the grandchildren, unless satisfied that the income from the estate of their mother was insufficient for their support. *Roe* v. *Vingut*, 117 N. Y. 204.

Accumulations—when provision for was void. *Schermerhorn* v. *Cotting*, 131 N. Y. 48.

Where a trust is constituted, duly limited in point of duration, the title to the whole estate vests in the trustee during the trust term, although the valid trust purpose will not absorb the whole income, and connected with the lawful purpose is an express or implied direction for an unlawful accumulation, except, at most, when the valid purpose is nominal only, being inserted as a mere cover for the unlawful accumulation.

By the will of S. and a codicil he gave to his executors his residuary estate, real and personal, in trust, to collect and receive the rents and income, and out of the net proceeds to pay certain annuities amounting in all to $20,000, during the life of his daughter S., and upon her death to convey said estate to such of his grandchildren named as should then be living, to whom he devised and bequeathed the same. If any of said grandchildren should die previous to the death of S., leaving issue, such issue to take the parent's share. Of the grandchildren named some were adults at the time the will was executed. The net annual income derived from said estate had been for several years prior to the testator's death, and continued thereafter to be, over $80,000. No disposition was made in terms of the surplus income. Action for the construction of the will.

Construction:

It created a valid trust, and the grandchildren took remainders, which would vest in possession upon the death of S.; the trust interest was inalienable and required the estate to continue in the trustees during the life of S. (1 R. S. 730, sec. 63); in the absence of any express direction a direction for the accumulation of the surplus income was to be implied (Gilman v. Reddington, 24 N. Y. 9); this implied direction was void, as it was to commence at the testator's death, and might be for the benefit of persons not then in being, and was for the benefit of adults as well as infants (1 R. S. 726, sec. 37; Manice v. Manice, 43 N. Y. 376), but this did not affect the validity of the trust; it could not be inferred that the primary object of the testator was to create a trust as a cover for a scheme of unlawful accumulation; the surplus income belonged to and was distributable among the grandchildren named as the persons presumptively entitled to the next eventual estate (1 R. S.

726, sec. 40); assuming the grandchildren took vested remainders, they were not absolute remainders in fee, as upon the death of any grandchild during the trust term leaving issue, such issue, whether born before or after the death of the testator, would take the decedent's share by substitution and as purchasers, and such a contingent limitation over necessarily suspended the power of alienation.

Where the whole income of such a trust is not required for the valid trust purposes, the court can not set apart a portion of the capital of the fund, which may be deemed sufficient to produce the income required for these purposes. Hawley v. James, 5 Pai. 318; *Cochrane* v. *Schell*, 140 N. Y. 516, aff'g 64 Hun, 576.

Distinguishing, Hawley v. James, 16 Wend. 61; limiting, Lang v. Ropke, 5 Sandf. 363; Griffin v. Ford, 1 Bos. 123.

NOTE 1.—"The only rule consistent with the authorities is, that where a trust constituted under sub. 3 of sec. 55, is duly limited in point of duration, but connected with the lawful purpose is an express or implied direction for an unlawful accumulation, the title to the whole estate vests in the trustee during the trust term, although the valid trust purpose will not absorb the whole income, except perhaps where the valid purpose is nominal merely, and it can be seen that it was inserted as a mere cover for an attempted illegal accumulation. Phelps v. Pond, 23 N. Y. 69; Gilman v. Reddington, 24 id. 19; Savage v. Burnham, 17 id. 561." (536.)

NOTE 2.—"The remaining question relates to the persons who are now entitled to the rents, profits and income, not required to pay the annuities. It is claimed on the one side that they go to the heirs and next of kin of the testator, according to the nature of the property, and on the other, that, by force of section 40 of the article on the creation and division of estates (1 Rev. St. 726), they belong to and are distributable among the eight grandchildren as the persons presumptively entitled to the next eventual estate. By the rule of the common law, where there is a specific devise of a future estate, and no disposition of the intermediate rents and profits, they go to the heir, unless there is a residuary devise, not future or contingent, in which case they go to the residuary devisee. But a residuary bequest of personalty, whether future or contingent, carries the prior income, and where real and personal estate are blended in one residuary gift, the rule as to personalty governs. The same rules are applicable to trusts. (Glanvill v. Glanvill, 2 Mer. 38; Genery v. Fitzgerald, Jac. 468; Ackers v. Phipps, 3 Cl. & Fin. 665; In re Dumble, L. R. 23 Ch. Div. 360; 1 Jar. (5th ed.), 652.) But it was held that where the devise or gift was of a residue, as to part of which the disposition fails, that part will not accrue in augmentation of the remaining part, as a residue of a residue, but instead of retaining the nature of a residue, devolves as undisposed of. (Skyrmsher v. Northcote, 1 Sw. 566.) This last rule is applied by the English courts in the construction of the Thellusson Act (39th and 40th George, III, ch. 98) to the disposition of income unlawfully directed to be accumulated, and it is held that such income goes to the heirs and next of kin, as in case of intestacy, and not to the residuary legatee or devisee, under that clause in the act which declares that such surplus income "shall go to such person or persons as would have been entitled thereto if such accumulation had not been directed." (1 Jar. (5th ed.) 312, 602.) If the rule of distribution was the same under our statute as under the English statute there might be some ground for claiming, in this case, that as the gift of the residue included by intendment the unlawful accumulation, the heirs and next of kin were entitled to it. Section 40 of our statute, before referred to, pre-

scribes the rule of distribution in cases within it, and if it applies to the surplus income in question it must furnish the rule of distribution. That section is: "When, in consequence of a valid limitation of an expectant estate, there shall be a valid 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." It must be conceded, we think, that the surplus rents and profits were undisposed of within the meaning of this section. The implied disposition attempted was unlawful and void, and it is the same as if no disposition whatever had been attempted. (Williams v. Williams, 8 N. Y. 525.) It is claimed in behalf of the appellant that the remainders given to the grandchildren were vested and not contingent. This was conceded by all the parties heard before us, except that the counsel for the executors suggested that the decision of the question was not now necessary. We shall assume, without deciding the question, that the appellant is right in this contention. It is claimed that if the grandchildren took vested remainders, then the statute does not apply, for the reason that the limitation of a vested expectant estate does not suspend the power of alienation, and that it is only where the power of alienation is suspended by a contingent limitation of a future estate, that section 40 applies. In other words, that the present estate in the trustees, although the power of alienation if suspended thereby, by force of sections 63 and 65 of the Statute of Uses and Trusts, does not create the suspension which brings the case within section 40, because that only applies where the suspension is "in consequence of a valid limitation of an expectant estate." This construction of the statute seems to be the natural construction according to the ordinary meaning of the language. It seems to have been assumed by the revisers and the legislature that if the future estate was vested and absolute, the surplus income would, without any statutory rule, go to the person in whom the estate was ultimately to vest in possession. (See Gott v. Cook, 7 Pai. 521.) But however this may be, we think the appellant, to succeed in her contention, must at least be able to point out that no contingency attended any of the limitations of the future estates, which prevented the conveyance by persons in being of an absolute remainder in fee. This, we think, can not be done. Upon the death of any grandchild during the trust term leaving issue, such issue, whether born before or after the death of the testator, would take by way of substitution, and as purchasers, the share of the deceased parent. Assuming as we have, that the grandchildren took vested remainders, it is the common case of a limitation to one person in remainder, with a gift over to another person on the death of the first remainderman or the happening of any other event before the remainder vests in possession. The first remainderman takes a base or qualified fee, subject to be divested in favor of some other object on the happening of the contingency specified. Such a contingent limitation over necessarily suspends the power of alienation, provided it is or may be in favor of persons not in being at the death of the testator, and the suspense continues so long as there is a possibility that persons may come into being who would be entitled to take under the ulterior limitation. This was the situation in this case. Until the death of a grandchild during the term it could not be ascertained in whom the remainder in the share of the one so dying would vest. Issue not yet in being may be born who will be entitled to take under the will. That the word issue in the will means children is plain from the context, and that it is a word of purchase, and not of limitation, is plain also. (Nodine v. Greenfield, 7 Pai. 544; Crystie v. Phyfe, 19 N. Y. 345; Smith v. Scholtz, 68 id. 42; Mead v. Mitchell, 17 id. 210; Wilson v. White, 109 id. 59; 2 Jar. (5th ed.) 104.) The case is clearly within section 40 The power of alienation is suspended by a valid limitation of a contingent expectant estate to the issue of the grandchildren, and meanwhile the rents and profits are undisposed

of. The remainders to the grandchildren, whether vested or contingent, may ripen into a fee simple absolute. They are the persons entitled to the next eventual estate within the meaning of section 40, however it might be considered if they took a life estate only, and their estate, if they survive the daughter of the testator, will vest in possession concurrently with the termination of the trust estate and the period of accumulation." (pp. 537–540.)

A discretionary power given to trustees to make a disbursement of income upon and in the course of the management of the trust property, if restricted to such matters as tend to preserve it, or make it efficient for earning purposes, is not a violation of the statute providing for the accumulation of income in certain cases, and declaring void any provision for accumulation other than as specified. (1 R. S. 727, secs. 37, 38; id. 773, 774, secs. 3, 4.) *Matter of Nesmith*, 140 N. Y. 609.

The will of C. directed his executors to divide one-half of his estate into as many equal shares as he should leave children him surviving, to collect the interest on each share and apply the same, or so much thereof as they might deem necessary, to the use of the child for whom the share was intended, and to accumulate the remainder until said child should become of age or sooner die, and upon the coming of age to pay over to him or her the accumulations, and thereafter to apply the whole interest and income to the use of said beneficiary during life; upon the death of a child before or after coming of age to transfer the share to his or her children, and in case of the death of a child leaving no issue to transfer the share to the testator's surviving issue. In an action brought by the executors for a judicial settlement of their accounts, it appeared that the testator left two children, both infants, one of whom died under age, intestate and unmarried. There had been a large accumulation of interest upon the share of the child so dying.

Construction:

Until the death of the child the entire interest of her share vested at once when paid in, and only the time of payment over, or enjoyment, was postponed until majority; and so, the administratrix of the deceased child was entitled to the accumulation.

It seems, that where a will so provides for the accumulation of interest on an infant's share during minority, the testator has power to make such disposition thereof, in case of the death of the infant during minority, as he may see fit; and so, may bequeath it to any person, whether a minor or of full age. Such a provision is not violative of the statute providing that accumulations must be for the benefit of minors. *Smith* v. *Parsons*, 146 N. Y. 116; 75 Hun, 155.

A testator gave real estate to his executors, with directions to turn it into money, accumulate the income, and, after his widow's death, divide the whole among his

nephews. The directions for accumulation were, in part, unlawful, as extending beyond the minorities of the nephews.

Construction:

The accumulations of income received by the executrix, after the nephews' majorities respectively, belonged to them, and they might call the executrix to account before the surrogate for the accumulations received by her, under two Revised Statutes 220, section 1, subdivisions 3 and 6; Laws of 1867, (1925); and obtain payment thereof.

The accumulations of income, up to the majorities of the nephews, must remain in the hands of the executrix, as principal until the death of the widow, and are then payable, with the principal, to the nephews, if they should survive. And the statute of limitations was not available to the executrix against the claim for the accumulations made after the nephews' majorities. *Robison* v. *Robison*, 5 Lans. 165.

The ninth clause of the will of the plaintiff's testator was as follows: "I further bequeath to my children, after paying all the above legacies and my just debts, all interest that may accrue on the balance of my estate, to be divided between them at the age of forty years, to hold for their natural lives and then to be divided between their heirs."

Construction:

The provision for the accumulation of the income of the estate was void, as it extended beyond the minority of the children; and, the provision could not be held void in so far as it required the accumulation to extend beyond the minorities of the respective children, and effect be given to the residue, for the reason that it provided for a suspension of the power of alienation for more than two lives in being at the time of the creation of the estate. *Simpson* v. *English*, 1 Hun, 559.

The testator directed that a portion of the rents, incomes and profits of certain of the shares, which were given to minors, should be accumulated during their respective minorities, and upon their expiration, the accumulation of each share should be added thereto, and the rents, incomes and profits of the shares, thus augmented, paid over to the respective beneficiaries.

Construction:

The direction was valid; the law does not require the accumulation to be paid over to the beneficiary upon the termination of his minority and it is sufficient if it be for his benefit. *Meserole* v. *Meserole*, 1 Hun, 66; overruled in Pray v. Hegeman, 92 N. Y. 519.

A testator, by his will, gave to his wife the use of all his property until the majority of his daughter, when it was to be divided between them equally; in case his daughter died during her minority, the whole to go to his wife; in case the wife should die during the minority of her daughter, then the daughter was "to come in possession of all of said property, on arriving at the age of twenty-one years, previous to which to be handed out, at the discretion of the executors hereinafter named;" in case of the death of both wife and daughter without issue, during the minority of the latter, the property to go to persons named in the will.

The wife died before the daughter, and the latter during her minority. Accumulations of income were made by the executors during the survivorship of the daughter.

Construction:

Such accumulations passed to the ultimate legatees with the body of the estate, and and did not belong to the estate of the daughter. *Willets* v. *Titus*, 14 Hun, 554.

A testator devised and bequeathed to his executor the sum of $11,000 in trust, to invest the same in bond and mortgage, and keep the accumulations on the same invested

until the decease of his sister-in-law, and then to pay the same to her children as therein provided. The balance, rest and remainder of his estate he devised and bequeathed to two persons named in his will.

Construction:

The direction as to the accumulation of the interest on the $11,000 was void; interest should be paid to residuary legatees and not to those entitled to the fund on the death of the sister-in-law. *Matter of DeyErmand*, 24 Hun, 1.

A provision by will attempting to keep a sum of money in the town board or officers of a town beyond two lives in being at the death of the testator is in violation of the statute as to accumulation of personal property. *Iseman* v. *Myres*, 26 Hun, 651.

Discretionary power was given to executors to sell real estate and deposit proceeds in savings bank and at the termination of a life estate in other property to divide the same between testator's then surviving grandchildren. Such direction for accumulation was void. *Matter of Hoyt*, 71 Hun, 13.

Trust estate; undisposed of rents and profits belong to the person entitled to the next eventual estate, not to the surviving beneficiary, nor to the next of kin of the deceased beneficiary. *Gould* v. *Rutherford*, 79 Hun, 280.

Where, under the provisions of a trust created by will, the trustees are directed "to receive the interest, income and profits (of a share of the estate) and to apply the same to the use" of a daughter of the intestate who is of unsound mind, "and upon her death to assign, transfer and set over the said share to her children," etc., the whole income is given to the daughter, and she is entitled to have it all.

The words "apply to the use of" are equivalent to the words "pay over to."

Where, in such case, a committee has been appointed for the *cestui que trust*, the committee is entitled to receive any income beyond the necessary expenses of the *cestui que trust*, which has accumulated in the hands of the trustees. *Gasquet* v. *Pollock*, 1 App. Div. 512. See Hendricks v. Hendricks, 3 App. Div. 604.

By the first clause of her will Charlotte Gomez gave to her executors the sum of $12,000, to be held by them in trust, to apply the income to the support of her daughter Matilda during life; by the second clause of her will she devised the residue of her estate to her executors in trust to pay over the income to her daughter Emeline; by the fourth clause she provided that in case Matilda survived Emeline, and Emeline left no issue, all the property so held in trust for Emeline should be held by her executors in trust to apply the rents, income, dividends and profits "of all and singular the same" to the support of Matilda during life, and after her decease to convey it to the children and lawful heirs of Harmon Hendricks, a brother of the testatrix. Emeline died before Matilda, who was at the time her mother made her will and until her own death, in 1893, an inmate of an insane asylum, and after the death of Emeline there was a considerable accumulation in the hands of the trustees of income not necessary to the support of Matilda.

Construction:

As the will contained no direction for an accumulation of income, and, as any such accumulation was forbidden except in the case of a minor, the court would not indulge in any presumption that there was an intention to accumulate.

The accumulation should be paid over to the administrator of Matilda and did not pass as undisposed of income to the heirs of Harmon Hendricks. *Hendricks* v. *Hendricks*, 3 App. Div. 604. Van Nostrand v. Moore, 52 N. Y. 12; 2 Jarman on Wills, 5th ed., 773; Roe v. Vingut, 21 Abb. N. C. 484.

A testator directed his trustees that if they should ascertain that there were funds

sufficient left to commence and found a school, they should petition the legislature of this state to accept the devise, for that object, upon the testator's plan; and to make the necessary arrangements for its uniform and steady government. And if such a law could not be obtained in this state, to the satisfaction of the trustees, then the residue of the testator's estate was to be disposed of, and the money received therefor invested, until the sum of $100,000 should be funded, when the trustees were to form the institution in any state which was willing to give the proper irrevocable legal guaranty for its performance, and appropriate not less than 1,000 acres of land for the purpose.

Construction:

The remainder of the real estate, after the payment of debts and legacies, descended to the heirs at law of the testator; and so much of the personal estate as had been accumulated and invested for the support of the school, by a sale of the real property, or which was not required for the payment of debts and legacies, passed to his next of kin. *Yates* v. *Yates*, 9 Barb. 324.

A testator devised as follows: "I give and bequeath to my wife C. R." a farm. "I give * to the P. E. Society for promoting religion and learning * * in New York, $5,000; the interest * of which shall be applied, as it shall accrue, to the support of the rector * , for the time being, of Christ's Church in * G., etc., provided that whatever interest may accrue during a vacancy in the office of rector * , shall be paid to the clergyman who shall next fill the said office. I give * to the P. E. Society for promoting religion and learning" another farm, "provided the said society is authorized to hold real estate in trust, but if not thus authorized to hold real estate, then I hereby direct my executors to sell" the last named farm, "and pay over the same, more or less, to the said society. The interest * of which shall be paid as it shall accrue, to the rector * of Christ church, G., in the same manner, and with the same provisions, as in the last preceding bequest. All the remainder of my property * * I hereby direct my executors to sell, and the avails of the sale, more or less, it is my will that they should invest in good securities, etc., and the interest it is my will shall be paid to my beloved wife C. R., as it shall accrue, and during her natural life. Then it is my will that this money shall be paid to the P. E. Society for promoting religion and learning in the state of New York, and by them held as a fund to be denominated the Rundle fund for the support of missionaries in the diocese of New York. It is also my will that the said fund shall be left to increase by the addition of the interest to the principal, until it amounts to the sum of $10,000, and then that the interest or income of the said fund as it shall accrue, shall be paid into the disposable fund of Education and Missionary Society of the P. E. Church in the state of New York, for the support of missionaries in the diocese of New York."

Construction:

The bequest of $5,000 to the Protestant Episcopal Society in trust to apply the interest and income to the support of the rector or minister of Christ church in G. was invalid, as suspending the absolute ownership of the property for an indefinite term, without reference to any designated life or two lives in being, and as directing an accumulation of income for a purpose forbidden by law.

The bequest of such avails, after the widow's death, to the P. E. Society, in trust to accumulate the interest until the fund should reach the sum of $10,000, and then to pay the interest and income as it should accrue, into the disposable fund of the Education and Missionary Society, for the support of missionaries, etc., was invalid. *King* v. *Rundle*, 15 Barb. 139.

A provision for an accumulation for the erection of a church was invalid and void. *Wilson* v. *Lynt*, 30 Barb. 124.

A direction to executors to pay the indebtedness of the estate out of the residue of the rents and profits and, until such payment could be made, to invest such proceeds from time to time, was not within the statute of accumulations. *Bean* v. *Hockman*, 31 Barb. 78.

A direction that surplus interest or income should be accumulated for the benefit of all the grandchildren, until the youngest attained his or her majority, was void so far as it provided for an accumulation for the benefit of the grandchildren after they should have attained their majority. This direction for an unlawful accumulation did not affect the validity of the bequest of the fund or this surplus income to the grandchildren; as they severally attained their majority they would be entitled to their share of the surplus income. *Forsyth* v. *Rathbone*, 34 Barb. 388.

A direction to ascertain the amount of the legacies to various beneficiaries by adding the principal of the fund to the amount of interest which should have been paid to them during minority, was not a direction for accumulation, but only a method of ascertaining the amount of their shares. *Titus* v. *Weeks*, 37 Barb. 136.

Where the object of a trust in a will executed in Missouri is a charity and has provisions for accumulation as to undue suspension for more than two lives, it can not be enforced under our laws; and where these provisions were so interwoven with the whole trust that no part of the trust could be carried out without working injustice and giving to a portion of the testator's family a larger share of the estate than was intended, it was held that the testator's objects would be better effectuated by declaring the whole will void. *Clemens* v. *Clemens*, 60 Barb. 366.

A direction in the will that the executors lease real property previously devised by the will, until the net amounts derived therefrom shall amount to enough to pay all testator's debts, and then convey to the devisees, attempts to create an indefinite accumulation, and is in violation of the statutes limiting accumulations and the suspension of the power of alienation.

Testator devised three houses and lots among his children and grandchildren severally, but directed his executors to lease the same and collect the rents until a sufficient sum was realized to pay all his debts, and then to convey to the several devisees. One of the houses was encumbered by two mortgages, which the court found were the debts intended to be so paid, but found that the attempted accumulation of rents for that purpose was void, as in violation of the statutes against accumulations and perpetuities. Action to construe the will and charge the three houses with the payment of the mortgage debts.

Construction:

The intent of the testator to charge the mortgage debts on the entire real property being established and the means selected having failed, the amount of the mortgages was on equitable principles chargeable upon the three houses, in proportion to the value of the respective parcels as shown upon the trial, and the executors should be directed to convey at once to the several devisees subject to such proportionate charge. *Wells* v. *Wells*, 30 Abb. N. C. 225.

The gifts of the legacies which are limited to take effect after a prescribed period of accumulation, and to be paid out of the accumulated fund as part of the subject matter of the gifts, being a period too remote, the gifts must fail. Legacies dependent upon a void trust fall with it. *Bean* v. *Bowen*, 47 How. Pr. 306.

Where a trust estate by will provides for accumulation for the benefit of adults as well as minors, it is void, but an annuity to the widow provided for under the trust estate was charged upon the real estate and survived the failure of the trust; but such

annuity was subject to a reduction in favor of an afterborn child to take as if his father died intestate. *McCormack* v. *McCormack*, 60 How. Pr. 196.

Citing, on the last proposition, Sanford v. Sanford, 4 Hun, 753; Mitchell v. Blain, 5 Paige, 388.

The invalidity of a trust for accumulation of rents created by will does not affect other independent provisions therein. If a valid trust of such real estate is otherwise created in such a will, for the benefit of the beneficiary of such rents and profits and to be applied to his use, the only effect of such invalidity would be to entitle such beneficiary to the whole of such rents and profits. *Bolton* v. *Jacks*, 6 Robert. 166.

Will directed executors to pay debts, etc., and bequeathed to them the residue of the estate, in trust, to invest the same and from the interest accruing therefrom during twelve years, to pay the legacies to religious and charitable societies specifically named. The trust was void, as it suspended the ownership of the residuary estate for a definite period of time and because the directed accumulatiou of interest was not for a lawful purpose. *Matter of Starr*, 2 Duer, 141.

An accumulation for three years for the purpose of erecting a statue, was void. *Morgan* v. *Masterton*, 4 Sandf. 442.

Although a trust for an accumulation is invalid, this does not affect independent provisions in a will ; the only result is that those for whose benefit the accumulation is directed have an immediate right to the whole income. *Lange* v. *Ropke*, 5 Sandf. 363.

A direction for the accumulation of the income of A.'s share of a devise until B. should arrive at age, was bad. *Estate of Ruppert*, Tucker, 480.

Testator left lands to two sisters for their mutual use and benefit, the lands to be equally divided between them, and the management to be in the hands of one named executrix, and on their decease, if they should not marry and leave issue, to go to testator's nephews and nieces and their issue. There was no undue suspension. Testator further provided that, if both or either of the sisters should marry and leave issue, then that one-half the land should go to such issue ; but if neither should marry, or marrying have no issue, the survivor should pay the expenses and collect the rents and invest the deceased sister s part of the net rents, which should be divided after the death of the survivor of the sisters among the testator's nephews and nieces or their issue ; and it was provided that such sister named as executrix should sell the property for the purpose of carrying into effect such provision. The provision for the accumulation was void, but this did not invalidate the other provisions, and the rents so directed to be accumulated went as they accrued to the nephews and nieces as the persons presumptively entitled to the next eventual estate. *McGrath* v. *Van Stavoren*, 8 Daly, 454.

Will directed executor, named trustee, to sell the real property, and from the income of the whole estate to pay an annuity to testator's daughter for life, and after her death to her children, unborn at the time testator died, until they should attain the age of twenty-one years and then to pay them the principal, and upon her death, failing issue, to pay to his nephew an annuity until he should become twenty-one years of age, and then to pay the principal to him, and that the surplus income, after paying such annuity, should be invested in order that the interest might supply the place of such portion of the income of the estate as might fail from time to time.

Construction :

The disposition of the surplus income was void under 1 R. S. 773, sec. 1, and the direction to sell the real property converted it into personalty, so as to save the devise to the executor and not to allow it to fail as an illegal suspension ; and the person entitled to the surplus income was the same as would have taken it if it had been real

property. Under 1 R. S. 726, sec. 40, the nephew should take it as presumptively entitled to the next eventual estate. *Grant* v. *Grant*, 3 Redf. 283.

A direction for the accumulation of rents, income, etc., of real or personal property "*for the benefit* of one or more minors then in being" must, in order to be valid under 1 R. S. 726, sec. 37, and id. 773, sec. 3, provide for an accumulation *exclusively* for the benefit of the minors.

Under a valid direction for the accumulation of rents and income for the benefit of a minor, the accumulation not only vests in the minor, but, on his attaining majority, vests in him *absolutely* so as to be no longer liable to be divested.

Testator, who left both real and personal property, by his will, after making certain bequests, gave all the residue of his property, real, personal and mixed, to his executors, in trust, and by implication directed the accumulation of a portion of the income and profits during the minority of his children, respectively. He then gave a vested remainder in the trust property to his children, to take effect in possession at the end of the trust term, subject to being divested as to each child by his or her death without issue during said term ; in case all his children should die without issue during said term, he gave and devised the residue, one quarter to his widow, if then living, and the balance to his brothers and sisters then living or the issue of any that might be dead, in equal proportions. All of the children having died during the trust term, without issue, one during and the others after the expiration of minority, a sister of testator claimed an interest in the accumulated income which accrued before the death of the last survivor of the children.

Construction :

Such accumulations vested absolutely before the substituted limitation took effect and the sister of testator took a share of the *corpus*, only, of the estate.

As to whether, if all the children of the testator had died without issue during their minority, the accumulations would have passed to the substituted legatees and devisees, *quære*. *Gilman* v. *Healy*, 1 Dem. 404.

Distinguishing, Gilman v. Reddington, 24 N. Y. 9 ; Meserole v. Meserole, 1 Hun, 66.

The eighth clause of the will provides for the continuance of the interest of the testator in the business therein mentioned, and the receipt of the profits thereof by the executors, until the youngest child should reach majority, and then their division between the testator's wife and her children by him.

Construction :

In so far as it makes provision for the retention of the profits for the purpose of division until the event specified, it is invalid. Such provision contemplates an accumulation of profits in the meantime which are not expressed or intended to be for the benefit of the minors solely.

The provisions of the third Revised Statutes (7th ed.), page 2179, which directs that the rents and profits of an expectant's estate during the time when the power of alienation is suspended, shall be given to the persons presumptively entitled to the next eventual estate, is applicable to personal property, as well as real estate.

The parties presumptively entitled to the next eventual estate or interest in the fund set apart by the eighth clause of the will, are those for whose benefit the trusts are provided to be set up out of the residuary estate, the widow of the testator and her children by him. *Matter of Sands*, 20 N. Y. St. Rep. 850 (Surr. Ct.).

A deed provided that the rents and profits of his share should be applied to the use of J. for life and on his attaining the age of thirty, such share and all additions should be conveyed to him absolutely ; that if there was a surplus not required for

his support it should accumulate for his benefit until he reached twenty-one years, and then the whole of such surplus was to be paid to him.

Construction:

Such accumulations belonged to J., although he died under twenty-one, and the same did not pass to R.; the words "trust fund" did not refer to such accumulations. *Draper* v. *Palmer*, 27 St. Rep. 510 (Sup. Ct.).

Testator directed his executors to lease the residue of his estate, and deposit the net rents and income in savings bank to create a fund to liquidate any indebtedness against the same, and also empowered the executors to sell the real estate whenever they deemed it for the best interest of the estate to do so. And the will provided that the proceeds of such sale, after deducting the expenses of such sale and the indebtedness against such real estate, should be deposited as aforesaid, or in good securities, and at the decease of his daughter H. to be equally divided between each of testator's grandchildren her surviving, the children of his two daughters, share and share alike.

Construction:

The will contemplated a gift of the principal and accumulated income to the grandchildren; the gift of the principal was valid, but the direction to accumulate was void under the statute, and the income, as it accrues, will pass to the grandchildren, they being the persons presumptively entitled to the next estate. *Matter of Hoyt*, 32 St. Rep. 787 (Surr. Ct.).

An accumulation which might not terminate until the majority of the youngest of four beneficiaries was void. *Thompson* v. *Clendening*, 1 Sandf. Ch. 387.

Trusts for the accumulation of the surplus income of the respective shares given were valid. As to all the beneficiaries, the accumulations were to commence within two lives in being at death of the testator, during the minority of the respective beneficiaries, and were to terminate as to each when he became of age.

It is a sufficient compliance with the provisions of the revised statutes as to such accumulations, if the persons for whom the same are intended are designated or described as a class, *e. g.*, as the children of a person named.

Where such a class is designated, it is not essential that all should be living when the accumulation commences, provided at the commencement it goes for the benefit of such as are *in esse*, exclusively, and that those who subsequently become entitled fall within the prescribed rules laid down by the statute.

Such a succession of accumulations is not objectionable if they are all made to terminate within the prescribed limits as to time in respect of the suspense of the power of alienation.

A devise in trust for the payment of annuities out of the income of real estate is valid. *Mason* v. *Mason's Exrs.*, 2 Sandf. Ch. 477; aff'd 2 Barb. 229.

Where A., by a deed executed previous to the revised statutes, conveyed all his real and personal estate to B. in trust that such trustee, or his assigns, or such other person or persons as he should by will appoint for that purpose, should dispose of, lease and manage the trust property, and receive the rents and income, and after deducting the expenses of the trust, should apply so much of the rents and income to the use and support of the grantor, and of his family, during his life, as the trustee should deem discreet and reasonable, and should invest and accumulate the residue of such rents and income for the benefit of the heirs of A.; and on the further trust, upon the death of A., to account for what should remain of the trust estate, and of the accumulations of the rents and income, to the heirs at law and next of kin of the grantor.

Construction:

The trust to receive the rents and income of the trust property, during the life of the grantor, to apply such part thereof to his support as was necessary, and to accumulate the residue for the benefit of his next of kin, at his death, was valid. But such a trust would not be valid, under the provisions of the revised statutes. *Bryan* v. *Knickerbacker*, 1 Barb. Ch. 409.

An implied trust to accumulate a part of the income, of a share of the testator's estate, for children or descendants of B. C., who are not in existence at the time when such accumulation is to commence, or whose right to the accumulated fund is entirely contingent, is void, under the provisions of the revised statutes relative to accumulations. And the surplus income of the trust property, so far as it arises from real estate, or the proceeds thereof, if it is not otherwise disposed of by the will of the testator, belongs to his heirs at law; and so far as it arises from the personal estate, it belongs to his widow and next of kin. *Haxtun* v. *Corse*, 2 Barb. Ch. 506.

Trusts for accumulation, being prohibited by statute, except for the benefit of minors, a trust to accumulate the rents and profits of real estate, or the interest or income of personal estate, can not be created for the benefit of a lunatic who is not a minor. But where an annuity is given absolutely to a lunatic, a court of equity may direct the surplus, beyond what is necessary for his support, to be paid over to his committee, and invested for his use.

Where the income of a lunatic is more than can be properly expended for her use, it must, as a matter of necessity, be accumulated for him, or for those who may eventually be entitled to his property, as his next of kin. But that is not a trust for accumulation which is prohibited by the statute. *Craig* v. *Craig*, 3 Barb. Ch. 76.

Testator, by his will, gave a portion of his estate to his executors to be sold, and directed the investment of the proceeds thereof and the income of the estate not otherwise needed, and bequeathed to the widow of his deceased brother, for the support of herself and her family, an annuity of $2,000 during her life or widowhood, and made a further provision for the support of her two children, his nieces, until they should arrive at the age of twenty or be married, if their mother should die or remarry before that time; and also bequeathed an annuity of $600 to his mother for life; and directed his executors to pay to each of his two nieces, after they should respectively have arrived at the age of twenty or should be married, on their separate receipts notwithstanding their coverture, one equal half of the income of his estate during their respective lives; and further directed, that in the case of the death of either of his nieces after she should have attained the age of twenty years, without leaving lawful issue, the surviving niece should receive the whole income during her life, with remainder in fee to his mother in case both nieces should die without issue during her lifetime.

Construction:

The executors were to accumulate the moiety of the income belonging to each niece, for her exclusive benefit, until she should arrive at the age of twenty or should be married, and then to pay the same over to her, on her separate receipt, or to her legal representatives in case of her death; and after the nieces had respectively arrived at that age, or were married, the executors were to pay over to them their several shares of the income as it should accrue and be received by such executors; the trust to sell the property and invest the proceeds, and to accumulate the income and pay over the same to the nieces for their separate use notwithstanding coverture, was a valid trust, under the provisions of the revised statutes relative to uses and trusts. *Gott* v. *Cook*, 7 Paige, 521.

A trust for the accumulation of rents and profits of real estate, when it operates to the benefit of adults, as well as minors, is void; but this does not invalidate the whole will. *Hawley* v. *James*, 16 Wend. 61, 162.

Accumulation for wife and minor child was void. *Boynton* v. *Hoyt*, 1 Denio, 53.

XII. ESTATES IN SEVERALTY, JOINT TENANCY AND IN COMMON.

I. ESTATES BY THE ENTIRETY.

Real Prop. L., sec. 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."

1 R. S. 726, Banks's 9th ed., p. 1794, sec. 43, same; repealed by Real Prop. L.

Real Prop. L., sec. 56. When estates 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.[1] This section shall apply as well to estates already created or vested as to estates hereafter granted or devised."

1 R. S. 727, Banks's 9th ed., p. 1794, sec. 44, same; repealed by Real Prop. L.
See early statute, 1 Green. Laws, 207, sec. 6.

Real Prop. L., sec. 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."

1 R. S. 753, Banks's 9th ed., p. 1827, sec. 17, repealed.

TENANTS IN COMMON.

1. Every estate shall be a tenancy in common unless expressly declared to be in joint tenancy.

Real Prop. L., sec. 56. Campbell v. Rawdon, 18 N. Y. 412; Everitt v. Everitt, 29 id. 39; Matter of Kimberly, 150 id. 90; Hunter v. Hunter, 31 Barb. 334; Matter of Blaker, 12 St. Rep. 741; Manier v. Phelps, 15 Abb. N. C. 126, 127.

2. This statute applies as well to personal as to real estate.

Matter of Kimberly, 150 N. Y. 90; Mills v. Husson, 55 St. Rep. 312; Matter of Lapham, 37 Hun, 15; Blanchard v. Blanchard, 4 id. 288, 289, aff'd 70 N. Y. 615.

3. Whether legatees take distributively as tenants in common, or as joint tenants.

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[1] Thatcher v. Candee, 4 Abb. Ct. App. Dec. 387; People v. Coleman, 42 Hun, 585; Van Rensselaer v. Akin, 22 Wend. 549. Assignees take as tenants in common. Beal v. Miller 1 Hun, 390.

TENANTS IN COMMON.

Smith v. Edwards, 88 N. Y. 92; Bliven v. Seymour, id. 469, 478; Matter of Verplanck, 91 id. 439, 443; Purdy v. Hayt, 92 id. 446; Mott v. Ackerman, id. 539, 549; Van Brunt v. Van Brunt, 111 id. 178, 187; Dana v. Murray, 122 id. 604, 615; Matter of Kimberly, 150 id. 90; Lane v. Brown, 20 Hun, 382; Bingham v. Jones, 25 id. 6; Cromwell v. Cromwell, 2 Edw. Ch. 495; Muir, In re, 46 Hun, 555; Moffett v. Elmendorf, 82 id. 470; Gage v. Gage, 43 id. 501; Coster v. Lorillard, 14 Wend. 335; Putnam v. Putnam, 4 Bradf. 308.

4. Presumption of joint ownership.

Mercantile Deposit Co. v. Huntington, 89 Hun, 465.

5. When joint devisees and legatees of real estate hold as copartners.

McFarlane v. McFarlane, 82 Hun, 238.

6. Tenants in common hold by unity of possession and may hold by several and distinct titles, or by title derived at the same time by the same instrument or descent.[1]

Kent's Com. vol. 4, *367.

7. Each tenant in common is solely or severally seized of his share.

Kent's Com. vol. 4, *368.

8. A tenant in common, in alienating, conveys his undivided share in the estate as if he were seized of the entirety.

Kent's Com. vol. 4, *368. A conveyance of some defined portion of the property by metes and bounds may bind the granting tenant[2], but is inoperative as to his cotenants.

Kent's Com. vol. 4, *368; see, further, Peabody v. Minot, 24 Pick. 329; Great Falls Co. v. Worster, 15 N. H. 412, 449; Jewett v. Stockton, 3 Yerg. 492; Scott v. State, 1 Sneed 629; Duncan v. Sylvester, 24 Me. 482; Mitchell v. Hazen, 4 Conn. 495; but see, as holding such conveyances valid as to cotenants, Lessee of White v. Sayre, 2 Ohio, 110; E. Prentiss Case, 7 Ohio, pt. 2, p. 129. Although a conveyance be valid as to the granting tenant it can not affect the rights of the cotenants.[3]

Crippin v. Morss, 48 N. Y. 63, see, further, Goodwin v. Keney, 49 Conn. 563; Worthington v. Staunton, 16 W. Va. 208; Crooke v. Vandervoot, 13 Neb. 505; Lyman v. Railroad Co., 58 N. H. 384; Stevens v. Town of Norfolk, 46 Conn. 227; Sewell v. Holland, 61 Ga. 608; Tainter v. Cole, 120 Mass. 162.

9. A tenant in common can not, by his sole act, create an easement in premises held in common, nor acquire nor exercise for the benefit of other property held by him an easement in the property held in common, nor confer such rights upon another.

Crippin v. Morss, 49 N. Y. 63; see further, Eldridge v. Rochester City & Brighton R. Co., 54 Hun, 194.

10. Tenants in common are seized *per my and not per tout*, and hence

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[1] In this country, tenancy in common may be created by descent in which particular it differs from the common law. Kent's Com. vol. 4, *367.

[2] But see, Eldridge v. Rochester City & Brighton R. Co., 54 Hun, 194.

[3] One tenant can not make a lease binding on a cotenant. Kingsland v. Ryckman, 5 Daly, 13.

TENANTS IN COMMON.

must sue separately,[1] but they join[2] when the action relates to some entire and indivisible thing, and in actions of trespass relating to the possession, and in debt for rent.

Kent's Com. vol. 4, *369; see further, Marshall v. Moseley, 21 N. Y. 280; Decker v. Livingston, 15 Johns. 479; Tripp v. Riley, 15 Barb. 333; Wall v. Hinds, 4 Gray, 256; Webber v. Merrill, 34 N. H. 202; Tucker v. Campbell, 36 Me. 346.

11. Tenants in common must account to each other for a due share of the profits of the estate,[3] beyond a just proportion thereof.

Code Civ. Pro. sec. 1666; Kent's Com. vol. 4, *369; 1 R. S. (N. Y.) 750, sec. 9; Roseboom v. Roseboom, 15 Hun, 309; aff'd 81 N. Y. 356; McCabe v. McCabe, 18 Hun, 152; Myres v. Bolton, 89 id. 342; see, further, Kingsland v. Chetwood, 39 id. 602.

12. Tenant in common is entitled to credit upon an accounting or partition for taxes paid by him for his cotenant.

Ford v. Knapp, 102 N. Y. 135, 143; see, further, Hitchcock v. Skinner, Hoff. Ch. 21; Van Horne v. Fonda, 5 Johns. Ch. 389, 407; see, McAlear v. Delaney, 19 Weekly Dig. 252; Stephenson v. Cotter, 23 N. Y. St. Rep. 74. But not for insurance paid. Ford v. Knapp, 102 N. Y. 135, 143.

13. A tenant in common may sue his cotenant under 1 R. S. 750, sec. 9, for money received by the latter and retained by him beyond his due proportion.

Joslyn v. Joslyn, 9 Hun, 388; see, further, Tuers v. Tuers, 16 Abb. N. C. 464; Cochrane v. Carrington, 25 Wend. 409.

14. Tenants in common are liable to each other for waste.

N. Y. Code Civ. Proc., sec. 1656.

Kent's Com. vol. 4, *369; N. Y. R. S. vol. 2, 334; see, further, Balch v. Jones, 61 Cal. 234; Chesley v. Thompson, 3 N. H. 9; Shepard v. Pettit, 30 Minn. 119.

15. Tenants in common may compel each other to a partition.[4]

Kent's Com. vol. 4, *369; N. Y. Code Civ. Pro., secs. 1532, 1533, 1537, 1538, 1548, 1590, 1656–8; Beebee v. Griffing, 14 N. Y. 235; Moore v. Moore, 47 id. 467; Baldwin v. Baldwin, 23 Civ. Pro. 268.

16. Owners in common of grain or other personal property, in its nature separable in respect to quantity and quality by weight or measure, may sever their portions of the common bulk at will; and where one of them, having the entire property in his possession, appropriates the whole to his own use, and refuses on reasonable demand to let the other have his portion of it, he is liable for a conversion.

Stall v. Wilbur, 77 N. Y. 158; Thomas v. Williams, 32 Hun, 257, 260; Lobdell v.

[1] N. Y. Code, sec. 1500 allows a separate action. Stall v. Wilbur, 77 N. Y. 158; Chaunon v. Lusk, 2 Lans. 211; Lobdell v. Stowell, 37 How. 88, aff'd 51 N. Y. 70; Soule v. Mogg, 35 Hun, 79; see, Kutz v. Richards, 40 St. Rep. 693; Jones v. Felch, 3 Bos. 63; Palmer v. Stryker, 36 St. Rep. 785.

[2] Tylee v. McLean, 10 Wend. 373; Porter v. Bleiler, 17 Barb. 149.

[3] When action for accounting is not maintainable. Nirdlinger v. Bernheimer, 33 St. Rep. 1019; Rollwagen v. Rollwagen, 37 id. 293.

[4] When action to ascertain and adjudicate rights was not maintainable. Hartwell v. Mutual Life Ins. Co., 50 Hun, 497.

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Stowell, 51 N. Y. 70, aff'g 37 How. Pr. 88; Channon v. Lusk, 2 Lans. 211; Forbes v. Shattuck, 22 Barb. 568; Tripp v. Riley, 15 id. 333; Soule v. Mogg, 79 Hun, 82.

17. Tenants in common may effect a valid partition by deed or by parol, followed by exclusive possession.

Wood v. Fleet, 36 N. Y. 499; see, further, Taylor v. Millard, 118 id. 244, 249; Sanger v. Merritt, 120 id. 116; Kaufman v. Schoeffel, 46 Hun, 571, aff'd 113 N. Y. 635; Ferguson v. Tweedy, 56 Barb. 168; Mount v. Morton, 20 id. 123; Ryerss v. Wheeler, 25 Wend. 434; Jackson v. Harder, 4 Johns. 202.

18. A disseized cotenant may maintain action of partition.

Weston v. Stoddard, 137 N. Y. 119.

19. The possession of one tenant in common is the possession of his cotenants[1], and, although he takes the whole of the profits, it is not tantamount to an ouster.

Kent's Com. vol. 4, *370; Sweetland v. Buell, 89 Hun, 543.

20. Ouster may be effected by one tenant in common procuring title from his cotenant by fraud or undue influence.

Zapp v. Miller, 109 N. Y. 51; see, further, Stephenson v. Cotter, 23 St. Rep. 74.

21. What does or does not constitute ouster.

Gilman v. Gilman, 111 N. Y. 265; see, further, Woolsey v. Morss, 19 Hun, 273; Clark v. Crego, 47 Barb. 599; Whiteman v. Hyland, 40 St. Rep. 575.

22. What does or does not constitute adverse holding.

Kathan v. Rockwell, 16 Hun, 90; see, further, Valentine v. Northrop, 12 Wend. 494.

23. When a tenant in common is presumed to hold adversely to his cotenant.

Abrams v. Rhoner, 44 Hun, 507.

24. If one tenant in common actually ousts his cotenant, or does acts amounting to a total denial of his cotenant's right and title, and to a disseizin, such cotenant has his action of ejectment.

N. Y. Code of Civ. Pro. sec. 1515; Kent's Com. vol. 4, *370; Edwards v. Bishop, 4 N. Y. 61; Zapp v. Miller, 109 id. 51; Sweetland v. Buell, 89 Hun, 543; see, further, Sigler v. Van Riper, 10 Wend. 415; Ricard v. Williams, 7 Wheat. 60; Valentine v. Northrop, 12 Wend. 495; Muldowney v. Morris & Essex R. R. Co., 42 Hun, 444.

25. A tenant in common can not maintain an action for the possession of personal property against his cotenant.

Davis v. Lottich, 46 N. Y. 393; see, further, Russell v. Allen, 13 id. 173; Hudson v. Swan, 83 id. 552; Robinson v. Gilfillan, 15 Hun, 267; nor to compel a surrender of their joint muniments of title; Clowes v. Hawley, 12 Johns. 484; but a delivery to the proper officer for record may be compelled. Smith v. Cole, 109 N. Y. 436; s. c., 39 Hun, 248.

26. What does or does not constitute conversion by a tenant in common.

LeBarron v. Babcock, 122 N. Y. 153; Osborn v. Schenck, 18 Hun, 202; Dear v.

[1] Beal v. Miller, 1 Hun, 390; German v. Matchin, 6 Pai. 288; Shumway v. Holbrook, 1 Pick. 114; Buchmaster v. Needham, 22 Vt. 617; Bowen v. Preston, 48 Ind. 367; Long v. McDow, 87 Mo. 197.

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Reed, 37 id. 597; see, further, Burns v. Winchell, 44 id. 261; Thomas v. Williams, 32 id. 257; Van Doren v. Balty, 11 id. 239; Benedict v. Howard, 31 Barb. 569; Soule v. Mogg, 35 Hun, 79.

27. If a tenant sell or convert the personal[1] property, his cotenant may have his action for damages, or hold his title with the purchaser.

Davis v. Lottich, 46 N. Y. 393.

28. An action of trespass does not lie against a tenant in common by his cotenant for use or occupation of the common property, unless a tenant be disturbed in some defined portion of the property occupied by him under agreement with his cotenant.

Kent's Com. vol. 4, *370; see, further, Clowes v. Hawley, 12 Johns. 484; Kray v. Goodwin, 16 Mass. 1.

29. The mere occupation by one of several tenants in common does not make him liable to his cotenant for rent or profits unless he has ousted them.

Zapp v. Miller, 109 N. Y. 51; Roseboom v. Roseboom, 15 Hun, 309. aff'd 81 N. Y. 356; see, further, Woolever v. Knapp, 18 Barb. 265; Dresser v. Dresser, 40 id. 300; Henderson v. Eason, 9 Eng. L. & Eq. 337; McKay v. Mumford, 10 Wend. 351 (tenant held over after expiration of lease from cotenant); Wilcox v. Wilcox, 48 Barb. 327; Rich v. Rich, 50 Hun, 199; but see, Muldowney v. Morris & Essex R. Co., 42 id. 444.

30. When a tenant in common may recover from a cotenant, who excludes him from the possession of the premises.

Muldowney v. Morris & Essex R. Co., 42 Hun, 444.

31. Growing crops put in by one tenant in common, who takes possession exclusively without contract, on partition made while the crop is growing, goes in severalty to the tenants in common.

Kent's Com. vol. 4, *370; see Calhoun v. Curtis, 4 Metc. 413.

32. A tenant in common is entitled to crops put in and gathered by him, without denying his cotenant's rights and without agreement with them.

Le Barron v. Babcock, 122 N. Y. 153, rev'g 46 Hun, 598.

33. A tenant in common or joint tenant, after request and refusal, can compel his cotenant to pay his share of the expense necessary for repairs to a house or mill[2], but the rule does not apply to fences inclosing wood or arable lands.

Kent's Com. vol. 4, *370; Ford v. Knapp, 102 N. Y. 135; see, further, Denman v. Prince, 40 Barb. 213; Mumford v. Brown, 6 Cow. 475; Carver v. Miller, 4 Mass. 559; Beaty v. Bordwell, 91 Pa. St. 438; Alexander v. Ellison, 79 Ky. 148.

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[1] Post v. Kimberly, 9 Johns. 470. Tenant is liable to cotenant for interrupting voyage of vessel for which she is chartered. Killum v. Knechdt, 17 Hun, 583.

[2] As to the rule respecting mills in Massachusetts, see Carver v. Miller, 4 Mass. 559; Mass. R. S. 1836, pp. 682-3; Bellows v. Dewey, 9 N. H. 278.

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34. A tenant in common is not liable to his cotenant for the expense of improvements.

See, Scott v. Guernsey, 48 N. Y. 106; Coapley v. Mahar, 36 Hun, 157; Taylor v. Baldwin, 10 Barb. 582, 626; Bowen v. Kaughran, 1 St. Rep. 121; Austin v. Barrett, 44 Ia. 488; Thurston v. Dickinson, 2 Rich. Eq. 317; Walter v. Greenwood, 29 Minn. 87. But see, Hitchcock v. Skinner, Hoff. Ch. 21; Grannis v. Grannis, 3 S. C. 299.

35. But a tenant in common, asking the aid of a court of equity for partition against his cotenant, who has made improvements, is entitled to the relief only upon the condition that any equities thereby arising shall be taken into account. When actual partition is made and it is possible to do so, the improving tenant should be awarded the portion of the land upon which the improvements have been made.

Ford v. Knapp, 102 N. Y. 135, distinguishing Scott v. Guernsey, 48 id. 106; see, further, Town v. Needham, 3 Paige, 545; In re Heller, id. 199; St. Felix v. Rankin, 3 Edw. Ch. 323; Conklin v. Conklin, 3 Sandf. Ch. 61; Green v. Putnam, 1 Barb. 500; Putnam v. Ritchie, 6 Paige, 390; Young v. Polack, 3 Cal. 208; Conrad v. Starr, 50 Ia. 470, 478; Bridgford v. Barbour, 80 Ky. 529; Scaife v. Thomson, 15 S. C. 337; Walter v. Greenwood, 29 Minn. 87

36. A tenant in common is liable to his cotenant for injury to the property by his negligence.

See, Soule v. Mogg, 35 Hun, 79; Balch v. Jones, 61 Cal. 234; Chesley v. Thompson, 3 N. H. 9; Shepard v. Petit, 30 Minn. 119.

37. Tenant is not entitled to compensation for care of the joint property.

See, Franklin v. Robinson, 1 Johns. Ch. 157.

Unless he do some act by agreement not due from him, as a tenant.

Abell v. Clark, 23 Week. Dig. 559.

38. If a tenant in common purchase an outstanding title or incumbrance on the land, it inures to the equal benefit of all the tenants, and the tenant so purchasing is entitled to contribution.

Burhans v. VanZandt, 7 N. Y. 523; 7 Barb. 91; Peck v. Peck, 110 N. Y. 64; Carpenter v. Carpenter, 131 id. 101; Sweetland v. Buell, 89 Hun, 543; see, further, Knolls v. Barnhart, 71 N. Y. 474; Van Horne v. Fonda, 5 Johns. Ch. 388, 407; Allen v. Arkenburgh, 2 App. Div. 452; Austin v. Barrett, 44 Ia. 488; Davis v. King, 87 Pa. St. 261; Davis v. Givens, 71 Mo. 94; Rippetoe v. Dwyer, 49 Tex. 498; Pomeroy's Eq. sec. 1221; Rothwell v. Dewees, 2 Black. (U. S.), 613; Weaver v. Wible, 25 Pa. St. 270; Lloyd v. Lynch, 28 id. 419, 424; Lee v. Fox, 6 Dana (Ky.), 171, 176; DuBois v. Campan, 24 Mich. 361; but see, Streeter v. Schultz, 45 Hun, 405; Wells v. Chapman, 4 Sandf. Ch. 312; 13 Barb. 561.

39. Grantee of a tenant in common, who has paid a mortgage on the estate can not obtain contribution from the other cotenants.

Cambreleng v. Graham, 84 Hun, 550.

40. When property given and charged with the payment of a legacy creates a tenancy in common and not a trust.

Greene v. Greene, 54 Hun, 93.

JOINT TENANTS.

41. Notice to one of several tenants in common is not notice to the others.

Snyder v. Sponable, 1 Hill, 567.

42. Husband and wife may hold an estate as tenants in common.

Matter of Albrecht, 136 N. Y. 91; Kaufman v. Schoeffel, 46 Hun, 571; Brown v. Brown, 79 id. 44, see, p 552.

43. When one tenant in common may set up title against another.

Hilton v. Bender, 2 Hun, 1.

44. When husband or wife take by survivorship.

Craig v. Craig, 3 Barb. Ch. 376.

45. Patents. Owners of a patent are tenants in common, and each may use the patent or manufacture for his own benefit and without accounting to his cotenant.

Dewitt v. Elmira Nobles Mfg. Co., 66 N. Y. 459, aff'g 5 Hun, 301.

Nor is one tenant liable for the acts or agreements of his cotenant.

McNeven v. Livingston, 17 Johns. 437.

46. Release. One tenant in common can not release a cause of action so as to affect the rights of a cotenant.

Gock v. Keneda, 29 Barb. 120.

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1. Joint tenants own lands by a joint title created at one and the same time by the same instrument.[1]

Kent's Com. vol. 4, *357-8; 2 Bl. Com. 181; Am. & Eng. Ency. of Law, vol. 2, p. 1076; Woodgate v. Unwin, 4 Sim. 129.

2. A corporation can not be a joint tenant either with a natural person or another corporation.

Dewitt v. San Francisco, 2 Cal. 289.

3. Joint tenants uniformly hold by purchase.

Kent's Com. vol. 4, *357.

4. Estates in joint tenancy must be of the same duration or nature, and quantity of interest.[2]

Kent's Com. vol. 4, *357-8.

5. The beneficial acts of one joint tenant respecting the estate inure equally to the benefit of his cotenants.

Kent's Com. vol. 4, *359; 2 Bl. Com. 182; see, further, "Tenants in Common," p. 536.

6. Each tenant may enter upon the land and exercise every reasonable act of ownership.

Kent's Com. vol. 4, *359; see, further, "Tenants in Common," p. 535.

7. Joint tenants are severally liable to each other, not only in an

[1] See exceptions to this rule, Kent's Com. vol. 4, *358.

[2] See exceptions to this rule, Kent's Com. vol. 4, *358.

JOINT TENANTS.

action of account, but also in an action for money had and *received*, for the rents and profits of the estate.

Kent's Com. vol. 4, *359; N. Y. Code Civ. Pro., sec. 1666; see, further, McMurray v. Rawson, 3 Hill, 59; Miller v. Miller, 7 Pick. 133; Gowen v. Shaw, 40 Me. 56; Moses v. Ross, 41 id. 360; Blanton v. Van Zant, 2 Swan. (Tenn.) 276; see "Tenants in Common," p. 533.

8. Each tenant is liable to his cotenant for waste.

Kent's Com. vol. 4, *359; N. Y. Code Civ. Pro., secs. 1656–8.

9. Joint tenants have one entire and connected right, and must join and be joined in all actions affecting the estate.[1]

Kent's Com. vol. 4, *359.

10. Joint tenants are seized *per my et per tout* and each has the entire possession of the whole and of every parcel.

Kent's Com. vol. 4, *359.

11. For the purposes of alienation, each tenant is seized only of his undivided portion.[2]

Kent's Com. vol. 4, *360.

12. At common law, the entire tenancy or estate, upon the death of any of the joint tenants, went to the survivors, and so on to the last survivor, who took the entire estate, free from all charges[3] or interest created by the deceased cotenant.

Kent's Com. vol. 4, *360.

13. Joint tenancy may be destroyed by a conveyance by one joint tenant of his interest to a stranger, or by a release to his cotenant, in which case the purchaser holds the share so purchased as a tenant in common with the remaining joint tenant or joint tenants, and the latter, if more than one, continue as between themselves to hold as joint tenants.

Kent's Com. vol. 4, *363–4; see, further, Bowyer v. Judge, 11 East. 288.

Joint tenancy may be severed voluntarily by deed, or partition may be compelled.

Kent's Com. vol. 4, *364; N. Y. Code Civ. Pro., secs. 1532, 1533, 1537, 1538, 1548, 1590, 1656–8; see, further, "Tenants in Common," p. 533.

A testator, before the Revised Statutes, devised a lot of land to his wife during her widowhood, and on her death to be "equally divided"

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[1] N. Y. Code, sec. 1500 allows a separate action.

[2] Joint tenants have the whole for the purpose of tenure and survivorship, while each has only a particular part for the purpose of alienation.

Preston on Estates, 1, 136.

[3] The charges created by a joint tenant, and judgments against him, bind his assignee and him as survivor. Kent's Com. vol. 4, *361; Preston on Abstracts, 11, 65.

Dower does not attach to interest of deceased cotenant. Kent's Com. vol. 4, *360.

It is said that a will does not operate upon title thereafter acquired by a joint tenant by survivorship. Kent's Com. vol. 4, *360.

between his two sons, and there were no words of inheritance in the will.

Construction:

The sons took a life estate only.

Same will:

By the common law as well as under the statute (2 R. S. 307), a tenant in common, in order to maintain ejectment against his cotenant, must show an actual ouster, or some act amounting to a total denial of his right.

The denial must be such as to amount to a disseizin of the cotenant, or establish an adverse possession on the part of the wrong doer.

The defendant, who was a tenant in common with the plaintiff of the title, "admitted himself to be in possession, claiming the premises in question as *owner in fee thereof* under a *quit-claim* deed" from a grantor who had owned an undivided share, and which deed purported to remise, lease, and forever quit-claim unto the defendant, his heirs and assigns forever, the same premises, describing them by metes and bounds.

Construction:

The defendant was not guilty of any ouster or denial of his cotenant's right, so as to subject him to an action of ejectment.

By claiming title under such a deed merely, the defendant, it seems, only asserted his right to the share which his grantor held, and not to the whole premises. *Edwards* v. *Bishop*, 4 N. Y. 61.

From opinion.—"There would be no safety for tenants in common, if those who were occupants of the lands could be made disseizers, or an adverse possession be established, and the statute of limitations commence running against those who were out of possession on the evidence contained in this bill of exceptions. (4 Peters's Cond. Rep. 606, 608.) There is no adjudged case that goes so far. In Doe v. Prosser (Cowp. 217), it was said, that a refusal to pay rents and profits to a cotenant, is not sufficient without denying his title. But, if upon demand, by the cotenant of his share, the other denies to pay and *denies* his title, and continues in possession, such possession is adverse. (Doe v. Hilling, 11 East, 49; Sigler v. Van Riper, 10 Wend. 415; Ricard v. Williams, 7 Wheat. 60.)

"Valentine v. Northrop (12 Wend. 495), is the strongest case for the plaintiff I have been able to find. The defendant held under a title derived from five of the heirs of one Fish. The defendant claimed the *whole* premises and *his own*, had offered to *sell* them; and being told that all the heirs had not signed his deed, he said they had received their *share* of the *consideration*, and he thought equity would compel them to sign it. This was held to amount to a denial of the right of the plaintiffs, who, as heirs of Fish, were entitled to four-ninths of the property."

The purchaser at a sheriff's sale of an estate for life of the judgment debtor, holds his title in subordination and not in hostility to the title

of the reversioner, and an adverse possession against the tenants in reversion can not be predicated of it.

Where the tenant in possession of a life estate in lands, purchases of one of several *cestui que trusts* of the reversion his undivided interest thereto, and suffers the land to be sold for a municipal assessment and becomes the purchaser, he can not hold the land for his exclusive benefit. He is bound to protect the interest of those who stand in the same relation with himself to the property, and can not take a title to their prejudice, but the title he receives inures to the common benefit. *Burhans* v. *Van Zandt*, 7 N. Y. 523; 7 Barb. 91.

Where the intestate was seized and possessed of lands which descend to tenants in common, one of them, though not in possession, can sustain proceedings under the statute for partition, the lands being unoccupied. *Beebee* v. *Griffing*, 14 N. Y. 235.

By a will, executed in 1819, the testator, who died in 1832, devised to his sons George and Joseph, and his housekeeper Jane, land "to them and their heirs, for their use, improvement and equal emolument during their natural lives, and after their decease, to the heirs of John Bill." Bill died in 1825, in the lifetime of the testator; he left three children, who survived the testator, one of whom, and the children of another, were the plaintiffs in this action; the third died intestate and without issue.

Construction:

George, Joseph and Jane took estates for life, as tenants in common. *Campbell* v. *Rawdon*, 18 N. Y. 412, digested p. 327.

Under a bequest to children, the legatees take under the will distributively, as tenants in common, and not jointly. *Everitt* v. *Everitt*, 29 N. Y. 39, digested p. 419.

See, Tucker v. Bishop, 16 N. Y. 402.

Trustees must all unite in bringing an action on behalf of the estate. *Thatcher* v. *Candee*, 4 Abb. Ct. App. Dec. 387.

See, Sinclair v. Jackson, 8 Cow. 543; Ridgeley v. Johnson, 11 Barb. 527; Crane v. Decker, 22 Hun, 452; Trustees of M. E. Church v. Stewart, 27 Barb. 553; People v. Sigel, 46 How. Pr. 151. See, also, Hartell v. Van Buren, Bogert, et al., 3 Edw. Ch. 20; 9 Paige, 52; 4 Hill, 492.

A parol partition of real estate by tenants in common, followed by exclusive possession, are acts of ownership by each tenant respectively, and are valid and binding upon their heirs.

The doctrine of partition by and between tenants in common, discussed. *Wood* v. *Fleet*, 36 N. Y. 499.

See, Taylor v. Millard, 118 N. Y. 244, 249; Sanger v. Merritt, 120 id. 116; Kaufman v. Schoeffel, 46 Hun, 571, aff'd 113 N. Y. 635; Ferguson v. Tweedy, 56 Barb.

168; Mount v. Morton,.20 id. 123; Ryerss v. Wheeler, 25 Wend. 434; Jackson v. Harder, 4 Johns. 202.

One tenant in common, or joint owner, can not maintain an action for the possession of personal property against his cotenant.

If the cotenant sells or converts the property, he may have his action for damages, or hold his title with the purchaser. He can not compel a delivery of the possession to himself of the whole property. *Davis* v. *Lottich*, 46 N. Y. 393.

A wife owning real estate as tenant in common with her husband, can maintain an action for partition against him. *Moore* v. *Moore*, 47 N. Y. 467.

One tenant in common can not, by his sole act, create an easement in the premises held in common. Nor can a tenant in common, who owns other premises in severalty, so use the last as to acquire or exercise, for the benefit thereof, an easement in the property held in common; and he can not, by grant or by operation of an estoppel or otherwise, confer upon another rights and privileges which he does not himself possess. (Lampman v. Milks, 21 N. Y. 505, distinguished.)

Where, therefore, a tenant in common, in a grant of premises held by him in severalty, has attempted to create an easement in the premises held in common, a subsequent grantee of all the tenants in common is not estopped by the fact of his succeeding to the interest of the one who granted the easement from asserting, as a grantee of the cotenants, the invalidity of the grant of the easement, and as against him it is void. *Crippen* v. *Morss*, 49 N. Y. 63.

Where tenants in common of a quantity of grain agree to a division thereof and settle the portion belonging to one, the apportionment operates as a severance of the tenancy in common, and the one whose portion is thus allotted can, upon a demand and a refusal to deliver up the same, maintain an action for the conversion thereof against his former cotenant having the property in his possession, although such portion was never in fact separated from the residue. The possession of the latter, after such severance, is simply that of bailee. *Lobdell* v. *Stowell*, 51 N. Y. 70.

Although remaindermen and reversioners may be made parties defendant in an action for partition, they can not institute the action, at least as against others not seized of a like estate in common with them. The right is only given to one having actual or constructive possession of the lands sought to be partitioned. A remainderman has neither, but simply an estate to vest in possession *in futuro*.

As to whether remaindermen having undivided interests may compel a partition as between themselves, leaving the tenants entitled to the

possession undisturbed, *quære*. *Sullivan* v. *Sullivan*, 66 N. Y. 38, rev'g 4 Hun, 198.

Distinguishing Howell v. Mills, 56 N. Y. 226, and distinguishing and limiting Blakeley v. Calder, 15 id. 617.

Devise to Robert, Catherine, his wife, and Richard, "as tenants in common and their heirs forever."

Construction:

Each took a third interest. *Hilton* v. *Bender*, 69 N. Y. 65, rev'g 2 Hun, 1.

When the devise is to two or more, the action may be brought by one, to recover his proportion of a crop; it is not necessary to join his cotenants.

As to property separable in respect to quantity and quality by weight or measure, a tenant in common may demand of his cotenant, having possession of the whole, his share; and, upon a refusal or a conversion by such cotenant, may sue in his own name without joining all the other cotenants. *Stall* v. *Wilbur*, 77 N. Y. 158.

See, Thomas v. Williams, 32 Hun, 257, 260; Lobdell v. Stowell, 51 N. Y. 70, aff'g 37 How. Pr. 88; Channon v. Lusk, 2 Lans. 211; Forbes v. Shattuck, 22 Barb. 568; Tripp v. Riley, 15 id. 333; Soule v. Mogg, 79 Hun, 82.

The fact of the possession and use by one of two tenants in common of personal property, of the property so held, even though it prevents the possession and use by the other, furnishes no ground to the latter for an action for conversion.

It seems, however, that if the possession develops into a destruction of the property, or of the interest of the cotenant, or into such a hostile appropriation of it as excludes the possibility of beneficial enjoyment, or if it ends in a sale of the whole property, ignoring the rights of such cotenants, then a conversion is established.

A purchaser, however, from the cotenant who has assumed to sell the whole property is not made liable simply from his purchase and claim to be sole owner.

Plaintiff and P. owned a planing machine, which, with the building in which it stood, they leased for a term of years. P. being indebted to defendants gave them, as security, a chattel mortgage upon the whole machine; he informed them, however, at the time, that he owned only half, and plaintiff the other half. The payments stipulated in the mortgage were fixed so as to correspond, in amounts and dates, with the rents reserved in the lease which was looked to to discharge the mortgage debt. Action for conversion of plaintiff's interest.

Construction:

The taking of the mortgage did not amount to a conversion by defendants, conceding that the giving of it was a conversion by P., the effect of the mortgage was simply to vest the interest of P., upon default, in defendants.

Defendant H. B. S., after default, removed the machine from the possession of the lessees, claiming a right so to do. It appeared that no demand was made upon him before suit brought, and until after that time neither did nor said anything in denial of plaintiff's rights as cotenant.

Construction:

The taking possession was simply the exercise of defendants' rights as cotenants, and neither made the defendants jointly nor H. B. S. individually liable. *Osborn* v. *Schenck*, 83 N. Y. 201, aff'g 18 Hun, 202.

Distinguishing, Benedict v. Howard, 31 Barb. 569; Van Doren v. Balty, 11 Hun, 239.

From opinion.—"The earlier cases on the subject hesitated to decide that a mere sale of the whole of the common property by one of the owners was sufficient proof of a conversion (Wilson v. Reed, 3 Johns. 176; Hyde v. Stone, 9 Cow. 230; Mumford v. McKay, 8 Wend 444), and the loss or destruction of the property, so that it had passed out of the reach of the injured party, was to some extent coupled with the fact of a sale as furnishing the ground of an action. But in White v. Osborn (21 Wend. 75), the rule freed itself from any such incumbrance, and it was decided that the sale of the whole property which ignored and denied the right of the cotenant, furnished sufficient proof of a conversion. That case has been steadily followed and the doctrine is now fully established. (Tyler v. Taylor, 8 Barb. 585; VanDoren v. Balty, 11 Hun, 239; Delaney v. Root, 99 Mass. 547; Wheeler v. Wheeler, 33 Me. 348; Dyckman v. Valiente, 42 N. Y. 560.)"

Where a life estate is given to a widow, with remainder to the children, and such remainder vests at once upon the death of the testator, the children take as tenants in common, and the proper share of each vests in each. Such is the express provision of the statute as to a grant or devise of real estate (1 R. S. 727, sec. 44), and the same rule is applicable to a bequest of personalty and must be so applied. (Everitt v. Everitt, 29 N. Y. 72.) The children of A. living at the death of the testator took distributively, and the share of each vested at once, subject to the life estate of the mother, and liable to be divested by death in her lifetime. *Bliven* v. *Seymour*, 88 N. Y. 469, 478.

See, also, Smith v. Edwards, 88 N. Y. 92, 103, digested p. 433; Matter of Verplanck, 91 id. 439, 443, digested p. 438; Purdy v. Hayt, 92 id. 446, digested p. 439; Coster v. Lorillard, 14 Wend. 342, digested p. 486; Lorillard v. Coster, 5 Paige, 228, digested p. 486; Mott v. Ackerman, 92 N. Y. 539, 549, digested p. 441; Dana v. Murray, 122 id. 604, 615, digested p. 461; Matter of Kimberly, 150 id. 90, digested p. 549.

See, *post*, Lane v. Brown, 20 Hun, 382; Bingham v. Jones, 25 id. 6; Matter of Lap-

ham, 37 id. 15; Gage v. Gage, 43 id. 501; aff'd 112 N. Y. 667; Muir, In re, 46 Hun, 555; Moffett v. Elmendorf, 82 id. 470; Hunter v. Hunter, 31 Barb. 334; Cromwell v. Cromwell, 2 Edw. Ch. 495; Putnam v. Putnam, 4 Bradf. 308; Matter of Blaker, 12 St. Rep. 741; Manier v. Phelps, 15 Abb. N. C. 126-7.

Defendants were tenants in common with W. in a mill property and were in actual occupation, their interest being an undivided one-half. The interest of W. was sold on a judgment against him and bid in by defendants. The property was so badly run down and out of repair as to be nearly useless; defendants, after such purchase, expended large sums in necessary repairs and improvements, restoring it to its original usefulness and greatly increasing its value. Thereafter plaintiffs, as subsequent judgment creditors of W., redeemed and brought an action for partition, and the property was sold under judgment therein.

Construction:

Upon the division of the proceeds of sale, defendants were entitled to an allowance for the enhanced value of the property resulting from the repairs and improvements. *Ford* v. *Knapp*, 102 N. Y. 135, rev'g 31 Hun, 522. Distinguishing Scott v. Guernsey (48 N. Y. 106).

Action to set aside transfer of real estate on the ground of undue influence and fraud.

The land in question was devised to plaintiff and defendant jointly, subject to a life estate. The defendant was charged with rent for the portion of the property occupied by him after plaintiff's conveyance to him.

Construction:

No error; if plaintiff and defendant were tenants in common of the property the former, having been induced to leave the premises by the fraud and undue influence of the latter, was ousted and could have maintained an action of ejectment and an action to recover the *mesne* profits.

Woolever v. Knapp, 18 Barb. 265; Dresser v. Dresser, 40 id. 300; Roseboom v. Roseboom, 15 Hun, 309; Henderson v. Eason, 9 Eng. L. & Eq. 337, distinguished.

It appeared that defendant had paid taxes upon the property during the lifetime of the tenant for life. The amount so advanced was not chargeable to plaintiff. *Zapp* v. *Miller*, 109 N. Y. 51.

From opinion.—"The counsel cites a number of cases holding that the mere occupation by one of the several tenants in common of an estate does not make the occupant liable to his cotenant for the rent of the premises. Such are the cases of Woolever v. Knapp (18 Barb. 265); Dresser v. Dresser (40 id. 300); Roseboom v. Roseboom (15 Hun, 309). These cases refer to the leading one of Henderson v. Eason (9 Eng. L. & Eq. 337), where such a proposition was decided, and there is no doubt of its correctness. But that case, and all others resting upon it, contain the qualification

that the other tenants shall not be excluded or ousted from the possession of the premises or their title denied, in which event the other tenants may maintain ejectment to recover possession and then an action to recover the *mesne* profits. (1 Co. Litt. 784; 4 Bac. Abr., title Joint Tenants L. 518.) And in order to prove an ouster it is not necessary to prove a violent ejectment, or as one of the cases has it, it is not necessary to prove the party was set out by the shoulders. It may be inferred from circumstances. (Doe ex dem. Fishar v. Prosser, 1 Cowp, 217; Hornblower v. Reed, 1 East, 568; Goodtitle v. Tombs, 3 Wils. 118, cited in 1 Coke, 906; 4 Kent, 370, note a.) Obtaining title to the whole property held in common, by virtue of fraud and undue influence practiced on the cotenant who thereupon leaves the premises is, we think, an ouster of such cotenant and would enable him to bring ejectment."

One tenant in common is entitled to any advantage obtained by his cotenant from a purchase by the latter of a mortgage covering the common property, upon contributing his proportional share of the sum paid for the same. *Peck* v. *Peck*, 110 N. Y. 64.

A provision that issue shall take *per stirpes* does not make such beneficiaries joint tenants. *Van Brunt* v. *Van Brunt*, 111 N. Y. 178, 187, digested p. 452.

The will of G. gave to his wife, so long as she remained his widow, "for her own use and occupation, and none other," one-third of his "mansion house." The other two-thirds the will declared were to be for the use of such of the testator's children by his said wife as might choose to occupy the same. In case none of them so chose, the wife was to have the use of the whole. The provisions made in the will for the wife were declared to be in lieu of dower. His residuary estate the testator gave to his children. Upon the death of the testator the widow waived the provisions for her in the will and claimed dower, and provision was made for her by a court of competent jurisdiction. Defendant, a son of G. by a former wife, took possession of three rooms in the mansion; another heir occupied a fourth and the remainder was unoccupied. In an action of ejectment, brought by the children of the testator by his second wife, it appeared that they made a formal demand of defendant for possession of the whole house, and required him to move out at once. He offered to leave as soon as he could find another place, and expressed a willingness for them to move in without delay, and it did not appear that at any time he denied plaintiffs' rights to any part of the premises; about two months after the demand he did move out. The court charged the jury that the plaintiffs were entitled to recover possession of two-thirds of the premises, with damages.

Construction:

Error. The portion the widow refused became part of the residue and vested under the will in his heirs, and, among them, the defendant, and so the parties were tenants in common; plaintiff failed to prove that

they had been actually ousted, or that there had been any denial of their rights as cotenants, in the absence of which proof they were not entitled to recover. (Code of Civ. Pro. sec. 1515. Sigler v. Van Riper, 10 Wend. 419; 2 R. S. part 3, chap. 5, p. 306, sec. 27.)

Defendant's answer was a general denial. This was substantially a denial that defendant was guilty of unlawfully withholding the premises as alleged in the complaint, and under it defendant was entitled to prove any matter which would defeat the action, and the burden was upon plaintiffs of showing a right to the possession of the premises as against defendant at the time of the commencement of the action.

The court charged that plaintiffs were entitled to recover, as damages, the value of the use of two-thirds of the premises from the time of demand up to the trial. Error; they were only entitled to recover, if at all, damages up to the time of the surrender of the premises. *Gilman* v. *Gilman*, 111 N. Y. 265.

Where one of several tenants in common of a farm (all being of full age) occupies it with the acquiescence of his cotenants, and, in the usual course of husbandry, takes the annual products thereof, without having entered into any contract in respect to its use, and without having ousted, or denied the right of any of his cotenants, he is not liable to account to them for its use or for the products so taken.

When, in the due course of husbandry, the tenant in occupancy, in good faith, severs such products from the land, he becomes the sole owner thereof, and a cotenant, by taking them away, becomes liable to him in damages for conversion thereof.

L. died intestate, seized of a farm, and leaving eleven children. Plaintiff, one of the children, was administrator of his father's estate, and, being in possession of the farm, sowed a portion thereof with oats. Upon the farm there were about forty acres of meadow. Plaintiff cut the oats, and the grass upon about fifteen acres of the meadow. No one of the heirs but plaintiff had bestowed any labor on the farm. Defendants entered upon the farm and drew away the oats and hay, claiming to do so in the right and by the direction of one of the other heirs. Plaintiff forbade the removal of the property, but admitted the right of any of his cotenants to cut or take his or her share of the standing grass. None of the cotenants had ever been excluded from the farm, nor had the right to possess or enjoy it ever been denied to them or any of them. Action for conversion.

Construction:

Plaintiff was sole owner of both the oats and hay; and defendants were liable. *Le Barron* v. *Babcock*, 122 N. Y. 153, rev'g 46 Hun, 598.

From opinion.—"The oats and hay were personal chattels, the former being such before as well as after they were cut, and the latter became such when severed from the meadow. (2 Steph. Com., 8th ed., 212.) If they were owned in common by the plaintiff and Mrs. House, it was not a conversion in law for the defendants, acting by her (a cotenant's) authority, to merely draw them away. (Carr v. Dodge, 40 N. H. 404; Ballou v. Hale, 47 id. 347; Russell v. Allen, 13 N. Y. 173; Lobdell v. Stowell, 51 id. 70; Freem. on Cotenants, sec. 306.) But if the plaintiff owned the products in his own right, then the defendants' act in carrying them away was a conversion in law, and they are liable for the damages.

"When one of several tenants in common of a farm (all being of full age) occupies it and has taken, in the usual course of husbandry, the annual products thereof without having entered into any contract in respect to its use, and without having ousted or denied the rights of any of his cotenants, he is not liable to account to them, or to any one of them, for its use, or for the products so taken. (Woolever v. Knapp, 18 Barb. 265; Wilcox v. Wilcox, 48 id. 327; Dresser v. Dresser, 40 id. 300; Roseboom v. Roseboom, 15 Hun, 309; 81 N. Y. 356; Zapp v. Miller, 109 id. 51, 57; Henderson v. Eason, 17 Ad. & El. 701; 4 Kent's Com. 369; Freem. on Cotenants, sec. 286.) The judgments which hold that a tenant in common of farming land, who, while in peaceable possession, takes and uses the products which have grown while so in possession, is not liable to account for their value to his cotenant, rest necessarily on the assumption that he becomes the sole owner of such products; for if a tenant in common of a chattel uses it up or sells it for his own exclusive benefit, without the express or implied assent of his cotenants, he is liable to them for its conversion. (Wilson v. Reed, 3 Johns. 175; Nowlen v. Colt, 6 Hill, 461; Dyckman v. Valiente, 42 N. Y. 560; Freem. on Cotenants, secs. 307, 308.) When a cotenant of such lands peaceably takes the products grown during his possession, there comes a time when he is vested with the sole title, which can not be later than when in the due course of husbandry they are peaceably and in good faith severed by him from the common estate on which they were grown. If they do not then become the undivided property of the cotenant who grew and severed them, it is difficult to see what subsequent act he could perform which would vest him with the title. Storing the hay and grain in a barn would not strengthen his title, and unless it becomes perfect when the products are severed, a cotenant, out of possession, can lie by and permit the one in possession to rear and prepare crops for market and then peaceably take them whenever or wherever he can, or, under certain circumstances, of the purchaser, so long as the property can be traced. This would not be a convenient nor an equitable rule, and we find no authority which justifies the court in declaring it to be the legal one.

"The plaintiff, having in the due course of husbandry grown and severed the grass and oats, while being with the acquiescence of his cotenants legally and peaceably in possession of the land whereon they grew, became the sole owner of them, and the defendants, by taking them away, became liable for their value. (Calhoun v. Curtis, 4 Metc. 413; Brown v. Wellington, 106 Mass. 318; Bird v. Bird, 15 Fla. 424; Henderson v. Eason, 17 Ad. & El. 701; 1 Dom. Civ. Law [Cushing's ed.], 952.)"

When beneficiaries take life estates as tenants in common, with cross remainders determinable on marriage. *Dana* v. *Murray*, 122 N. Y. 604, 615, digested p. 461.

From opinion.—"The estate devised to the husband and three daughters is *in solido*, and the statute provides that '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.' (1 R. S. 727, sec. 44.)

"Here we have no express words devising the estate to them as joint tenants, or words clearly imputing such intent, and they consequently must be regarded as tenants in common. (Purdy v. Hayt, 92 N. Y. 446–452; In the Matter of Verplank, 91 id. 439–443.)"

Where one or more tenants in common are in the actual possession and control of the common property, they may not buy in an outstanding title to defeat the rights of their cotenants, and are bound to do nothing with a view to prejudice their interests. *Carpenter* v. *Carpenter*, 131 N. Y. 101.

When husband and wife held property as tenants in common. *Matter of Albrecht*, 136 N. Y. 91, digested p. 557.

By the Code of Civil Procedure (sec. 1543) jurisdiction is conferred upon the court to determine, in an action for partition, all questions arising between the parties in respect to the property, as to their respective titles and rights of possession, and a disseized cotenant may maintain the action.

The fact that by another provision of said Code (sec. 1537) it is specifically provided that a party out of possession may maintain the action, when he claims by reason of heirship, and the lands are in possession of a devisee, under a devise claimed to be void, does not limit to such a case the right of a party out of possession to maintain the action.

Nor is the right limited by the fact that the provision specifying the cases when the action may be brought (sec. 1532) declares that it may be brought "where two or more persons hold and are in possession of real property as joint tenants or as tenants in common," etc. What is meant thereby is not a strict *pedis possessio*, but a present right of possession.

One of several life tenants in common could maintain the action, although his cotenants were in possession, holding adversely; it appearing that the adverse possession had not been in force a sufficient length of time to extinguish plaintiff's title.

The rule in this regard existing prior to and the change brought about by the enactment of the provision of the Code first referred to, stated. *Weston* v. *Stoddard*, 137 N. Y. 119, aff'g 60 Hun, 290.

NOTE.—"In many of the estates it has always been held that a disseized cotenant may maintain compulsory partition. (Call v. Barker, 12 Me. 325; Marshall v. Crehore, 13 Metc. 464; Miller v. Dennett, 6 N. H. 109; Tabler v. Wiseman, 2 Ohio St. 207; Godfrey v. Godfrey, 17 Ind. 9; Cook v. Webb, 19 Minn. 170; Howey v. Goings, 13 Ill. 108; Scarborough v. Smith, 18 Kan. 399; Martin v. Walker, 58 Cal. 590; Cuyler v. Ferrill, 1 Abb. C. C. 182.)"

A devise and bequest of all the testator's estate "unto my three sisters" (naming them, but without further words), constitutes, by force

of the statute (1 R. S. 727, § 44), a tenancy in common and not a joint tenancy or a bequest to a class; and, hence, if one of the three legatees has died before the testator, her legacy lapses and the testator must be deemed to have died intestate as to one-third of his estate.

1 R. S. 727, § 44, applies to personal estate. The statute (1 R. S. 727, § 44), which declares that "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," applies to personal as well as real estate.

A bequest is not a gift to a class, where, at the time of making it, the number of the donees is certain and the share each is to receive is also certain and in no way dependent for its amount upon the number who shall survive. *Matter of Kimberly*, 150 N. Y. 90, aff'g 3 App. Div. 170.

See cases collected, p. 543.

From opinion.—"The sole question * * * is whether the bequest was to the testator's sisters jointly, or whether they took the property as tenants in common. That upon the death of one of the legatees before the decease of the testator, the legacy lapsed if it was to the legatees as tenants in common, is not denied by either party. The courts below have held that the legatees took as tenants in common, and, hence, that as to one-third of the testator's estate, he died intestate.

"The appellant's contention is that the legatees took jointly, and if not, that the bequest was to the sisters of the decedent as a class, and consequently there was no lapse in the disposition by reason of the death of one of the legatees. We do not think that contention can be sustained. While at common law such a bequest would have constituted the legatees joint tenants, yet, under the statutes of this state, the rule is clearly otherwise. The Revised Statutes provide that, '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.' (Sec. 44, art. 1, tit. 2, ch. 1, pt. 2, R. S.) This statute applies to personal as well as real estate. (Everitt v. Everitt, 29 N. Y. 39, 72; Bliven v. Seymour, 88 id. 469, 478; Van Brunt v. Van Brunt, 111 id. 178, 187; Mills v. Husson, 140 id. 99, 104.)

"Nor was the bequest in this case to a class. In legal contemplation, a gift to a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number. (1 Jarman on Wills, 5th ed., 269.) Here the number of persons was certain at the time of the gift, the share each was to receive was also certain, was in no way dependent for its amount upon the number who should survive, and, hence, this case is not within the principle invoked."

When assignees take as tenants in common. *Beal* v. *Miller*, 1 Hun, 390.

Devise of an estate for years to wife and children; they take as tenants in common notwithstanding it is personal property. *Blanchard* v. *Blanchard*, 4 Hun, 288–9, aff'd 70 N. Y. 615.

Right of a tenant in common to sue his cotenant under 1 R. S. 750, sec. 9, for money had and received by the latter, who retains an undue proportion of the rents and profits. *Joslyn* v. *Joslyn*, 9 Hun, 388.

Where one tenant in common enters into possession of a farm, and does nothing to

prevent his cotenants from occupying the same with him, he is not liable to account for the value of the rents, issues and profits thereof, nor for what he takes therefrom, but only for what he actually receives over and above the just proportion. *Roseboom* v. *Roseboom*, 15 Hun, 309, aff'd 81 N. Y. 356.

Citing, Wilcox v. Wilcox, 48 Barb. 327; Joslyn v. Joslyn, 9 Hun, 388.

Possession by one tenant in common, when not adverse to his cotenant. *Kathan* v. *Rockwell*, 16 Hun, 90.

Partition—right of a defendant to an allowance for rents received, and stone quarried, by the plaintiff, his cotenant. *McCabe* v. *McCabe*, 18 Hun, 152.

When children take as tenants in common. *Lane* v. *Brown*, 20 Hun, 382.

Gift of interest on a sum of money to grandchildren "share and share alike," corpus to be paid to others upon their decease, grandchildren take in severalty and not jointly. *Bingham* v. *Jones*, 25 Hun, 6.

When legatees presumed to take, as tenants in common, a bequest to a trust. *Matter of Lapham*, 37 Hun, 15.

Conversion of property by one tenant in common—exception to the rule requiring a sale or destruction of the property in order to constitute a conversion. *Dear* v. *Reed*, 37 Hun, 594.

When one tenant in common may recover, for use and occupation, from a cotenant, who excludes him from the possession of the premises. *Muldowney* v. *Morris & Essex R. Co.*, 42 Hun, 444.

Several executors holding estates as trustees hold it as joint tenants, and this though it be personal property. *People* v. *Coleman*, 42 Hun, 585.

When devisees will be held to take as tenants in common, and not as joint tenants. *Gage* v. *Gage*, 43 Hun, 501, aff'd 112 N. Y. 667.

When one tenant in common is presumed to hold adversely to his cotenant. *Abrams* v. *Rhoner*, 44 Hun, 507.

Right of one tenant in common to purchase property on the foreclosure of a mortgage covering the interests of both. *Streeter* v. *Shultz*, 45 Hun, 406, aff'd 127 N. Y. 652.

Legacy to the brothers and sisters of the testator; when they take distributively as tenants in common, not as a class. *In re Muir*, 46 Hun, 555.

Husband and wife may hold personal property as tenants in common. *Kaufman* v. *Schoeffel*, 46 Hun, 571, aff'd 113 N. Y. 635.

Gift of property to be held for six years and charged with the payment of legacies; when it creates a tenancy in common and not a trust. *Greene* v. *Greene*, 54 Hun, 93, aff'd 125 N. Y. 506.

When a husband and wife may take as tenants in common. *Brown* v. *Brown*, 79 Hun, 44.

Joint devisees and legatees of real estate and of the business transacted thereon—when they become copartners—real estate treated as a part of the copartnership assets. *MacFarlane* v. *MacFarlane*, 82 Hun, 238.

When devisees take as tenants in common and when as a class—rights of the survivors. *Moffett* v. *Elmendorf*, 82 Hun, 470.

Voluntary payment of a mortgage by one tenant in common—his grantee can not demand contribution from his cotenants. *Cambreleng* v. *Graham*, 84 Hun, 550.

Safe deposit box rented in two names—joint ownership of its contents and right of survivorship not presumed therefrom. *Mercantile Deposit Co.* v. *Huntington*, 89 Hun, 465.

Accounting—when some of several tenants in common are in possession of the land, the relation of landlord and tenant exists—their liability to their cotenants. *Myers* v. *Bolton*, 89 Hun, 342.

A tenant in common is not permitted to purchase an outstanding title for his benefit

alone—possession of one tenant in common is the possession of all—when tenants in common are ousted by the act of their cotenant. *Sweetland* v. *Buell*, 89 Hun. 543.

Agreements by one, a tenant, and uncle of his cotenant to purchase in the realty for a common benefit. *Allen* v. *Arkenburgh*, 2 App. Div. 452.

Gift of a remainder to testator's seven children during their lives, share and share alike—children took as tenants in common and not as joint tenants. *Matter of Blaker*, 12 St. Rep. 741.

Devise to H. and each of said children share and share alike—they take as ten ants in common and not as joint tenants and that, to, independent of the statute. *Manier* v. *Phelps*, 15 Abb. N. C. 126–7.

Joint tenants may have the property sold if not partitioned, and the proceeds divided and that though the cotenant may object thereto. *Baldwin* v. *Baldwin*, 23 Civ. Proc. 268.

The statute declaring that 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 a joint tenancy, applies to personal estate. (1 R. S. 727, sec. 44.) *Mills* v. *Husson*, 55 St. Rep. 312, s. c. 140 N. Y. 99.

A bequest to W. and F. of a share of the residne, followed by a direction that such share be "paid them, when they come of age," constitutes a joint tenancy, and if one of the legatees die before a severance, the survivor will be entitled to the whole gift.

The right of survivorship is a characteristic of a joint tenancy. On the death of one joint tenant, either before the decease of the testator, or after his decease and before a severance of the joint tenancy, his right will survive to the other joint tenants. *Putnam* v. *Putnam*, 4 Bradf. 308.

Devise of an equal portion of a remainder to each of testator's children—they take as tenants in common. *Hunter* v. *Hunter*, 31 Barb. 334.

See also, Mason v. Jones, 2 Barb. 229; Richards v. Moore, 5 Redf. 278; Moore v. Lyons, 25 Wend. 119; Hone's Exrs. v. Van Schaick, 20 id. 564; Buckley v. Depeyster, 26 id. 26.

The release of the lands by one of two trustees, from the operation of a mortgage, is not in itself sufficient to discharge the lands; to render it available, it must be executed by both trustees. *VanRensselear* v. *Akin*, 22 Wend. 549.

Gift of rents and profits of each of several undivided one-twolfth parts of testator's property, to his nephews and nieces. Their interests are in joint tenancy, and not tenancies in common. *Coster* v. *Lorillard*, 14 Wend. 335, rev'g 5 Paige, 228–9.

On a conveyance to two or more as joint tenants or tenants in common, notice to one of them of a prior unrecorded mortgage will not affect the rest, except in the case of a trust estate. Otherwise, when the one receiving notice is agent for the rest. *Snyder* v. *Sponable*, 1 Hill, 567.

Several tenants in common of mere life estates in the premises held in common, made a partition, of such premises, by parol, and one of them afterwards conveyed the lots set off to him, in such partition, in fee, with warranty, and subsequent to such conveyance acquired an undivided interest in the remainder in fee in the whole premises.

Construction:

His grantee of the part of the premises so set off in severalty, was not entitled to the undivided share which their grantor had thus acquired in those portions of the premises not embraced in their deeds from him. *Carpenter* v. *Schermerhorn*, 2 Barb. Ch. 314.

Where stocks are conveyed to the husband and his wife jointly, and she outlives her husband, who dies without having disposed of the stocks, the wife takes the whole by survivorship. *Craig* v. *Craig*, 3 Barb. Ch. 76.

Gift to be equally divided among my children or the survivor or survivors of them as shall die childless, yearly and every year, share and share alike during their natural lives. The three sons take as tenants in common, for life. *Cromwell* v. *Cromwell*, 2 Edw. Ch. 495.

I. ESTATES BY THE ENTIRETY.

An estate by the entirety has but one feature in common with that of joint tenancy, and that is in the right of survivorship.

Jooss v. Fey, 129 N. Y. 17.

Where a grant or devise is made to a husband and wife, without any words specially prescribing, qualifying or characterizing the kind or quality of the estate which each shall take, they hold as tenants by the entirety.

Torrey v. Torrey, 14 N. Y. 430; Zorntlein v. Bram, 100 id. 12; Bertles v. Nunan, 92 id. 152; Grosser v. City of Rochester, 148 id. 235; Stelz v. Schreck, 128 id. 263; Miner v. Brown, 133 id. 308; Bram v. Bram, 34 Hun, 487; Platt v. Grub, 41 id. 447 (deposit in bank in name of husband and wife); Reynolds v. Strong, 82 id. 203; Rogers v. Benson, 5 Johns. Ch. 431; Dias v. Glover, 1 Hoff. Ch. 71; Sutliff v. Forgey, 1 Cowen, 89.

See, in cases of lease, Goelet v. Gori, 31 Barb. 314.

Where, however, it appears from the words of the grant or devise that it was so intended they will take as tenants in common.

Miner v. Brown, 133 N. Y. 308; Hicks v. Cochran, 4 Edw. Ch. 107; Matter of Albrecht, 136 N. Y. 91; Hiles v. Fisher, 144 id. 306, 312; Wurz v. Wurz, 27 Abb. N. C. 58; Mason v. Mason's Exrs., 2 Sandf. Ch. 432; Preston on Estates, 1, 132.

Or as joint tenants.

Jooss v. Fey, 129 N. Y. 17; Cloos v. Cloos, 55 Hun, 450.

During their joint lives they are tenants in common or joint tenants of the use of the land, although, as to the estate, they be tenants by the entirety, and either may bind or charge his or her use and title arising from survivorship.

Hiles v. Fisher, 144 N. Y. 306; Grosser v. City of Rochester, 148 id. 235; Buttlar v. Rosenblatt, 42 N. J. Eq. 651.

As tenancy by the entirety is founded upon the marital relation, a severance of the relation causes each party, irrespective of guilt or innocence, to take a proportional share of the property as a tenant in common.

Stelz v. Schreck, 128 N. Y. 263; see Beach v. Hollister, 3 Hun, 519.

During their joint lives, neither husband nor wife can alien so as to bind the other.

Kent's Com. vol. 4, *362; Doe v. Howland, 8 Cow. 277; Dias v. Glover, 1 Hoff. Ch. 71; Wright v. Saddler, 20 N.Y. 320; O'Connor v. McMahon, 54 Hun, 66; Rogers v. Benson, 5 Johns. Ch. 431. But a release between themselves is good. Meeker v. Wright, 76 N. Y. 262.

Nor does the statute of partition affect the estate.

Kent's Com. vol. 4, *362; Miller v. Miller, 9 Abb. Pr. 444.

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But partition may be had when they hold as tenants in common.
Wurz v. Wurz, 27 Abb. N. C. 58.

If an estate be conveyed expressly in joint tenancy, to a husband and wife, and to another, the latter takes a moiety and the husband and wife, as one person, the other moiety.

Kent's Com. vol. 4, *363; Barber v. Harris, 15 Wend. 616: it is otherwise when they take as tenants in common. Hilton v. Bender, 69 N. Y. 75.

If husband and wife were seized of the lands as joint tenants before marriage, the same tenancy would continue after the marriage.

Kent's Com. vol. 4, *363.

Service of process upon the husband does not bind the wife in judicial proceedings affecting property held by the husband and wife as tenants by the entirety.

Grosser v. The City of Rochester, 148 N. Y. 235; see Matter of Board of Street Opening, 89 id. 525.

In tenancy by the entirety action by one tenant against the other for use or occupation or waste does not lie.

Freeman v. Barber, 3 Sup. Ct. T. & C. 574.

Notice to husband of an unrecorded mortgage is not notice to wife.

Snyder v. Sponable, 1 Hill, 567.

Where land is conveyed to husband and wife, they do not take as joint tenants or as tenants in common; both are seized of the entirety; neither of them can dispose of any part without the assent of the other, and the whole goes to the survivor; and the effect is the same whether the land be limited to the two during their joint lives, with remainder to the survivor during his or her life, or to the two and their representatives during the life of the survivor. *Torrey* v. *Torrey*, 14 N. Y. 430.

Where, since the passage of the act of 1860, concerning the rights and liabilities of husband and wife (ch. 90, Laws of 1860), lands have been conveyed to a husband and wife, jointly, without any statement in the deed as to the manner in which the grantees shall hold, they are tenants in common.

Even if under such a conveyance they are tenants of the entirety, not tenants in common, a conveyance by the husband for a valuable consideration of his interest in the lands to the wife is good; and a bond and mortgage, executed by her to secure part of the purchase money, are valid. *Meeker* v. *Wright*, 76 N. Y. 262, rev'g 11 Hun, 533.

Torrey v. Torrey, 14 N. Y. 430, distinguished; Goelet v. Gori, 31 Barb. 314; Miller v. Miller, 9 Abb. Pr. (N. S.) 444; Beach v. Hollister, 3 Hun, 519; Freeman v. Barber, 3 T. & C. 574, so far as this point is concerned, disapproved.

[1] See, on question of notice to one cotenant being notice to all, Parker v. Kane, 4 Wis. 1.

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The common law rule that where land is deeded to husband and wife, they each become seized of the entirety, and on the death of either the whole survives to the other, was not abrogated by the acts in relation to married women.

It seems, also, that said rule was not done away with by the act of 1880 (ch. 472, Laws of 1880), allowing the husband and wife to make division between themselves of land so held.

At all events said act does not affect the right of survivorship where the conveyance was prior to its passage.

Said act, therefore, can not so operate as to authorize either the husband or wife, who acquired title under such a conveyance, prior to the passage of said act, separately to convey to a third person, and such a deed conveys no title. *Zorntlein* v. *Bram*, 100 N. Y. 12, rev'g 17 J. & S. 476.

Where land is conveyed to a husband and wife jointly, they take not as tenants in common or joint tenants, but as tenants by the entirety, and on the death of either the survivor takes the whole estate.

This is the common law rule, and under the rule of strict construction of the statutes in derogation of the common law, was not abrogated by any of the following statutory provisions: L. 1848, ch. 200, sec. 3; L. 1849, ch. 375, amending preceding; L. 1860, ch. 90, secs. 1, 2; L. 1862, ch. 172, amending above law of 1860. *Bertles* v. *Nunan*, 92 N. Y. 152.[1]

Overruling Feely v. Buckley, 28 Hun, 451, rev'd 92 N. Y. 634. Citing Goelet v. Gori, 31 Barb. 314: Farmers' and Mechanics' N. Bank v. Gregory, 49 id. 155; Beach v. Hollister, 3 Hun, 519, and many cases in other states construing similar legislation in a similar manner; disapproving Meeker v. Wright, 76 N. Y. 262, to the contrary. 1 R. S. 727, sec. 44 did not abrogate the common law rule. Torrey v. Torrey, 14 N. Y. 430; Wright v. Saddler, 20 id. 320; Dias v. Glover, 1 Hoff. Ch. 71.

Where land is conveyed to husband and wife without any express restriction as to the character of their holding, they take as tenants by the entirety.

As such tenancy is founded upon the marital relation and upon the legal theory that the husband and wife are one, it depends for its continuance upon the continuance of the relation, and when the unity is broken by a divorce the tenancy is severed; each takes a proportionate share of the property as a tenant in common.

There is no implied condition annexed to an estate by the entirety that the grantees shall remain faithful to the marriage vow, or that either shall not, by misconduct, cause a severance of the marital relations, and

[1] This case is followed in Zorntlein v. Bram, 100 N. Y. 12; Grosser v. City of Rochester, 148 id. 235.

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a decree of divorce granted because of adultery, does not vest the whole title in the innocent party. *Stelz* v. *Schreck*, 128 N. Y. 263.

Citing Harrer v. Wallner, 80 Ill. 197; Lash v. Lash, 58 Ind. 526; Ames v. Norman, 4 Sneed, 683; and not approving Lewis case, 48 N. W. Rep. 680.

NOTE.—"A conveyance of this kind, if made to two persons who were not husband and wife, would, at common law, have created a joint tenancy. But our statute provides that 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. (1 R. S. 727, sec. 44.) This statute did not reach an estate by the entirety, nor did the statutes of 1848 and 1849, and 1860 and 1862. (Bertles v. Nunan, 92 N. Y. 152.) It, therefore, still exists under our law."

A married woman may take and hold real property as a joint tenant with her husband, and where by a deed to herself and husband it appears plainly that the intent was to convey to her, not merely as a wife, but separately, by virtue of her individual right, as a joint tenant with him, she has the right to dispose of her interest independent of her husband.

Certain premises were in 1882, purchased by F. and his wife, each contributing to the purchase money from his and her separate estate. The words of the grant were to "the parties of the second part as joint tenants, and to their heirs and assigns," and the habendum clause was to them "as joint tenants and not as tenants in common." The wife subsequently conveyed her interest in the premises to plaintiff.

Construction:

The wife took and held as joint tenant with her husband, not as tenant by the entirety; she had power to convey, and, by her deed, plaintiff acquired her interest (sec. 3, chap. 200, Laws of 1848, as amended by chap. 375, Laws of 1849); and the action was maintainable. (Code Civ. Pro., sec. 1532.) *Jooss* v. *Fey*, 129 N. Y. 17.

Citing, on estates in entirety, Stelz v. Schreck, 128 N. Y. 263; Bertles v. Nunan, 92 id. 152, distinguished.

From opinion.—"Prior to the passage of the various acts by the legislature of this state for the benefit of married women (in the years 1848, 1849, 1860 and 1862), the common law rule obtained that, by a conveyance to husband and wife, they could only take and hold the estate as tenants by the entirety. It was immaterial to affect the quality of their holding, whether the estate was given to them, or acquired by their joint purchase. Words of grant which, to separate persons, would convey in joint tenancy, to husband and wife, would convey by entireties. They could not take and hold otherwise. They were seized each of the whole, and neither could sell without the consent of the other. (Williams on Real Property, 208; 2 Kent's Com. 110, 132; Jackson v. Stevens, 16 Johns. 113, 115.) This estate of tenancy by the entirety has but one feature in common with that of a joint tenancy, and that is in the right of survivorship. In all other essential respects they differ. The estate which vests by virtue of a grant jointly to husband and wife, is peculiarly the result, or product of the marriage relation, and depends for its continuance upon the unity of man and wife." (19.)

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It seems that where a grant or devise is made to a husband and wife, without any words specially prescribing, qualifying or characterizing the kind or quality of the estate which each shall take, the grantees hold as tenants of the entirety. (Bertles v. Nunan, 92 N. Y. 152.)

Where, however, it appears from the words of the grant or devise that the intent was to create a tenancy in common in the grantees or devisees, they take and hold as tenants in common.

No particular form of words is necessary to create that relationship; it is sufficient if expressions are used which can not be operative unless the wife is admitted to an equal present enjoyment of the estate with her husband, and that her estate is not to be subservient to his exclusive control.

The will of B. gave to C., his son, and to E., his son's wife, the use of certain premises, "for their use, benefit and support during their natural lives."

Construction:

It was the intent of the testator to make the husband and wife tenants in common, and they held in that capacity; and so, the wife was entitled to the possession and use of a moiety of the premises, of which she could not be deprived by any act or default of her husband. *Miner* v. *Brown*, 133 N. Y. 308.

From opinion.—"There was in such cases at common law, a unity of seizin and of possession during their joint lives, which seemed to invest the husband with the exclusive use and control of the property, and which deprived the wife of all the practical benefits of its immediate enjoyment. This anomalous condition resulted from the unity of the parties to the marriage contract, whereby, as stated by Blackstone, 'The very being and legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband.'

"It was merely a legal fiction, which still survives in a form greatly abridged by modern legislation, and its application was frequently the cause of much hardship and great injustice. We, therefore, find a disposition manifest at a very early period in the history of English law to limit its extension and hold that a husband and wife may, by express words, be made joint tenants, or tenants in common by a gift or conveyance to them during coverture, and that every grant to them is to have just such effect in respect to the estate which they take, as was intended to be created. (Shepard's Touchstone, 132; 2 Prest. on Abs. tit. 41; 2 Kent's Com. 133, note 2.)

"In Preston on Estates (vol. 1, p. 132), it is said: 'In point of fact, and agreeable to natural reason, the husband and wife are distinct and individual persons, and accordingly when lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties, as other distinct and individual persons will do.' (Citing 1 Inst. 187.)

"In Hicks v. Cochran (4 Edw. Ch. 107), the vice-chancellor applied this rule, and held that where there were words in a conveyance to husband and wife, strongly expressive of a tenancy in common in equal moieties, they should be construed to have the same effect as if there had been an explicit statement that they were to hold as tenants in common.

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"In Cloos v. Cloos (55 Hun, 450), the general term of the second department held that the husband and wife took as joint tenants, where it was clear from the words of the conveyance that it was the intention of the parties to create a joint tenancy.

"In a very recent case (Jooss v. Fey, 129 N. Y. 17), this court decided that a married woman could hold real property as a joint tenant with her husband, if the intent to convey such an estate is plainly expressed in the words of the grant."

A husband and wife each furnished half of the amount of a loan and took as security therefor a bond and mortgage payable to them jointly.

Construction:

Upon the death of one of them the interest of the deceased vested, not in the survivor, but in the personal representatives of the deceased. *Matter of Albrecht*, 136 N. Y. 91.

From opinion.—"It might be observed that if this was a case governed by the same principles which determine the rights of husband and wife where real property is conveyed to them during coverture, it would not necessarily follow that they would become tenants by the entirety. If nothing was shown to evince a contrary intent such would undoubtedly be held to be the relationship of the parties, as was decided in Bertles v. Nunan (92 N. Y. 155). But this court has held in the recent case of Miner v. Brown (133 N. Y. 308), that such a tenancy is not created where it appears from the character of the transaction that it was the intention of the parties that the grantee should take as joint tenants or as tenants in common. To the same effect is Jooss v. Fey (129 N. Y. 17). What would be the legal rights of the parties where, upon the purchase of real property, the husband and wife had each contributed from their separate estates equally or in any other ascertained proportion to the payment of the consideration does not as yet seem to have been the subject of judicial decision.

"It is not necessary, however, to farther pursue this mode of reasoning, for it has no value, except as it may be instructive by way of analogy. The rights of husband and wife in the personal property of each other, or in that which may be transferred to them jointly, rest upon different grounds than those which support a tenancy by the entirety.

The common law right of a husband to take during coverture the rents and profits of lands held by him and his wife as tenants by the entirety, and to assign and dispose of them during that period, did not spring from the peculiar nature of this estate and is not an incident or characteristic of it, but is simply a right inuring to the husband from the general principle of the common law which vested in him *jure uxoris* the rents and profits of all his wife's lands, whether held by a sole or joint title, during their joint lives.

While, therefore, the acts relating to the rights of married women have not abrogated the common law doctrine of tenancy by the entirety, and under a conveyance to a husband and wife they take not as tenants in common or joint tenants, but by the entirety and upon the death of either the survivor takes the whole estate (Bertles v. Nunan, 92 N. Y. 152), as the right of the husband to the rents and profits of the wife's

lands during their joint lives has been completely swept away by said statutes, he is not exclusively entitled to the *usufruct* of the lands so held by them in entirety, but they are tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits, so long as the question of survivorship is in abeyance.

Where a husband executed a mortgage upon lands deeded to him and his wife, the mortgage was effectual to cover his interest, which was a right to the use of an undivided half of the estate during their joint lives, and to the fee in case he survived her; and the purchaser on sale under a foreclosure of the mortgage acquired this interest, and became a tenant in common with the wife subject to her right of survivorship. *Hiles* v. *Fisher*, 144 N. Y. 306, modifying 67 Hun, 229.

NOTE 1. "This was pointed out in Miner v. Brown (133 N.Y. 308), and authorities were cited to show that where the intention disclosed by the deed or will was to create a tenancy in common that estate would be created. (See, also, McDermott v. French, 15 N. J. Eq. 78; Wales v. Coffin, 13 Allen, 213; 1 Wash. on Real. Prop. 425.)" (312.)

NOTE 2. "Either the rents and profits follow the nature of the estate, and can neither be disposed of nor charged except by the joint act of both husband and wife, which seems to be the view taken in McCurdy v. Canning (64 Pa. St. 39), or the parties become tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits during the joint lives, with power to each to dispose of or to charge his or her moiety during the same period, which seems to be the view taken in Buttlar v. Rosenblath (42 N. J. Eq. 651). We think the rule adopted in New Jersey best reconciles the difficulties surrounding the subject." (315.)

NOTE 3. "The opinion of the general term exhibits, with great clearness, the reasons upon which it was held that a conveyance or mortgage by the husband, without restrictive words, binds the fee in case he survives his wife. (See, 1 Wash. Real Prop. 425; 1 Prest. Est. 135; Ames v. Norman, 4 Sneed, 683.)" (316.)

When a husband and wife are seized of an estate as tenants by the entirety, a proceeding by a municipality to condemn a right of way for a sewer across the premises, in which notice is served upon the husband alone, and he only appears, and which results in an award to him, does not bind the wife's interest or confer any right in the land as to her; and she can, by force of the married woman's acts, maintain an action, during the life of her husband, to restrain the construction of the sewer, as a threatened permanent injury to the freehold which will interfere with her possession. *Grosser* v. *The City of Rochester*, 148 N. Y. 235; 66 Hun, 636.

From opinion.—"We are aware that, by the common law, the husband, before the death of his wife, could possess and control the land and take all the profits thereof for his own benefit. (Bertles v. Nunan, 92 N. Y. 152.) This right, however, followed the conveyance and inured to the husband under the general principles of the common law, and was not acquired by reason of the creation of a tenancy by the

entirety. So that, when the disability of the wife was removed under the married woman's act of 1848, and subsequent acts, she was thereafter permitted to have, hold and enjoy whatever estate came to her by devise or conveyance, and the husband's right to the sole occupancy and possession terminated. Thereafter she became entitled to hold, enjoy and possess with him as if she were a tenant in common. (Hiles v. Fisher, 144 N. Y. 306.)"

When property is held by a husband and wife as tenants by the entirety—divorce, effect of, as to purchaser of husband's interest at execution sale. *Beach* v. *Hollister*, 3 Hun, 519.

Deed to husband and wife; they become seized of the entirety. *Bram* v. *Bram*, 34 Hun, 487.

Deposit in a savings bank of money of a husband in the name of the husband and wife; right of the survivor to the fund. *Platt* v. *Grub*, 41 Hun, 447.

Conveyance to husband and wife "as joint tenants," prevents their taking as tenants by the entirety. *Cloos* v. *Cloos*, 55 Hun, 450; s. c., 24 Abb. N. C. 219. See note, p. 229.

In a devise to husband and wife as such, they take a tenancy by the entirety. *Reynolds* v. *Strong*, 82 Hun, 203.

Tenancy by the entirety; award for property in condemnation proceedings where the husband is a lunatic; proceeds should be deposited in court and paid to the survivor. *Matter of Board of Street Opening*, 89 Hun, 525.

Where a lease for a term of years is executed to husband and wife, jointly, the rights and interests of the lessees, respectively, by and under the lease, and in and over the demised premises, are what they are declared to be by the common law, and are unaffected by the acts of 1848 and 1849, for the more effectual protection of property of married women. *Goelet* v. *Gori*, 31 Barb. 314.

Lands were given to a husband and wife upon certain conditions; upon performance thereof the title vested in them as tenants by the entirety, and the wife could not maintain an action in her own name for use, occupation and waste thereupon. *Freeman* v. *Barber*, 3 Sup. Ct. (T. & C.) 574.

There is no law enabling husband and wife to partition land given them by a deed, not purporting that they take it as joint tenants, tenants in common or severalty. *Miller* v. *Miller*, 9 Abb. Pr. 444 (Sup. Ct.).

A husband and wife may take and hold lands as tenants in common as well as by entirety, and by the law of 1880, ch. 472, they may partition the same. *Wurz* v. *Wurz*, 27 Abb. N. C. 58.

A deed to husband and wife and to six of their children, naming them, and to such other children of the marriage as might be subsequently born, creates a tenancy in common between the husband and wife and the children; the husband and wife being considered in law but as one person, take, while there are six children, one-seventh of the estate granted, and when two more children are born, take only one-ninth of the estate.

As between themselves, the husband and wife hold neither as joint tenants or as tenants in common—each is seized of the entirety *per tout et non per my* and for that reason the husband alone can not alien the estate; but having the absolute control of the estate during his life, he may convey or mortgage it during that period. *Barber* v. *Harris*, 15 Wend. 616.

Conveyance of land to husband and wife, on which there was a prior unrecorded mortgage. Notice to the husband thereof will not affect the wife's right and survivorship therein. *Snyder* v. *Sponable*, 1 Hill, 567.

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A conveyance to husband and wife makes them neither joint tenants, nor tenants in common; but both are seized of the entirety and neither can alien, without the consent of the other, and on the death of one, the whole will go to the survivor. *Sutliff* v. *Forgey*, 1 Cowen, 89.

Husband and wife holding lands by a conveyance to them jointly, are not joint tenants or tenants in common. They are seized *per tout*, but not *per my*, each owner of the whole; and the conveyance by one is inoperative as to any part; for both are necessary to make one grantor. *Doe* v. *Howland*, 8 Cow. 277.

Where land is conveyed to husband and wife, they do not take as joint tenants, nor as tenants in common; but are both seized of the entirety; neither can sell without the consent of the other, and the survivor takes the whole; this case not being within the provisions of the act relative to joint tenants. *Rogers* v. *Benson*, 5 Johns. Ch. 431.

A conveyance was made to J. C. and P. C., his wife. Habendum, to "the said J. C. and P., his wife, as tenants in common, and in equality of estate, and not as joint tenants." The common law rule, that husband and wife take by entireties and no alienation of one could prevent the right of the survivors, applied in this case. *Dias* v. *Glover*, 1 Hoff. Ch. 71.

Words in a will importing a joint bequest, or a union of interests, construed as bestowing separate and distinct shares and interests, from the nature of things given and the directions as to their disposition and enjoyment.

So words in the conjunctive will be construed disjunctively and as distributive when the income of the testator requires it. *Mason* v. *Mason's Ex'rs*, 2 Sandf. Ch. 432.

A husband who has abandoned but not divorced his wife, can not convey any part of the estate of which he and his wife are tenants by the entirety. *O'Connor* v. *McMahon*, 26 St. Rep. 596 (Sup. Ct.); s. c., 54 Hun, 66.

XIII. WHEN EXPECTANT ESTATES ARE DEEMED CREATED.

L. 1896, ch. 547 (Gen'l L. ch. 46), sec. 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."

1 R. S. 726, sec. 41, Banks's 9th ed. p. 1794, repealed by Real Prop. L.

Stokes v. Weston, 142 N. Y. 433; Lange v. Ropke, 5 Sandf. 363; see Real Prop. L., secs. 158, 209.

USES AND TRUSTS.

The common law in its earlier state permitted no immediate estate in lands not clothed with the legal seizin and possession. Later the following system of conveyancing arose. "The owner of real estate conveyed it by feoffment, with livery of seizin to some friend, with a secret agreement that the feoffee should be seized of the lands to the use of the feoffor, or of a third person. Thus the legal seizin was in one (the feoffee), and the use or rents and profits in another" (the *cestui que use*). Greenleaf's Cruise on Real Prop. 331. Originally the rights of the latter were precarious and unrecognized, and he depended entirely upon the good faith of the persons to whom the lands were conveyed. But the church found in the system of uses a means of evading the statutes of mortmain, and the chancellors chosen from the clergy, following the civil law, considered the execution or fulfillment of the use by the feoffee as binding in conscience, and enforceable in chancery, and the feoffee was, contrary to all existing rules, even compelled to appear and answer whether he was the feoffee of the lands limited to a secret use. Nevertheless, Lord Bacon says "an use is no right, title or interest in law." Hence, as no legal right to a freehold estate in lands could be transferred without the ceremony of the livery of seizin, the *cestui que use* could have no remedy in the courts of law, where regard was had only to the legal title, and although he were in possession of the lands he was at law as regards the feoffee but a tenant by suffrance. But the court of chancery from first compelling the payment of the rents and profits to the *cestui que use*, finally established that the *cestui que use* might call on the feoffee to uses for a conveyance of the legal estate, to himself, or to any other person whom he chose to appoint; and compel him to defend the title to land, so that Lord Bacon says that "pernancy of the profits, execution of estates, and defense of the land are the three points of a trust or use." As the legal estate was in the feoffee to uses, he performed the feudal services, he alone could incumber the land; his widow had her dower in it if he died; the guardian of his infant child could hold the land during infancy; if the feoffee was attainted of treason or felony the lands were forfeited, and one purchasing from the feoffee *without notice and for a valuable consideration* usually could not be compelled even in chancery to execute the use. Greenleaf's Cruise on Real Prop. 338–9.

A *use* not being an estate in land, was not an object of tenure, and was therefore, exempt from all feudal burdens, so that upon the death

of the *cestui que use*, the lord had not the wardship, or marriage of the infant heir, nor other similar rights, nor was the use forfeited for treason or felony, nor did curtesy or dower attach to the interest of the *cestui que use*, but a use could be aliened without the technical words of a grant, and without the general restrictions and prohibitions that attached to estates in land; and was devisable, although lands at that time were not, and was descendible like a legal estate. Greenleaf's Cruise on Real Prop. vol. 1, 293–294, 296.

The exemption of uses from certain of these incidents and burdens, the facility afforded by them to defraud creditors and purchasers, and the great confusion and obscurity of titles resulting from their employment, led to the enactment of several statutes for their regulation and finally to "an act concerning uses and wills" known as "The Statute of Uses," 27 Henry VIII, ch. 10. By this act an attempt was made to abolish uses, by destroying the estate of the feoffees to uses, transferring the legal estate from the feoffees directly to the *cestuis que use*. Thereby the use would be changed into a legal estate, and all the incidents and rules of a legal estate would appertain to the interest of the *cestui que use* and no estate would continue vested in the feoffees.

The revisers, in the original note[1] to Art 11 of the Revised Statutes, describe the results of this statute and the new system proposed by them, as follows:

"This last statute (statute of uses), 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 seized 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 language, 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.

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[1]Vol. 3, p. 582, *et seq.*

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 seizin, 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.

3. 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 seizin, in other words, by a forfeiture or change of the estate of the person seized 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 seizin, 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 trusts, 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 can not 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 utllity, 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 can not be abolished, as their existence is necessary to the prevention of frauds. 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 recom-

mended 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."

Personal property — how far governed by the statutes relating to real property.

The Revised Statutes, embodying the creation and division of estates, uses and trusts, and powers, as well as the Real Property Law embracing the same subjects, relate in terms to real property. However, by analogy or by virtue of statutory reference, these statutes are in great part made applicable to personal property.

Trusts in personal estate are subject to no statutory restrictions; in other words, the legislature has never attempted to define and enumerate the lawful occasions for creating such trusts. They stand, therefore, as at common law, subject only to the statutory rule against suspension of ownership for more than two lives. 1 R. S. 773, sec. 1, after prescribing the rule of perpetuity in first section, declares in the second, that in other respects limitations of future and contingent interests in personal property shall be subject to the rules prescribed in the statute relating to future estates in lands; and those rules are contained in 1 R. S. 721. Gilman v. Reddington, 24 N. Y. 12.

"It has been held in several cases that the statute which provides that limitations of future or contingent interests in personal property, shall be subject to the statutory rules prescribed in relation to future estates in land, was, in effect, a legislative application of the same principles and policy to both classes of property; and that even if the provisions of the statutes were not sufficiently comprehensive, absolutely to require as a peremptory injunction of statute law, their application in all their length and breadth and in the same degree to both classes of property, the argument to be derived from the general similarity of the legislative enactments in regard to both classes of the property, from the similar if not equal mischiefs to be remedied, and from the general policy of the law, would authorize a court of equity, in the exercise of its acknowledged powers, to apply the same rule of construction to both." Graff v. Bonnett, 31 N. Y. 9.

Denio, J., dissented on ground that the section referred to — 1 R. S. 773, sec. 2 — reading," in all other respects, limitations of future or contingent interests in personal property, shall be subject to the rules prescribed in the first chapter of this act, in relation to future estate in lands, " relates to the sections on future estates in lands and those only (*i. e.*, 1 R. S. 721, secs. 7 to 42, inclusive). In this construction of the

Revised Statutes, he relies on Kane v. Gott, 24 Wend. 641, and Grout v. Van Schoonhoven, 1 Sandf. Ch. 336, and discusses and criticizes previous cases. (5 Paige, 583; 7 id. 222; 8 id. 83.)

The provisions of R. S. (1 R. S. 727, sec. 471) as to the union of legal and equitable estates are applicable in principle to trusts of personal property. Asche v. Asche, 113 N. Y. 232.

Limitations of future or contingent interests in personal property are subject to the same rules which are prescribed by the Revised Statutes in relation to future estates in lands; and a bequest of the interest in the income of personal property to accrue and be received after the death of the testator is a limitation of a future interest, within the meaning of the Revised Statutes on this subject, and in analogy to the provision relative to the rents and profits of real estate to accrue and be received after the death of the testator. *Hone* v. *Van Schaick*, 7 Paige, 221.

Real Prop. L., sec. 32 (the portion contained in former section 16, 1 R. S. 724) does not apply to personal property Manice v. Manice, 43 N. Y. 305.

Real Prop. L., sec. 47 (at least so far as it embodies 1 R. S. 728, sec. 51) does not apply to personalty. Robbins v. Robbins, 89 N. Y. 251.

Real Prop. L., sec. 53 (1 R. S. 726, sec. 40), is made applicable to personal property by 1 R. S. 773, sec. 2. Cook v. Lowry, 95 N. Y. 103; Delafield v. Shipman, 103 id. 463.

Real Prop. L., sec. 56 (1 R. S. 727, sec. 44), (when estate in common; when in joint tenancy), applies to personal property. Everitt v. Everitt, 29 N. Y. 39; Bliven v. Seymour, 88 id. 469, 478; Van Brunt v. Van Brunt, 111 id. 178, 187; Matter of Albrecht, 136 id. 91 (tenancy by the entirety). See cases collected p. 543.

Real Prop. L., sec. 76. (Purposes for which express trusts may be created)— is not applicable to personalty. Gilman v. Reddington, 24 N. Y. 12; Cochrane v. Schell, 140 id. 517; Hagerty v. Hagerty, 9 Hun, 175.

Real Prop. L., sec. 78 (1 R. S. 729, sec. 57), applies to personal property. Bramhall v. Ferris, 14 N. Y. 41 (citing Clute v. Bool, 8 Paige, 83; Stewart v. McMartin, 5 Barb. 438); Williams v. Thorn, 70 N. Y. 270; Tolles v. Wood, 99 id. 616; Wetmore v. Wetmore, 149 id. 520; Rider v. Mason, 4 Sandf. Ch. 351.

Real Prop. L., sec. 83 (1 R. S. 730, sec. 63), (what trust interest may be alienated), applies to personalty. Graff v. Bonnett, 31 N. Y. 9; Campbell v. Foster, 35 id. 361; Lent v. Howard, 89 id. 169, 181; Tolles v. Wood, 99 id. 616.

Real Prop. L., secs. 110 *et seq.*, relating to powers, applies to personal property. Cutting v. Cutting, 86 N. Y. 522; Tilden v. Green, 130 id. 29; Hutton v. Benkard (so far as applicable), 92 id. 295; Life Ins. & Tel. Co. v. Livingston, 133 id. 125.

1 R. S. 730, sec. 67, as amended by ch. 545, L. 1875, applies to personalty. Mills v. Husson, 140 N. Y. 99; Cochrane v. Schell, id. 516.

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I. EXECUTED USES EXISTING—CONFIRMED AS A LEGAL ESTATE.

Real Prop. L., sec. 70. Executed uses existing. "Every estate which is now held as a use, executed under any former statute, is confirmed a legal estate."

1 R. S. 727, sec. 46; Banks's 9th ed. N. Y. R. S. p. 1796 (repealed by Real Prop. L., sec. 300), was the same.

II. CERTAIN USES AND TRUSTS ABOLISHED.

Real Prop. L., sec. 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."

1 R. S. 727, sec. 45; Banks's 9th ed. N.Y. R. S. p. 1796 (repealed by Real Prop. L., sec. 300) was substantially the same; "of law" was inserted after "courts."

III. WHEN RIGHT TO POSSESSION CREATES LEGAL OWNERSHIP.

Real Prop. L., sec. 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."

1 R. S. 727, secs. 47, 48, Banks's 9th ed. N. Y. R. S., p. 1796 (repealed by Real Prop. L., sec. 300), was substantially the same.

See N. Y. Dry Dock Co. v. Stillman, 30 N. Y. 174.

The legal title to lands, conveyed (in 1827) to A. and his heirs, in trust to pay the rents and profits to B. for life, and on her death to convey to the heirs of B., descended to A.'s heirs, upon his dying (in 1832) before B., notwithstanding the provisions of the Revised Statutes (part II, ch. 1, title 2, sec. 68) for the vesting of such trusts in the court of chancery; and a conveyance by A.'s heirs, after the death of B., is a proper execution of the trust. Section 11, title 5 of that chapter, limits the application of the statute to trusts thereafter created, except for the purpose of converting formal trusts into legal estates.[1]

Nor does the statute (sec. 47, art. II) vest the legal estate in the *cestuis que trust*, for the trust is not merely nominal, but is connected with the power of management and disposition. (Sec. 48.) *Anderson* v. *Mather*, 44 N. Y. 249.

The will of M. devised his real estate to his executors in trust, to hold one-third part thereof for the benefit of each of his three daughters during life. Upon the death of a daughter, leaving a husband and lawful issue living, it was declared that the executors should stand seized of her third "from and immediately after her death, upon trust for the sole use and benefit of such issue;" and in case of the death of a daughter single and unmarried "upon such trust, and for such purpose as she shall or may appoint by her last will;" in default of such appointment "for the sole use and benefit of her next of kin." The power of appointment related to the remainder in fee; in each event provided for, the trust in the executors upon the death of the daughter would be purely passive, the remainder vesting in the beneficiaries. *Mott* v. *Ackerman*, 92 N. Y. 539.

Citing 1 R. S. 727, sec. 44; Purdy v. Hayt, 92 N. Y. 446.

1 R. S. 724, sec. 24. See, also, Termination of Express Trust, *post*, p. 692.

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[1] The provision of the Revised Statutes providing that persons entitled to both the actual possession and the receipt of rents and profits are deemed to have a legal estate commensurate with the beneficial interest applies to trusts prior to its enactment. *Bellinger* v. *Shafer*, 2 Sandf. Ch. 324.

To the same effect are Frazer v. Williams, 1 Barb. Ch. 220; Cushney v. Henry, 4 Paige, 345; Johnson v. Fleet, 14 Wend. 176; Nicoll v. Walworth, 4 Denio, 385.

The fourth section of the statute of uses (1 R. S. 727, sec. 47) rendering lands liable to execution against the *cestui que trust*, applies only to those fraudulent or covenous trusts, in which the *cestui que trust* has the whole beneficial interest in the land, and the trustee the mere naked or formal legal title.

It is not applicable to a case where one person enters into a contract for the sale and conveyance of land to another, and the vendee pays part of the consideration, and enters into possession of the land but neglects to pay the remainder of the purchase money; for the vendor is not seized to the use of the vendee until the whole consideration is paid and the vendee has only a mere equitable interest on which a judgment at law is not a lien, nor can it be sold under an execution. *Bogert* v. *Perry*, 17 Johns. 351.

IV. TRUSTEE OF PASSIVE TRUST NOT TO TAKE.

Real Prop. L., sec. 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."

1 R. S. 728, secs. 49, 50, Banks's 9th ed. N. Y. R. S. p. 1796 (repealed by Real Prop. L., sec. 300) was substantially the same: the words "hereafter made" were inserted after "by deed or devise."

Where a conveyance of lands is made, to one person, in trust for the use and benefit of another, his, or her, heirs and assigns, without limitation, no estate or interest vests in the trustee, but the entire estate, legal and equitable, vests in the person to whose use the conveyance is made; subject, however, to such conditions as would have been attached to the legal estate, had the title vested in the trustee according to the terms of the deed.[1]

Such conveyance was made in terms to a trustee, who at the time of the conveyance executed to the grantor a mortgage upon the premises conveyed to secure a part of the purchase money.

Construction:

The person to whose use the conveyance was made took the legal and equitable title, *subject to the lien of the mortgage.*

Such deed and mortgage are to be construed together, as though both were incorporated in one instrument. *Rawson* v. *Lampman*, 5 N. Y. 456.

John Mason in 1838, placed in the hands of the defendants $3,500, with instructions to purchase a farm therewith, and to "take a deed in his own name, and hold the same in trust for the benefit of James Mason (son of John M.) and for his possession." The defendant purchased the farm, as directed, situated in the County of Queens, which

[1]See, also, LeGrange v. L'Amoureux, 1 Barb. Ch. 18; Knight v. Weatherwax, 7 Paige, 182; Wood v. Burnham, 6 id, 513; Nicoll v. Walworth, 4 Den. 385; Welch v. Allen, 21 Wend. 147; 2 Hill, 491; McCosker v. Brady, 1 Barb. Ch. 329; Kittell v. Osborn, 1 Hun, 613; Fairchild v. Edson, 77 id. 298, aff'd 144 N. Y. 645; Salsbury v. Parsons, 36 Hun, 12.

was occupied by James M. for ten years, when he sold and conveyed it to plaintiff.

Construction:

Whether, under the provision of the Revised Statutes in regard to trusts, the entire legal and equitable estate vested in James Mason, *quære? Ring* v. *McCoun*, 10 N. Y. 268; see, 3 Sandf. S. C. R. 524.

Devise in 1834 to B., son, in trust for the use of his children, and their heirs, receiving the income of the property for the benefit of B. and his children "during their natural life" and statement "that the property devised should remain undivided and in common until the youngest child shall have attained the age of eighteen years."

Construction:

(1) The trust attempted to be created in trustees was passive, not at that time allowable.

(2) Hence, the estate vested in B. and his children as tenants in common. (3 R. S. 5th ed., secs. 47, 49; Rawson v. Lampman, 1 Seld. 456; Wright v. Douglass, 3 id. 364.) *Fisher* v. *Hall*, 41 N. Y. 416.

Where land is conveyed to individuals as trustees of a religious corporation, in trust for the purposes of the corporation the statute of trusts vests the legal title in the corporation; and an action to recover possession should be brought in the name of the corporation, and the individual grantees should not join as plaintiffs. *Van Duzen* v. *Trustees of Presbyterian Congregation*, 4 Abb. Ct. App. Dec. 465.

Citing, Welch v. Allen, 21 Wend. 147; Nicoll v. Walworth, 4 Den. 385.

Devise of an estate including premises subject to a mortgage to executors in trust, to divide the same into three parts, as to one of which he provided, "I direct my said trustee to permit, suffer my son W. to have, receive and take the rents, issues and profits thereof for the time of his natural life; and after his decease, I give, devise and bequeath the same part or share to the heirs at law of my said son."

Construction:

The trust attempted was passive and invalid.

The son took a life estate upon which a judgment against him was a lien, and the judgment creditor was a necessary party to a foreclosure. *Verdin* v. *Slocum*, 71 N. Y. 345, rev'g 9 Hun, 150.

Citing Parks v. Parks, 9 Paige, 107; Jarvis v. Babcock, 5 Barb. 139; Beekman v. Bonsor, 23 N. Y. 298, 314, 316.

A trust for the "sole use and benefit" of remaindermen after life beneficiary is passive and vests the title immediately in them on death

of the life beneficiary. *Mott* v. *Ackerman*, 92 N. Y. 539, digested p. 441.

A deed recited an antenuptial agreement between J., the grantor, and his wife, in pursuance of which the conveyance was executed, which agreement was to the effect that in case the intended marriage was celebrated he would convey the land in question to H., "to the use, benefit and behoof" of the wife "in manner following," in the event of the decease of J. during the lifetime of the wife, she to have the use of one half of the premises during her life, and after her death the same to revert to the heirs of J.; also the use of the other half during the minority of two children of J. by a former marriage; when they became of age the said half to be conveyed to them, and in case of the decease of the wife without issue during the lifetime of J. all of the property to be transferred back to him. The wife died before J.

Construction:

No trust estate and no estate whatever vested in the grantee named in the deed, but it was simply a conveyance to him for the uses of the beneficiaries named, which uses would be executed by the statute without any conveyance; the deed was not to take effect at all, except in the contingency of J. dying before his wife; the provision in the agreement that, in the event of the decease of the wife "without issue" during the lifetime of J. all of the property should be assigned back to him, was not of itself sufficient to create a trust in favor of the issue of the marriage; therefore, all interests under the deed were defeated by and it ceased to have any operation upon the death of the wife during the lifetime of J.; and a mortgage executed by J. and his wife upon the premises after the execution of the deed, was a valid lien. *Helck* v. *Reinheimer*, 105 N. Y. 470.

By virtue of the statute of uses and trusts (1 R. S. 727, sec. 47), a deed to a person on a mere naked trust for another, vests the legal title in the beneficiary. *Ennis* v. *Brown*, 93 Hun, 22; citing Hopkins v. Kent, 145 N. Y. 363.

A conveyance to one for benefit of himself and others vests title immediately in the beneficiaries. *Woerz* v. *Rademacher*, 120 N. Y. 62, digested pp. 637, 886.

Active and passive trusts discussed. *Townshend* v. *Frommer*, 125 N. Y. 446.

To vest a title in a *cestui que trust*, under the provisions of the Revised Statutes (1 R. S. 728, sec. 49, and 729, sec. 58) declaring that a transfer of real estate to one or more persons, to the use of, or in trust for another, shall vest no estate or interest in the trustee, it is essential that the trust be declared by a deed or conveyance in writing (2 R. S. 134,

sec. 6), and the trust must have existed at the time of the grant to the trustee.

In an action of ejectment, plaintiff claimed title under a sheriff's deed upon sale on execution against the F. D. Co. Upon the trial, plaintiff offered in evidence a judgment record, which showed that one R. purchased the premises and took conveyances, paying a portion of the purchase moneys and giving his bonds, secured by mortgage on the premises, for the balance; that thereafter an arrangement was made between him and said company by which it assumed the purchases and became entitled to the benefit thereof, and thereupon it paid to R. the amount paid by him, and thereafter used and enjoyed the premises, paying interest on the bonds.

Construction:

The record was properly excluded; the legal title was in R.; the judgment record simply disclosed that the F. D. Co. had an equitable title subject to the mortgages, which title was not salable upon execution; and so, the sheriff's deed conveyed no title to the purchaser. *Bates* v. *Ledgerwood Mfg. Co.*, 130 N. Y. 200.

NOTE 1.—"The judgment was not a lien upon such equitable estate, nor was it salable upon execution issued upon such judgment. (1 R. S. 744, sec. 4; Sage v. Cartwright, 9 N. Y. 49; Grosvenor v. Allen, 9 Pai. 74.)" (204.)

NOTE 2.—"A different question would have been presented if it had appeared, in the manner required by statute, that Russell had taken the conveyances in trust for the company. In that case the legal title would have vested in the company. (1 R. S. 728, 729, secs. 49, 58.) But to accomplish this, it was essential that the trust be declared by deed or conveyance in writing, etc. (2 R. S. 134, sec. 6.) And the trust must have existed at the time of the grant to the trustee, although it may have been effectually declared afterwards. (Wright v. Douglass, 7 N. Y. 564.) This the deed executed by Russell to the American Fibre Company failed to do. And although the F. D. Co. advanced the money for the payments that were made upon the purchases, it can not, in view of the statute, be held that the company took the legal estate by virtue of any trust resulting to it. (1 R. S. 728, sec. 51; Garfield v. Hatmaker, 15 N. Y. 475.)" (205.)

In the plaintiff's chain of title was a deed to three persons, who were described as trustees of a land association. It did not appear that the association was incorporated, or capable as such of taking a legal title.

Construction:

It was to be assumed that the association was a partnership of individuals, of which the grantees were members, holding the legal title for the benefit of themselves and others, and so they were not mere trustees, holding simply a nominal title, and the provisions of the Revised Statutes (1 R. S. 728, secs. 49–58) (N. Y. Dry Dock Co. v. Stillman, 30 N. Y. 194), taking away such a title and vesting it in the bene-

ficiary, did not apply, and, therefore, whether the deed was to be regarded as one to the grantees named individually, or as a conveyance for their benefit and that of others, they had authority to sell and convey a good title. *King* v. *Townshend*, 141 N. Y. 358, aff'g 65 Hun, 567

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V. RESULTING AND CONSTRUCTIVE TRUSTS.

I. GRANT TO ONE WHERE CONSIDERATION IS PAID BY ANOTHER.
II. ARISING FROM A FIDUCIARY RELATION.
III. PAROL TRUSTS—SECRET TRUSTS.
IV. TRUSTS IMPOSED IN CASES OTHERWISE THAN ABOVE TO PREVENT FRAUD AND MISCARRIAGE OF JUSTICE.
V. FOLLOWING TRUST FUNDS.
VI. BONA FIDE PURCHASERS PROTECTED.

I. GRANT TO ONE WHERE THE CONSIDERATION IS PAID BY ANOTHER.

Real Prop. L., sec. 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."

1 R. S. 728, secs. 51, 52, 53, Banks's 9th ed. N. Y. R. S. p. 1797 (repealed by Real Prop. L., sec. 300) was substantially the same, with a different arrangement of the clauses.

Where real estate was purchased and paid for in part with the money or funds of the husband, and with his assent the conveyance was taken to a trustee who simultaneously gave a mortgage on the estate for the residue of the purchase money, and also with the husband's assent executed a declaration of trust to the effect that the premises were held to the sole and separate use of the wife, subject to the mortgage.

Construction:

The rights of creditors not being in question, the declaration of trust was valid and binding upon the husband, and the husband had no interest in such estate.[1] *Martin* v. *Martin*, 1 N. Y. 473.

[1]In pursuance of a contract to purchase, made by the husband, his wife took an absolute conveyance of the property with the understanding that she should hold it for

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Where a grant for a valuable consideration is made to one person, and the consideration therefor is paid by another, no interest, legal or equitable, vests in the person paying the consideration, to which a judgment and execution can attach, but the statute imposes upon the legal estate in the hands of the grantee in the conveyance, a *pure trust* in favor of the creditors at the time of the person paying the consideration, which can be enforced in equity only.

A husband paid the consideration for land, and the conveyance was taken to his wife. The land was sold under an execution upon a judgment recovered against the husband, and the purchaser, having obtained the sheriff's deed, brought ejectment.

Construction:

The action was not maintainable. *Garfield* v. *Hatmaker*, 15 N. Y. 475.

The case of Wait v. Day (4 Denio, 439), so far as it holds to the contrary, is overruled, and Brewster v. Power (10 Paige, 562) is approved.

From opinion.— "The rule at common law was, that if lands were conveyed to one person, the consideration for which was wholly paid by another, a trust resulted in favor of the person who paid the price. Such a trust, being raised by implication of law was held not to be within the statute of frauds, and it was also held that under the former statute of uses (1 R. L. 74, sec. 4), the interest of the *cestui que trust* could be seized and sold as a legal estate on execution against him. (Foote v. Colvin, 3 Johns. 216; Jackson v. Bateman, 2 Wend. 570; Guthrie v. Gardner, 19 id. 414; Jackson v. Walker, 4 id. 462.) In the present case, the plaintiff's title depends on the same rules, if they still exist, and the question has been determined in his favor by the court below, in accordance with the decision of the former supreme court in Wait v. Day (4 Denio, 439), but opposed to the views of the late court of chancery, as stated in Brewster v. Power (10 Paige, 569). After an attentive consideration, I am brought to the conclusion that the decision is erroneous.

"Our present statute "of uses and trusts" (1 R. S. 747) has made several very important changes in the law, and among them, I think, it has subverted the rules and principles which have just been stated. Under the old law the person who paid the consideration money had an estate in the land, by way of resulting trust, and the grantee in the conveyance who had paid nothing had no interest. I mean of course, no actual interest, without inquiring whether he held the formal legal title. Such was the relation between the grantee and the person who paid the purchase money; and the right to sell the land on judgment and execution against the latter, was the result of that relation. This was true, even when the transaction was intended to de-

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the use of herself and two minor children during her life, and after her death it should go to her children. The wife claimed to hold absolutely but a trust was implied though not expressed in writing on behalf of the children. McCahill v. McCahill, 11 Misc. 258.

Citing Sieman v. Austin, 33 Barb. 209; Siemon v. Schurck, 29 N. Y. 598; Foote v. Bryant, 47 id. 544; Gilbert v. Gilbert, 2 Abb. Ct. App. Dec. 256; Reitz v. Reitz, 80 N. Y. 538.

fraud creditors. In such cases the creditor could take the land in execution through the resulting trust, although, perhaps, neither courts of law nor equity would aid the *cestui que trust* for his own sake. His own inability to arrest a fraudulent trust did not affect the principal. The creditor, where the whole equitable interest was in his debtor, took the land, not through or by means of the fraud, but irrespective of it, and through the trust which the law implied.

"Now this relation between the grantee and the person paying the purchase money appears to me to be entirely overthrown by the present statute of uses and trusts. It is declared (sec. 51), that 'when a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, *no use or trust shall result* in favor of the person by whom such payment shall be made but the title shall vest in the person named as the alienee in such conveyance, subject only to the provisions of the next section.' The next section (sec. 52) declares that 'every such conveyance shall be deemed fraudulent as against the creditors at the time of the person paying the consideration; and where a fraudulent interest is not disproved a trust shall result *in favor of such creditors* to the extent that may be necessary to satisfy their just demands.'

"Now, it appears to me that this language is free from all ambiguity. The resulting trust of the common law is abrogated in the most explicit terms."

Although the plaintiff, it seems, understood that her money was to be invested in the real estate and assented thereto, yet not having consented that an absolute deed be taken to another person without any recognition of her interest, the transaction was in fraud of her rights, and the estate was chargeable with an equitable lien in her favor in the nature of a resulting trust. *Day* v. *Roth*, 18 N. Y. 448, digested p. 654.

Where a married woman paid the consideration for the conveyance of land which was, without her knowledge or consent, taken by her brother absolutely in his own name, without the expression of any trust, she was within the exception (1 R. S. 128, sec. 53) by which a trust results for her benefit, although she had consented to a conveyance which would have been ineffectual as a trust and would have vested the whole estate in herself. *Lounsbury* v. *Purdy*, 18 N. Y. 515.

Where one advances the purchase money of land, the conveyance of which is taken by another, the statute (1 R. S. 728, sec. 52) imposes a trust upon the land in favor of the existing creditors of the persons paying the purchase money, which they may enforce at any time by action in the nature of a bill in equity.

Although the purchase and conveyance were made with an actual intent to defraud by the person paying the money, the trust in favor of his then creditors prevails over the title of one who takes a conveyance from the grantee, unless he obtain it for a valuable consideration and without notice.

Accordingly, where, after a conveyance to the wife of one who advanced the purchase money, the transaction being fraudulent in fact, a

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subsequent creditor of the husband procured from the wife a mortgage of land to secure a precedent debt, the statutory trust in favor of the creditor at the time of the transaction prevails over the equal equity and superior diligence of the subsequent creditor. *Wood* v. *Robinson*, 22 N. Y. 564.

Trust resulted to heirs by widow procuring another to take title to land contracted to be purchased by the intestate.[1] *Swinburne* v. *Swinburne*, 28 N. Y. 568, digested p. 591.

A purchase of land was made for the benefit of the plaintiff, by her parents, and the purchase money was paid by the latter, the purchase being made for the benefit of, and intended as a gift or advancement to, the plaintiff, who was an infant; and an absolute deed was executed to Y. of the premises, for the benefit of the plaintiff, but without her consent or knowledge.

Construction:

Although Y. held the legal title, by virtue of his deed, it was a mere naked title without interest, and one upon which a judgment against him could not fasten as an effective lien.

The provisions of the fifty-first section of the article of the Revised Statutes, relating to uses and trusts, were inapplicable to the case; the rule of the common law as to resulting trusts in favor of him who pays the purchase money on a conveyance being made to another, was revived, and governed the rights of the parties.

A writ in equity would lie, by the plaintiff, as the equitable owner of the premises, to enforce her rights as such, and to restrain the prosecution of an ejectment suit brought by parties claiming under a judgment against Y., with notice that the consideration for the deed to Y. was paid by others.

And an action for such equitable relief was not barred because the plaintiff might have interposed her claim as a defense in the ejectment suit.

The language of the statute, declaring that where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person *by whom such payment shall be made*, is not necessarily prohibitory of a resulting trust for the benefit of *a third person* in whose favor, for family or other lawful and sufficient reasons, it is deemed proper to make some provision. *Siemon* v. *Schurck*, 29 N. Y. 598.

[1]Where there is a conveyance of land, purchased by a husband from a third person, to his wife, no trust results in his favor—1 R. S. 728, sec. 53. *Gould* v. *Gould*, 51 Hun, 9. See, also, Hurst v. Harper, 14 id. 280

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The enforcement of pure trusts is one of the original and inherent powers of a court of equity; and, by force of the state Constitution, this power is now vested in the supreme court.

The jurisdiction of the court in respect to creditors' bills, is *auxiliary* to the remedies of the creditors at law, and can only be invoked after performance of that statutory condition, that the remedies at law shall first be exhausted.

In cases of pure trust, the party ordinarily has no remedy at law, and may resort *in the first instance* to a suit in equity.

Previous to the revision of our statutes, when land was purchased in the name of one, with the money of another, save in a few exceptional cases, the law declared a resulting trust in favor of the party paying the consideration.

By the statute of uses and trusts, this rule was abolished, and an independent resulting trust was declared in favor of creditors, which may be enforced in the first instance in a court of equity, where nothing has been done or omitted by the creditors tending to impair their rights and where the design and effect of the transaction has been to defraud them. *McCartney* v. *Bostwick*, 32 N. Y. 53.

The decision in Siemon v. Schurck (29 N. Y. 598, affirming 33 Barb. 9),—that if lands are purchased for the benefit of a minor, with money given by parents, and the deed, taken in the name of a third person, is made absolute in form without the knowledge of the minor or parents, a valid trust results in favor of the minor, notwithstanding the abolition of resulting trusts by the Revised Statutes—reasserted, and followed in a case where the absolute character of the deed was known to the parent. *Gilbert* v. *Gilbert*, 2 Abb. Ct. App. Dec. 256.

Citing, Ryan v. Dox, 34 N. Y. 307.

Where one holds the legal title to real property (under a lease), evidence of his admissions that moneys expended by him in improvements thereon were received from or for the use of another person (his sister), and were thus expended for her use and benefit, and that such improvements (houses) were for and belonged to her, is not sufficient to establish the fact or raise a presumption that the title was taken or held in trust for her or as her agent, or that there was any understanding or agreement between them that it should be so taken or held. *Duffy* v. *Masterson*, 44 N. Y. 557.

The provisions of the statute in reference to fraudulent conveyances and contracts in reference to lands (title 1, chapter 7, part 2, of the R. S.), do not preclude a party from establishing an implied or resulting

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trust recognized by the common law. The transaction, out of which a trust of this character arises, may be proved by parol; but the trust itself must rest upon the acts or situation of the parties as proved, and not merely upon their declarations.

Where one pays the consideration for real estate and a conveyance is taken in the name of another, although by section 51 of the statute of uses and trusts (1 R. S. 728), no trust results in favor of the person paying the money, and the title is vested in the alienee named in the conveyance; yet it is competent for the alienee to regard the equitable rights of such person, and to secure them either by a lawful declaration of trust or by a conveyance.

Where, therefore, in such case the one paying the consideration requests a third person to take the title and hold it for his benefit, and the alienee executes a conveyance to such third person, intending it as an execution and admission of the trust, but the conveyance is, without the knowledge or consent of the *cestui que trust*, an absolute one, the case is brought within the exceptions of section 53 of said statute, and a trust results in his favor. (Gilbert v. Gilbert, 1 Keyes 159, questioned.)

The rule is not changed by the fact that the person paying the consideration was a married woman, and the payment was made prior to the acts of 1848 and 1849 in relation to married women. It was competent for the husband, except as against creditors, to recognize the equities of the wife and to secure it upon property. *Foote* v. *Byrant*, 47 N. Y. 544.

When one purchases land, and at his request the same is deeded to another, although the purchaser receives and retains the deed, without disclosing the existence thereof to the grantee, and takes and retains possession of the land, yet by the deed the title passes and becomes vested in the grantee, and under the prohibitions of the statute of uses and trusts (1 R. S. 728, sec. 51), no trust results in favor of the purchaser. *Everett* v. *Everett*, 48 N. Y. 218.

Citing, Garfield v. Hatmaker, 15 N. Y. 475.

Whenever property is transferred, no matter in what form or by what conveyance, as a security for a debt, the transferee takes merely as mortgagee, and has no other rights or remedies than the law accords to mortgagees.

Where D. contracted for the purchase of certain premises, and had made partial payments thereon, and plaintiff at the request of D. advanced the balance of the purchase money, and as security for the sum so loaned took a conveyance from the vendor, D., taking possession of

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the premises and occupying them as his own, and making subsequent payments to plaintiff, the latter was simply a mortgagee and could not maintain ejectment.

The statute abolishing resulting trusts in favor of one paying the consideration, where the grant has been made to another (1 R. S. 728, sec. 51), does not change the relation of the parties. The conveyance was but a mortgage and does not come within the statute. Again, it is only the common law trust, resulting from the fact of payment of the consideration, and having no other foundation, that the statute abolishes, it does not interfere with other equities, and does not preclude the assertion of title against one who has thus taken a conveyance for a lawful and specific purpose, and attempts to retain the property in violation of his agreement in fraud of the real owner. *Carr* v. *Carr*, 52 N. Y. 251.

Conveyance was made to plaintiff under a parol agreement between him and a woman, that he should hold the land for her benefit, she paying the consideration. She, not present at the conveyance, supposed the deed was in terms to the plaintiff for her benefit. The case did not fall within sec. 51, but rather sec. 53 of 1 R. S. 728, and she was not estopped from claiming her interest. *Brown* v. *Cherry*, 57 N. Y. 645.

A voluntary association of persons according to their written agreement purchased lands and vested title in B., one of their number. In an action against B.'s heirs at law, it was held that holders of shares in the association had the right to enforce their equitable interests. Oral declarations of B. as to the nature of his interest were competent not to prove a trust, but on the statute of limitations,[1] which would not begin to run until the trustee repudiated the trust. *Barker* v. *White*, 58 N. Y. 205.

Real estate purchased for and appropriated to partnership purposes and paid out of partnership funds is partnership property, although the legal title is taken in the name of one of the partners, equity will hold him as the trustee of the firm. The case does not fall within 1 R. S. 728, sec. 57. *Fairchild* v. *Fairchild*, 64 N. Y. 471; s. c., 5 Hun, 407.

See, Traphagen v. Burt, 67 N. Y. 30.

Plaintiff's assignor was in possession under a contract of purchase, and, being sued to foreclose the contract, retained the defendant to defend the action and finally agreed with him, by parol, to take an assignment of the contract, procure the money and pay the balance due, tak-

[1]See, on statute of limitations, Hill on Trustees, marg. p. 264; Seymour v. Freer, 8 Wall. 218.

ing a deed and giving a mortgage on the lands for the money so procured, and hold the land, subject to the mortgage in trust for him (plaintiff's assignor).

Although the agreement, being oral, could not be enforced as a formal, valid, express trust (Dillaye v. Greenough, 45 N. Y. 438), yet as it did not appear, and was not found that plaintiff's assignor knew that the deed was an absolute one to defendant, with no expression or declaration of trust, there was a resulting trust created in favor of plaintiff's assignor (Lounsbury v. Purdy, 18 N. Y. 515) and there remained an interest in him; and after possibility of performance had gone by, defendant was bound to account for the estate and for any loss by misfeasance or neglect (Zinn v. Van Pelt, 56 N. Y. 417, distinguished). *Helms* v. *Goodwill*, 64 N. Y. 642.

J., being an alien, arranged for the purchase of real estate in his wife's name, and upon sale by him she made conveyance. A note payable to her order, given for such land, was paid to J. In an action by the wife to recover the note against the maker it was held that, as there had been a full performance of the arrangement and a restoration of his property to J., in a form in which he could hold it, the note was his property and his right thereto was not affected by the statute against secret trusts. *Dunn* v. *Hornbeck*, 72 N. Y. 80, aff'g 7 Hun, 629.

A receiver appointed in proceedings supplementary to execution can not maintain an action to enforce the trust created by the statute (1 R. S. 728, sec. 52) in favor of creditors of one paying the consideration for lands, which are conveyed to another.

The judgment debtor never had nor could have any interest, legal or equitable, in the property affected by the trust. The creditor, by virtue of his debt, if he was a creditor at the time of the conveyance, but not otherwise, has an interest as *cestui que trust* in the land under the statute, and the right to enforce this trust does not pass to or vest in the receiver.

The creditor can proceed directly to enforce the trust (Wood v. Robinson, 22 N. Y. 566; McCartney v. Bostwick, 32 id. 59), after exhausting his legal remedies. *Underwood* v. *Sutcliffe*, 77 N. Y. 58, rev'g 10 Hun, 453.

Where a finding was that lands were purchased by an agent for a principal and there was no express finding that the deed was taken in the name of the agent without the consent or knowledge of the principal, the findings implied absence of consent or knowledge on the part of the principal, which it was necessary to establish to bring the case un-

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der 1 R. S. 728, secs. 51, 53, relating to secret trusts. *Reitz* v. *Reitz*, 80 N. Y. 539, rev'g 14 Hun, 536.

Citing, Day v. Roth, 18 N. Y. 448; Lounsbury v. Purdy, id. 515; Siemon v. Schurck, 29 id. 610.

Defendant purchased and paid for certain lands and caused them to be deeded to F., upon an oral understanding that F. would hold them subject to his orders. F., at defendant's request and without other consideration, conveyed the lands to defendant's son, the plaintiff, who agreed orally to hold them for the use and benefit and subject to the order of the defendant. Defendant went into possession of the lands when purchased and received the rents and profits. Plaintiff, at defendant's request, conveyed the lands, received in part payment therefor two bonds and mortgages, one of which defendant sold for his benefit, plaintiff assigning them without questioning his father's title. The other bond and mortgage was, with plaintiff's knowledge, delivered to defendant, and for refusal of the latter to restore to the plaintiff, the action was brought.

Construction:

The provision of the statute (1 R. S. 728, sec. 51) had no application, as the trust, although invalid, had been executed, the right to the purchase money vested in the defendant, and moreover the statute has no application to personal property.

It seems that if said statute, or the provision of the statute of frauds prohibiting the creation of trusts in lands save by writing (2 R. S. 134, sec. 6) applied, plaintiff had no such right to the securities as a court of equity would enforce. *Robbins* v. *Robbins*, 89 N. Y. 251, rev'g 15 J. & S. 193. Citing, on power of court of equity to give relief to one purchasing land, Reech v. Kennegal, 1 Ves. Sr. 123; Nelson v. Worrall, 20 Iowa, 469; Haigh v. Kaye, L. R., 9 Ch. App. Cas., 469; Ryan v. Dox, 34 N. Y. 307; Wheeler v. Reynolds, 66 id. 227.

NOTE.—F. had a right to recognize his moral obligation and convey it to such person as defendant chose (257); Siemon v. Schurck, 29 N. Y. 598; Foote v. Bryant, 47 id. 544.

B. purchased certain securities under an agreement between him and plaintiff that the purchase should be made by B. on joint account; B. became the agent of plaintiff as to the latter's half, and a *quasi* trustee of the money placed in his hands and of the property purchased, the burden was on B. of showing both the price paid and what property was purchased. *Marvin* v. *Brooks*, 94 N. Y. 71.

A judgment creditor's action, whether instituted under the Revised

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Statutes (2 R. S. 174, secs. 38, *et seq.*), or the Code of Civil Procedure (secs. 1871, *et seq.*) can reach only property belonging to, or things in action due to the judgment debtor or held in trust for him. The fact that the debtor paid the consideration for property conveyed at his instance to another does not alone authorize a judgment directing the taking of the property to satisfy the debt.

Under the provisions of the statute of uses and trusts (1 R. S. 728, secs. 51, 52), which declares that a grant made to one person, the consideration for which is paid by another, shall be presumed fraudulent as against the creditors at the time of the person paying the consideration, and where fraudulent intent is not disproved a trust shall result in favor of such creditors, to make out such a trust, the consideration must be paid at or before the execution of the conveyance. If the grantee makes the purchase with his own money or credit, no subsequent transaction, whether of payment or reimbursement by another, can produce such a trust. *Niver* v. *Crane*, 98 N. Y. 40.

From opinion.—"The statute last cited, however, contains an exception, and provides (sec. 52) that such conveyance shall be deemed fraudulent as against the creditors, at the time of the person paying the considerution, and declares that 'where a fraudulent intent is not disproved, a trust shall result in favor of auch creditors, to the extent that may be necessary to satisfy their just demands.' * * * To make out such a trust, the money must be paid at or before the execution of the conveyance, and not after. (Jackson v. Moore, 6 Cow. 706; Botsford v. Burr, 2 Johns. Ch. 405; Steere v. Steere, 5 id. 1; Jackson v. Seelye, 16 Johns. 197; Rogers v. Murray, 3 Paige, 390, 391; Russell v. Allen, 10 id. 249.) The whole foundation of a trust of this nature is the payment of the money by the *cestui que trust*, the real, not the nominal purchaser, and so its conversion into land. * * *

"The respondent cites various cases as supporting the judgment. (Wood v. Robinson, 22 N. Y. 564; McCartney v. Bostwick, 32 id. 53; Baker v. Bliss, 39 id. 70; Ocean Nat. Bank v. Olcott, 46 id. 12.) In each of these the entire consideration for the property sought to be reached was paid by the debtor at or before the conveyance, and so they came directly within the statute (*supra*), and entitled the creditor to the benefit of the trust declared in his favor.

"On the other hand, the doctrine that the trust, in order to exist, must have been coeval with the deeds, and that after one person has made a purchase with his own money or credit, no subsequent transaction, whether of payment or reimbursement, can produce such a trust in his favor, is well settled. Says Chancellor Kent in Botsford v. Burr (*supra*): 'There never was an instance of such a trust so created, and there never ought to be, for it would destroy all the certainty and security of conveyances of real estate. * * * The trust results from the original transaction at the time it takes place, and at no other time; and it is founded on the actual payment of money, and on no other ground.' And in Rogers v. Murray (*supra*) it is said to be 'impossible to raise a resulting trust so as to divest the legal estate of the grantee by the subsequent application of the funds of a third person to the improvement of the property, or to satisfy the unpaid purchase money.'"

In the absence of proof that the testator consented to an absolute,

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unconditional conveyance to his son, the provisions of the Revised Statutes (1 R. S. 728, secs. 51, 53), declaring that where a grant for a valuable consideration shall be made to one person, with the consent of another who had paid the consideration, the title shall vest in the payee, had no application to the case. *Schultze* v. *Mayor, etc.*, 103 N. Y. 307.

D. gave a bond and mortgage on his real property as security for performance of an agreement with plaintiff. Subsequently, to defraud plaintiff, the property was sold under execution on a prior judgment and bought in by J., under an arrangement by which he was to advance the purchase money and hold the property for the benefit of D., who subsequently repaid the purchase money. No trust resulted, as the purchase by J. was on his own credit. *Decker* v. *Decker*, 108 N. Y. 128.

The provisions of the Revised Statutes (1 R. S. 728, sec. 51) which declares that "where a grant for a valuable consideration shall be made to one person, and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment shall be made, but the title shall vest in the person named as alienee," has no application where the trust is expressly reserved in and by the grant, or is declared by another instrument, thus relieving it from the effect of a secret trust. *Woerz* v. *Rademacher*, 120 N. Y. 62, digested pp. 637, 886.

The statute (1 R. S. 728, sec. 51) did not apply under the circumstances. *Bates* v. *The Ledgerwood Mfg. Co.*, 130 N. Y. 200, 205; digested p. 576.

R., who was financially embarrassed, with intent to hinder and delay his creditors, purchased and paid for certain premises, taking a deed therefor in the name of M., without the consent or knowledge of the latter, which deed was recorded. R. died intestate, M. conveyed the premises to defendant without consideration, except an oral agreement on his part in case any of the heirs of R., whose whereabouts were unknown to M., should turn up in distress, that he (defendant) should help them to the extent of one or two hundred dollars. Neither M., R., nor the heirs of the latter, ever had possession or exercised acts of ownership over the premises.

Construction:

R. had no legal estate in the premises which descended to plaintiffs (R.'s heirs); the agreement between M. and defendant did not create a legal or equitable interest in the lots in favor of the plaintiffs or raise a liability which they could enforce in this action. *Robertson* v. *Sayre*, 134 N. Y. 97, aff'g 53 Hun, 490.

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From opinion.—"David H. Robertson having procured these lots to be conveyed to Messenger for the purpose of defrauding his creditors, had no legal estate in them which could be reached by execution (Garfield v. Hatmaker, 15 N. Y. 475), or which on his death descended to his heirs. (Moseley v. Moseley, 15 N. Y. 334; Wait on Fraud. Convey. sec. 121. See, also, 1 R. S. 728, secs. 50, 51, 52; Underwood v. Sutcliffe, 77 N. Y. 58; Brewster v. Power, 10 Paige, 562; Bates v. Ledgerwood Mfg. Co., 50 Hun, 420; Hamilton v. Cone, 99 Mass. 478.) This rule is a penalty imposed by the law for the prevention of frauds and for the protection of subsequent purchasers (Reviser's notes to sections cited), and the reason for its application is not weakened in case the grantee, as in the case at bar, was not a participant in the fraud."

The provision of section 53 of the statute of uses and trusts (1 R. S. 727), preserving the right to a resulting trust in 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," is not available to the extent of the whole property conveyed, if at all, to one who paid less than the whole consideration.

The violation of a mere promise, by the alienee named in a conveyance, to take a deed in the name of another who had contributed to the consideration, is not a violation of a trust within the meaning of the provision of section 53 of the statute of uses and trusts (1 R. S. 727), preserving the right to a resulting trust in cases where the alienee named in the conveyance, "in violation of some trust, shall have purchased the land so conveyed with moneys belonging to another person."

In an action of ejectment to recover a life estate, subject to the defendant's right of dower, brought by the devisee of a decedent against the widow, the defense was interposed, that the defendant at the time of the death of her husband was herself the owner of the whole estate in equity, and that her husband had no interest he could devise to plaintiff. It appeared that defendant, under a promise by her husband that he would take the deed in her name, paid a part (less than a tenth) of the consideration for the conveyance of the land, which was taken absolutely by the husband in his own name, without her consent or knowledge. *Held*, that the facts did not bring the wife within the provisions of section 53 of the statute of uses and trusts, and that the payment of part of the consideration did not vest in her any estate in the land conveyed. *Schierloh* v. *Schierloh*, 148 N. Y. 103; S. C., 72 Hun, 150. Citing Niver v. Crane, 98 N. Y. 40; Lounsbury v. Purdy, 18 id. 515; Garfield v. Hatmaker, 15 id. 477; Sayre v. Townsend, 15 Wend. 649; White v. Carpenter, 2 Paige, 238.

The statute of uses and trusts providing that where title is taken in the name of one person and the consideration paid by another, may not be invoked to cover a fraud.

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The provisions of the statute (1 R. S. 728, sec. 51), have no application to a case where an express trust has been created or where equities have arisen by the agreement of the parties, but has reference only to a case in which there exists no express trust or equities other than the payment of a consideration by a person other than the one who takes the title.

Hence, where husband and wife bought property, and the wife took the absolute title under an agreement that they should both live on it and pay for it and that after payment the wife should convey an undivided one-half to the husband, and in order to deprive her husband of his share conveyed it to a third party without consideration, the suit of the husband to set aside the conveyance and recover his share was sustained. *Gage* v. *Gage*, 83 Hun, 362.

Citing Robbins v. Robbins, 89 N. Y. 251; Carr v. Carr, 52 id. 251, 261.

Where a grant of lands is made to one person and the consideration therefor paid by another, though no trust results to the party who made the payment, for his own benefit, yet, as to the then creditors of such party, there is a resulting trust, which will enable them to sell the land on their execution.

Where the consideration is paid in order to satisfy a moral obligation which the party paying it owes to the one to whom the grant is made, no trust in favor of the creditors results from the transaction. Therefore, the father of an illegitimate child may pay for land purchased for the mother, and have it conveyed to her without exposing it to the claims of his creditors, provided it appear to have been done to reimburse her for expenditures in the support and education of such child. *Wait* v. *Day*, 4 Den. 439.

Where there is a resulting trust in favor of the creditors of a person who pays the consideration for real estate and takes a conveyance in the name of another, in fraud of their rights it seems that a judgment recovered by one of them is in equity a lien upon such real estate, except as against *bona fide* purchasers without notice; although such estate can not be sold under an execution upon the judgment. *Brewster* v. *Power*, 10 Paige, 562. Citing Forth v. The Duke of Norfolk, 4 Mad. Rep. 504; Lynch v. The Utica Insurance Company, 18 Wend. 236.

Where real estate is purchased by one person with moneys of another, and a conveyance is taken in his own name with the consent of the owner of the fund, there is no resulting trust in favor of the latter, under the provisions of the Revised Statutes; but the person to whom the conveyance is given, is entitled to the premises absolutely as against him. *Norton* v. *Stone*, 8 Paige, 222.

If an agent for the collection of a debt due to an alien takes a conveyance of land in his own name in payment of such debt, without authority from the principal, and without any written declaration of trust, a court of equity will not permit a resulting trust to be created in favor of the state by escheat but will decree the land to be sold and converted into money for the purpose of giving the alien the benefit thereof as personal estate. *Anstice* v. *Brown*, 6 Paige, 448.

II. TRUSTS ARISING FROM A FIDUCIARY RELATION.

One partner may, in good faith, purchase and hold for his own use, the reversion of real estate, occupied by the copartnership, under a lease for years.

But where one partner secretly makes such purchase in his own name whilst the other partner with his concurrence, is negotiating with the

owner to obtain the property for the use of the firm, the purchaser will be declared a trustee for the firm.[1] *Anderson* v. *Lemon*, 8 N. Y. 236.

A trust in respect to real estate may be established by parol evidence.

S. having made a written contract with H. and others, for the purchase of 160 acres of land, on credit, died, leaving a widow and heirs. The widow, after her husband's death, took in her own name for the benefit of the family, a contract for 60 acres of the land and paid money upon it. At her request, and without the knowledge or consent of the other heirs, A. S. took a new contract for the purchase of the same premises, in his own name, either for the benefit of the family or in fraud of their rights. He subsequently took a deed from the vendor, to himself, sold the land, and received and applied the avails to his own use, and refused to account.

Construction:

1. It was competent for the plaintiffs (who were all of the heirs of S., except A. S.) to establish a trust in favor of themselves, as against A. S. by parol.

2. On evidence showing the above facts, a valid resulting trust was established, and the plaintiffs were entitled to relief, in respect to their shares of the purchase money received by A. S. on the sale of the land. *Swinburne* v. *Swinburne*, 28 N. Y. 568. Citing Lounsbury v. Purdy, 18 N. Y. Rep. 518; Story's Eq. sec. 1256; Van Horne v. Fonda, 5 Johns. Ch. 388; Burrel v. Bull, 3 Sandf. Ch. 16; Featherstonhaugh v. Fenwick, 17 Ves. 29[a].

A fraudulent use of the statutes for the prevention of frauds, etc., will not be permitted; and a court of equity will interfere against a party intending to make such statute an instrument of fraud.

Where a purchaser under a foreclosure sale undertakes to purchase for the benefit of the mortgagor, and thus acquires the title at a price greatly below its value, he will be deemed the trustee of the party for whom he has undertaken the purchase, and, on tender to him, of the purchase money and interest, he will be compelled to convey the property to the party equitably entitled.

It is no objection that the agreement, by which he undertook to pur-

[1] An agent employed to sell, or engaged as an agent in any other business, is not permitted to make profits for himself in the transaction, and for all such profits he must account to his principal.

If he has taken title to property in violation of his trust, equity will treat him as a trustee for his principal. *Densmore* v. *Searle*, 7 App. Div. 45.

chase for the benefit of the owner of the equity of redemption, was not in writing. The law makes him a *trustee ex maleficio*. *Ryan* v. *Dox*, 34 N. Y. 307.

Citing Wetmore v. White, 2 Caines Cas. 87; Brown v. Lynch, 1 Paige, 147.

Where, during the existence of a continuing copartnership of undetermined duration, three or four copartners, without the knowledge of the other, obtained a new lease in their own name of premises leased and used by the firm, the same becomes partnership property, and upon dissolution the other partner is entitled to his proportion of its value. *Struthers* v. *Pearce*, 51 N. Y. 357.

One member of a copartnership can not, during its existence, with the knowledge of his copartners, take a renewal lease for his own benefit, of premises leased by the firm, upon which it has made valuable improvements, and by the joint efforts of the members made the good-will valuable and enhanced the rental value of the premises, and this although the term of the renewal lease does not begin until after the copartnership has expired by its own limitation.

A lease so taken by one partner, in his own name, inures to the benefit of the firm, and the partner in whose name it is taken can be required to account to his copartners for its value.

It is not material that the landlord would not have granted the new lease to the other partners or to the firm.

The authorities as to the right of trustees and partners to take renewal leases for their own benefit collated and discussed. (See opinion Dwight, C.) *Mitchell* v. *Reed*, 61 N. Y. 123, rev'g 61 Barb. 310.

Plaintiff and defendant entered into a verbal agreement to purchase and improve real estate on joint account, sharing equally the profits and losses. Under this arrangement two farms were purchased, which were conveyed to the parties jointly. A third farm was contracted for by their agent in his own name, but defendant, without the knowledge or consent of plaintiff, procured an assignment of the contract and a conveyance of the farm to himself. The parties made permanent improvements from time to time at their joint expense upon, and purchased cattle and other property for, all and each of the farms. All three were treated alike, and plaintiff, with the knowledge of defendant, directed about work and improvements upon the last one purchased and made payments therefor, he and defendant visiting it together, talking in reference to disposing of the personal property thereon and of an interest there, without any intimation on the part of defendant that plaintiff was not a joint owner with him. Plaintiff advanced money from time to

time on account of all the purchases without distinction. An action to compel defendant to convey an undivided interest in said farm to plaintiff.

Construction:

The agreement was not within the statute of frauds, but was valid as forming a partnership for the purchase of lands; the farm in question was included in the agreement, and the defendant having taken title in fraud of plaintiff's right, a resulting trust arose in favor of the latter; it was not necessary for plaintiff to resort to an action to dissolve the partnership and for an accounting, but plaintiff was entitled to the relief sought.

After discovery by plaintiff of the fact that the farm was conveyed to defendant, the parties entered into an agreement that plaintiff should convey to defendant his interest in one of the other farms, and in the personal property thereon, defendant agreeing, among other things, to convey to plaintiff an undivided one-half interest in the farm in question. The agreement was fully executed save in respect to such conveyance, which defendant refused to execute. Aside from the question of the copartnership, plaintiff was entitled to and could enforce a specific performance in this particular. *Traphagen* v. *Burt*, 67 N. Y. 30.

Citing Boyd v. McClean, 1 Johns. Ch. 582; Botsford v. Burr, 2 id. 405; distinguishing Levy v. Brush, 45 N. Y. 589.

Real estate purchased by a firm with its funds for partnership purposes is regarded in equity, so far as the firm and its creditors are concerned and so long as the partnership affairs remain unsettled, as personal property.

The interests of the respective members of the firm therein are not required to be established by deed or instrument in writing.

The creation of trusts as to such interests is not prohibited by the statute of uses and trusts.

It seems that after the dissolution of the firm, and after the claims of creditors are discharged and the equities of the respective partners in its assets determined and satisfied, such property, so far as it is preserved in specie and is awarded or conveyed to the respective members, loses its character of personal property and again becomes subject to the rule governing the devolution of real estate.

The question as to whether real estate is partnership property may be determined on parol evidence, independent of the particular form which the transaction took or the name in which the title was taken. (Fair-

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child v. Fairchild, 64 N. Y. 471; Chester v. Dickerson, 54 id. 1; Robbins v. Robbins, 89 id. 251.)

Where an agreement is made between two partners for the purpose of hindering and delaying the creditors of one of them, by which the legal title to the firm property is transferred to the other, it is competent for them, in the absence of any interference by creditors, to rescind it at any time and to restore to each, a legal interest in the property. *Greenwood* v. *Marvin*, 111 N. Y. 423.

NOTE.— Real estate purchased by a partnership firm for partnership purposes with partnership funds, is regarded in equity, so far as the firm and its creditors are concerned, as personal property. Widows are not dowable therein. (Sage v. Sherman, 2 N. Y. 417.)

While upon the death of one of two copartners, the successor has the legal title to the firm assets, he does not become the full and absolute owner thereof, but holds them charged with a duty to pay the firm debts and dispose of the residue for the benefit of himself and the estate of the deceased partner, and when, instead of gathering the assets, paying the debts, winding up the business and distributing the surplus, he misappropriates them and converts them to the use of himself and others, he is so far guilty of a breach of trust that a court of equity may give appropriate relief.

Where the surviving partner has thus misappropriated the assets and an equitable action has been brought against him by the personal representatives of the estate of the deceased partner, and a judgment obtained therein for an accounting and payment of the amount found due the estate, this, unless the amount so found due is paid, is not a bar to an action against others who, by intermeddling with the assets and sharing in the misappropriation, have rendered themselves liable therefor as trustees *de son tort*. Until satisfaction of the judgment it gives the surviving partner no greater rights over the assets than he had before its rendition. *Russell* v. *McCall*, 141 N. Y. 437, rev'g 68 Hun, 44.

Distinguishing Fowler v. Bowery Sav. Bank, 113 N. Y. 450; Terry v. Munger, 121 id. 161.

A purchase by a trustee inures to the benefit of the beneficiary. *People* v. *Merchants' Bank*, 35 Hun, 97.

Sales from a trustee to infant beneficiaries will not be sustained. *Hyland* v. *Baxter* 42 Hun, 9.

A trustee purchasing an outstanding title holds it for the benefit of his *cestui que trust*. Gilman v. Healy, 49 Hun, 274.

III. PAROL TRUSTS — SECRET TRUSTS.

This action was brought by plaintiff as judgment creditor of defendant R. B. M., to set aside as fraudulent a deed from him to defendant

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F. E. M. It appeared that the premises conveyed by the deed in question were formerly owned by S. M., mother of R. B. M. They were jointly interested in certain other premises, and it was agreed, by parol, between them, that in consideration of her joining with him in a deed thereof, he receiving the proceeds, he would, upon her death, convey the premises in question to F. E. M. Relying upon this agreement she omitted to make a will, and upon her death the premises descended to R. B. M., her sole heir at law, who subsequently, in pursuance of the agreement, executed the deed. While the title was in R. B. M., he became indebted to plaintiff and a suit to recover the debt was pending at the time of the conveyance, he intended the deed should precede the judgment and prevent it from becoming a lien. The referee found the transfer was made in good faith.

Construction:

The conveyance was valid as against plaintiff; R. B. M. having been paid the consideration for any interest he might have or expect as heir at law, was a trustee of the land for the benefit of F. E. N., who could have enforced the trust in equity; but even if trust could not have been enforced, R. B. M. having executed it, the title thus made, supported by the equities, was paramount to any equities of plaintiff. *Norton* v. *Mallory*, 63 N. Y. 434.

Conveyance of property on a verbal trust; when a court of equity will enforce its performance. *Moyer* v. *Moyer*, 21 Hun, 67; See, also, Lowry v. Smith, 9 id. 514; Church v. Kidd, 3 id. 254.

Plaintiff, insolvent, owner of land, and owner of mortgage thereon, agreed by parol that the latter should foreclose his mortgage, bid in premises and then sell and hold until the land could be sold for its value, and surplus over debt, expenses, etc., be paid to plaintiff. There was no interference with competition at foreclosure sale. Defendant held for nine years, paying taxes, etc. The land having greatly increased in value the plaintiff brought action to enforce specific performance of his parol contract. The alleged agreement could not be enforced either on the ground of part performance or as a parol trust. *Wheeler* v. *Reynolds*, 66 N. Y. 227. Distinguishing, Ryan v. Dexter, 34 N. Y. 307; Levy v. Brush, 45 id. 598, 596. See Traphagen v. Burt, 67 id. 30.

NOTE.—Parol trust in lands are condemned by the statute (2 R. S. 135, sec. 6) and no mere parol agreement creating them will be enforced in equity. Sturtevant v. Sturtevant, 20 N. Y. 39.

Mere refusal to perform a parol agreement is in no sense a fraud in law or equity. 234.) *Levy* v. *Brush*, 45 N. Y. 597.

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Brown v. Lynch, 1 Paige, 147; Cox v. Cox, 5 Richd. S. C. Eq. 365; Keith v. Purvis, 4 Dess. 114; Peebles v. Reading, 8 S. & R. 492; Trapwall v. Brown, 19 Ark. 49; were cases where there was fraud.

Actual and clearly proved fraud will not be protected by the statute prohibiting parol trust in real property. (2 R. S. 134, sec. 6.) Hall v. Erwin, 66 N. Y. 649; Traphagen v. Burt, 67 id. 30.

Proof that but for reliance upon the agreement the plaintiff would have purchased himself, or through some other agent, is not sufficient to compel conveyance to plaintiff. (235.) Smith v. Burnham, 3 Sumn. 435; 2 Story's Eq. Jur. 1201a.

Mere agreement to purchase real estate and convey to judgment debtor on payment does not raise a resulting trust. (235.) Kellum v. Smith, 33 Pa. St. 158; Lathrop v. Hoyt, 7 Barb. 59.

If purchaser of sale had declared that he was bidding in property for plaintiff, and thereby induced other persons to refrain from bidding, he might be held as trustee, *ex maleficio*. (236.) Brown v. Dysinger, 1 Rawle, 408; Ryan v. Dox, 34 N. Y. 307; 2 Wash. on R. P. 444.

Where a purchaser of land in possession, surrenders his contract, and procures a deed to be made by his vendor, to a third person, in consideration of the latter advancing unpaid purchase money necessary to procure the conveyance, and promising, orally, to give him a written obligation to convey to him on the repayment of the advance, etc., a court of equity will enforce performance of the parol promise.

This will be done upon the principle that a party will not be permitted to insist on the statute of frauds, to protect him in the enjoyment of advantages procured from another, in faith of an oral agreement on which the latter has acted, and in faith whereof he has placed himself in a situation in which he must suffer wrong and injustice.

Not only is the purchaser entitled to enforce such promise, but the grantee in the deed can not recover possession meanwhile, if the original contract entitled the purchaser to remain in possession, and it does not appear that, in assuming the place of the vendor, the grantee stipulated for any change in this respect; or if the parol agreement provided that he should have interest annually on the advance, for this imports that purchaser should have the rents and profits. *Dodge* v. *Wellman*, 1 Abb. Ct. of App. Dec. 512.

When prior to his discharge a bankrupt placed property in the hands of another to be held for his benefit, and restored after his discharge, such a trust is void by statute (1 R. S. 136, sec. 1), both as to existing and subsequent creditors. *Dewey* v. *Moyer*, 72 N. Y. 70, aff'g 9 Hun, 473.

Where a person, even by silent acquiescence, encourages a testator to make a devise or bequest to him, with a declared expectation that he will apply it for the benefit of others, this has the force and effect of

an express promise so to apply it, as if he does not intend to do so, the silent acquiescence is a fraud.[1]

Where the gift is to several as joint tenants, and the promise to carry out the declared purpose of the testator is made by one of them, it is obligatory upon all.[2]

In the case of such a declared intention and promise, if the testator has named some certain and definite beneficiary, capable of taking the provision intended, the law fastens upon the devisees or legatees a trust, which equity, in case of his refusal to perform, will enforce on the ground of fraud.[3]

If, however, the uses enjoined are for the benefit of persons incapable of taking, or of a character in direct violation of the law of the state, if the devisee or legatee repudiates his obligations, this is a fraud upon the testator; if he is willing to perform, his so doing would be both a fraud upon the law and against the heirs and next of kin; and equity will, for their protection in either case, fasten a trust *ex maleficio* upon the devisee or legatee.

M., by her will, gave the bulk of her estate to three persons, who were her lawyer, her doctor, and her priest, absolutely, as tenants in common. It was not intended by her to give to the persons named any beneficial interest, but her design was to devote the property to certain charitable purposes; this, she was advised, could not be done by express provision in her will, but only by such an absolute gift to individuals, to whose honor she could confide the execution of her purpose. She signed a letter of instructions, contemporaneous with the will, addressed to the legatees and devisees, stating the reason for the gift and dictating the purpose, which was, in substance, that during their lives, and after their deaths, by some permanent arrangement to be made by them, the income of specified portions of the fund should be given to indeterminate persons of their selection, and any surplus of income to such charities as they might select. The will was executed in reliance

[1]Wallgrave v. Tebbs, 2 K. & J. 321; Schultz's Appeal, 80 Pa. St. 405; Russell v. Jackson, 10 Hare, 204. See Williams v. Fitch, 18 N. Y. 546, digested p. 605.

[2]Rowbotham v. Dunnett, L. R., 8 Ch. Div., 430; Hooker v. Axford, 33 Mich. 453; Russell v. Jackson, 10 Hare, 206.

[3]Thynn v. Thynn, 1 Vern. 296; Oldham v. Litchford, 2 Freem. 284; Reech v. Kennegal, 1 Ves. Sr. 124; Podmore v. Gunning, 5 Sim. 485; Muckleston v. Brown, 6 Ves. 52; Hoge v. Hoge, 1 Watts, 163; McKee v. Jones, 6 Pa. St. 425; Dowd v. Tucker, 41 Conn. 197; Hooker v. Axford, 33 Mich. 454; Williams v. Vreeland, 32 N. J. Eq. 135; Brown v. Lynch, 1 Paige, 147; Williams v. Fitch, 18 N. Y. 546; Glass v. Hulburt, 102 Mass. 40; 3 Am. Rep. 318.

upon a promise of the legatees to apply the fund faithfully and honorably to the charitable uses so specified.

Action to establish a trust which, failing as to the beneficiaries, should result to the heirs at law and next of kin.

Construction:

The gift could not be sustained as an absolute one to the persons named, as this would be a fraud upon the testatrix; the secret trust attempted to be created could not be enforced, nor could equity permit it to be carried out, as it was in violation of the statute against perpetuities, but would impose a trust upon the fund for the benefit of the heirs and next of kin; and, therefore, the action was properly brought. *Matter of Will of O'Hara*, 95 N. Y. 403.

From opinion.—"In Jones v. Badley (L. R., 3 Eq. Cas., 635), the suit was by the coheiresses and next of kin to make the defendants trustees for them, on the ground that a devise made to them of a residue absolute on its face was, in fact, for charitable purposes, in violation of the mortmain act, and made on the faith of an agreement by the legatees that they would make such application. One of them was the confidential medical adviser of the testatrix; the devise to the two was in joint tenancy; no purposed or intentional dishonesty was charged against them; instead of wholly repudiating their duty, they alleged in their answer a design to carry out the charitable purposes; and yet the court did not hesitate on the ground of fraud to fasten a trust upon the property in their hands for the benefit of the heir and next of kin. Wallgrave v. Tebbs (2 K. & J. 313, 321) and Russell v. Jackson (10 Hare, 204) were cited with approval. The latter case was a bill filed by the next of kin, alleging that the absolute devise of a residue was upon a secret trust, either for charitable or illegal purposes. The court so held as to the proceeds of the freehold and leasehold estates, and because the dispositions 'could not by law take effect,' declared the devisees trustees for the heir and next of kin. In Muckleston v. Brown (6 Ves. 63, 65), Lord Eldon intimated that where the devisees took under an agreement to hold upon such trusts as the testator should declare, but he omitted to declare any, there would be a trust to the heir which equity would decree; and added, as to a case of evasion of the statute, the pointed inquiry 'is the court to feel for individuals, and not to feel for the whole of its own system, and compel a discovery of frauds that go to the root of its whole system?' In Schultz's Appeal (88 Pa. St. 405), the plaintiff failed solely for want of proof of an agreement by the legatee inducing the devise; and the same difficulty existed in Rowbotham v. Dunnett (L. R., 8 Ch. Div., 430); and as to three of the four tenants in common in Tee v. Ferris (2 K. & J. 367); but all confirm the general doctrine asserted."

NOTE 1.—The plan provided by the testatarix violated the law against perpetuities, and the active trust was unlimited in its duration (417) (Schettler v. Smith, 41 N. Y. 334; Adams v. Perry, 43 id. 497; Garvey v. McDevitt, 72 id. 561), also the beneficiaries were indeterminate (418). (Levy v. Levy, 33 N. Y. 99.)

NOTE 2.—The court repudiated the doctrine that a devise may become the mere equivalent of a general power of attorney. (419.) Prichard v. Thompson, 95 N. Y. 76. (See Power v. Cassidy, 79 N. Y. 602; 35 Am. Rep. 550.)

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Legacy impressed with secret trust. If a testator is induced to make an apparently absolute legacy, by a promise, express or implied, on the part of the legatee that he will devote his legacy to a certain lawful purpose, a secret trust is created, and equity will compel the legatee to apply property thus obtained by him in accordance with his promise.

Legacy to tenants in common — secret trust. The fact that a legacy is to three persons as tenants in common, and not as joint tenants, does not prevent a secret trust being imposed upon the shares of all the legatees by a promise to carry out the purpose of the legacy, made to the testator by two of the legatees on behalf of themselves and their associate, when the legacy was made in reliance upon such promise and all the legatees obtain their rights through the result accomplished by the promise.

Residuary legacy impressed with secret trust to distribute among designated colleges. If a testator, after making a will containing specific bequests to certain colleges, each capable of asserting itself as a definite beneficiary, and giving the residuary estate to two executors in trust to convert into cash and distribute equally among the same colleges, makes a codicil revoking the original residuary clause and giving the residuary estate absolutely to the individuals named in the will as executors, followed by a codicil adding a third person as executor, and by a final codicil confirming the revocation of the residuary clause of the will and amending the first codicil by giving the residuary estate absolutely to the three individuals theretofore named as executors, all such codicils being in fact based upon a continuing promise on behalf of the residuary legatees to distribute the residuary estate among the colleges named in the will—a secret trust is constituted for the benefit of the colleges named in the will, which (in the absence of any applicable statutory limitation upon the amount of testamentary gifts to literary corporations) may be enforced by them in equity; and the residuary legatees can not, by deed of gift or otherwise, devote any of the residuary estate to institutions not definitely designated by the testator as beneficiaries of the trust.

Limitation of testamentary gifts to literary corporations — L. 1860, ch. 360. The act (L. 1860. ch. 360) which prohibits a person, having a husband, wife, child or parent, from giving by will more than one-half of his or her estate to charitable or literary corporations, applies to a secret trust impressed upon a testamentary gift, when the trust is a manifest evasion of the statute, at least until all intervening rights derived from the statute have been lawfully cleared away.

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L. 1860, CH. 360. Only the persons named in chapter 360, Laws of 1860, and those benefited through them, can invoke its protection; and its protection can be waived or relinquished by those entitled thereto.

Release of statutory limitation upon amount of testamentary gift — secret trust. When the trustees of residuary property, given to them in form absolutely by the will of a testator having a wife and next of kin, but actually impressed with a secret trust for the benefit of certain definite literary corporations designated by the testator, and exceeding one-half of the testator's estate, have assumed to dispose of the property in violation of the secret trust, the effect of a settlement of their own claims by the widow and next of kin with the trustees, and a cancellation or transfer of the same by releases to the trustees, is to revive the secret trust relieved from the operation of chapter 360, Laws of 1860.

Equitable estoppel. The claim that the beneficiaries of a secret trust, created by a testator in favor of certain literary corporations, and exceeding one-half of his estate, are estopped in equity by reason of keeping silent concerning their intention of enforcing the trust, while promoting a settlement with the widow and next of kin of the testator by which the claims of the widow and next of kin upon the trust property were satisfied and released, is not established where the facts show that the acts of the beneficiaries are to be construed merely as a consent to the payment of a certain sum out of the trust property to the widow and next of kin, and not to the settlement as such. *Amherst College* v. *Ritch*, 151 N. Y. 282, aff'g 91 Hun, 509.

NOTE 1.—"O'Hara v. Dudley, 95 N. Y. 403; Brown v. Lynch, 1 Paige, 47; Dowd v. Tucker, 41 Conn. 197; De Laurencel v. De Boom, 48 Cal. 581; Browne v. Browne, 1 H. & J. 430; Church v. Ruland, 64 Pa. St. 442; Towles v. Burton, 24 Am. Dec. 409; McLellan v. McLean, 2 Head, 684; Russell v. Jackson, 10 Hare, 204; Thynn v. Thynn, 1 Vern. 296; Reech v. Kennegal, 1 Ves. Sr. 124; Wallgrave v. Tebbs, 2 Kay & J. 321; McCormick v. Corgan, 4 H. of L. 82. The trust springs from the intention of the testator and the promise of the legatee. The same rule applies to heirs and next of kin who induce their ancestor or relative not to make a will by promising, in case his property falls to them through intestacy, to dispose of it, or a part of it, in the manner indicated by him. Williams v. Fitch, 18 N. Y. 546; Grant v. Bradstreet, 87 Me. 583; Gilpatrick v. Gladden, 81 id. 137." (Opinion, p. 324.)

NOTE 2.—"There are authorities which hold that the rights arising from such a secret trust * * * are not testamentary in character, because the trust does not act upon the will, but on the fund after it reaches the hands of the legatees. Harris v. Howell, Gilb. Eq. R. 11; Addington v. Camp, 3 Atk. 141; Rockwood's Case, Cro. Eliz. 164; Chester v. Wowick, 25 Beav. 407; Re Rogers, L. R. (26 Ch. Div.) 531; Cullen v. Atty. General, 14 Irish C. L. R. 137; Olliffe v. Wells, 130 Mass. 221;

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Hoge v. Hoge, 1 Watts (Pa.), 163; In re Keleman, 126 N.Y. 73; Williams v. Fitch, *supra*.

Founded on these authorities, the argument is made by some of the respondents that the statute does not apply to this case, because the colleges do not claim under the will, or anything found in it, but on facts wholly outside of it. They insist that the same reason that takes a secret trust away from the statute of wills and of frauds takes it away from the act of 1860, and that their rights do not spring from the mode of changing title, but out of the duty of those who hold the title. They illustrate their argument by saying that if A. wills B. $10,000, and writes him a letter saying that the legacy is in trust for C., but the letter is not delivered until after A.'s death, there is no trust; but if the letter is delivered before A. dies and B. promises to perform, there is a trust. Although the will is the same in both cases, in the one B. takes and in the other C., because the former takes from the will and the latter from the trust. The argument is not without force when applied to a trust that does not run foul of a statute. When, however, as in this case, the trust is a manifest evasion of a statute, sound public policy forbids that the testator should be permitted to effect indirectly that which he could not effect directly, at least until all intervening rights derived from the statute have been lawfully cleared away. We think that the act of 1860 applies, but to what extent and how it was affected by the releases, we will proceed to consider." (Opinion, p. 332.)

P. died intestate, leaving E., plaintiff's assignor and the defendants herein his heirs at law, and leaving certain real estate. E. was at the time insolvent, and judgments to a large amount were outstanding against him; his interest in said real estate was sold on an execution against him and bid in by M. under an agreement between him and E. that the latter might, at any time thereafter, redeem, by paying the sum with interest. Differences having arisen between E. and the other heirs, an agreement for a settlement was made in February, 1883, by which, among other things, it was agreed that E. and M. should take up and pay the judgments against E. Immediately after this E. confessed a judgment to defendant G. under an agreement that it was to be used only as a lien, and was not to be enforced in any event until May thereafter. G., however, in April, by virtue of his judgment, redeemed the interest of E. by paying the sheriff the amount of M.'s bid, and received a conveyance from the sheriff.

Construction:

G. by his redemption did not obtain absolute title to E.'s interest, but held it simply in trust for him or his assigns, subject to the payment of the amount paid to redeem, and of G.'s judgment, with interest on both; and this, although at the time of the redemption the twelve months allowed for E., as the judgment-debtor, to redeem had expired: he still had an interest and also a right to redeem under his agreement with M., which was valid; also the agreement between E. and G., in

pursuance of which the judgment was confessed, was valid. Wood v. Rabe, 96 N. Y. 414.

Defendant T., under the agreement between the parties, received powers of attorney to manage and control the property; after these had been revoked on the part of E., but while T. was still to some extent, in possession and was receiving the rents, issues and profits, he, with full knowledge of the circumstances above stated, purchased a judgment against E., the amount whereof was about $6,600, for $3,000. T. had promised E. that he would protect the latter's interest in the estate.

Construction:

T. was not entitled to be paid the full amount of the judgment, but simply the amount paid by him with interest; notwithstanding the revocation of the power of attorney, his relations with E. continued to be fiduciary in their nature.

At the time of the decease of P. there was a mortgage upon the premises, which T. purchased for $10,000 and took an assignment to himself, the principal and interest of which amounted to over $16,000. It did not appear that at the time of the purchase there was any intention on the part of the mortgagee to foreclose, or that there was any immediate and pressing necessity to take care of the mortgage.

Construction:

T. was not entitled to hold the mortgage for its face, but only for the amount paid therefor, with interest, and he had simply the right to require of his cotenants to contribute their share of this amount; also, the failure of E., after knowledge of the purchase and of T.'s claim to hold the mortgage for the full amount, to contribute or offer to contribute his share of the purchase price, did not, under the circumstances, entitle T. to enforce the mortgage for its full amount. *Peck* v. *Peck*, 110 N. Y. 64. Distinguishing Streeter v. Shultz, 45 Hun, 406; Mandeville v. Solomon, 39 Cal. 125. See cases collected, *ante*, p. 536.

From opinion.—"One of the leading cases upon the subject of the right of one tenant in common to bid in an outstanding title or incumbrance on the estate is Van Horne v. Fonda (5 Johns. Ch. 388, 407). The learned chancellor there says that although he would not deny that one tenant in common might not, in any possible case, bid in an outstanding title for his exclusive benefit, yet (continuing), he says, 'when two devisees are in possession under an imperfect title derived from their common ancestor, there would seem, naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not affect the claim to the prejudice of the other. It is like an expense laid out on a common object by one of the owners, in which case all are entitled to the

common benefit, on bearing a due proportion of the expense. * * * Community of interest produces a community of duty; and there was no real difference, on the ground of policy and justice, whether one cotenant buys up an outstanding incumbrance or an adverse title to disseize and expel his cotenant. It can not be tolerated when applied to a common subject in which the parties had equal concern, and which created a mutual obligation to deal candidly and benevolently with each other, and to cause no harm to their joint interest.'

"In this case, if the mortgage were due and the defendant Theodore desired to redeem, he must, of course, have redeemed by paying the whole mortgage, or whatever amount the mortgagee was willing to take. He could not redeem his share of the estate from the lien of the mortgage by paying simply what would amount to his share of the mortgage. If an incumbrance be brought in by a cotenant or paid under such circumstances as exist in this case, the payment would operate as an equitable assignment from the mortgagee to himself, and his right under such equitable assignment would be to exact contribution from his cotenants for the amount he had paid to redeem the mortgage. Pomeroy, in his excellent work on Equity Jurisprudence (sec. 1221), states this doctrine fully. The same principle is decided in Rothwell v. Dewees (2 Black U. S. 613); Weaver v. Wible (25 Pa. St. 270), and Lloyd v. Lynch (28 id. 419, 424).

"The case of Streeter v. Shultz (45 Hun, 406) is in no way adverse to this principle. In that case a mortgage upon the property was foreclosed. Shultz was a tenant in common with the plaintiff by virtue of a conveyance of an undivided half of the premises from the plaintiff to him, subject to a mortgage given by the plaintiff to secure the purchase money. At the foreclosure sale of that mortgage, Shultz bid in the property for himself. He was also the owner of a subsequent mortgage given by the plaintiff to him on the plaintiff's undivided part of the premises; and the court held, that, under such circumstances, it being a public sale, judicial in its nature, and the relations between the parties being at arm's length, the case was taken out of the ordinary rule, and that the defendant, upon bidding in the property, obtained a good title thereto."

Where land has been conveyed to a party upon an oral trust, invalid under the statute of frauds and of uses and trusts (2 R. S. 134, sec. 6; 1 id. 728, sec. 51), it is lawful for him to perform it, and if he conveys the land and receives the proceeds, the law will treat him as a trustee of personal property realized for the benefit of the *cestui que trust*, who may maintain an action against him to recover such proceeds.[1]

The court will not allow the statute of frauds to be used as an instrument of fraud.[2]

H. held the title of certain lots in the city of B., as security for an indebtedness of J. At the request of J., and upon the agreement of plaintiff to pay the indebtedness, he conveyed the lots to defendant, who agreed to hold them for plaintiff's sole use and benefit, subject to

[1] Robbins v. Robbins, 89 N. Y. 258; Dunn v. Hornbeck, 72 id. 80; Foote v. Bryant, 47 id. 544.

[2] Ryan v. Dox, 34 N. Y. 307; Levy v. Brush, 45 id. 596; Siemon v. Schurck, 29 id. 598.

his direction respecting sales thereof, and to pay over the proceeds of such sales. Plaintiff paid J.'s indebtedness and from time to time negotiated sales of lots, which defendant deeded at his request. Plaintiff having negotiated a sale of the remaining lots, defendant refused to execute deeds to the purchasers unless the consideration was paid to his wife which was done, plaintiff advancing the money in order to procure the deeds.

Construction:

The plaintiff was entitled to recover of defendant the sum so paid; while the statutes may have justified the defendant in refusing to dispose of the land, having done this he was no longer protected, but held the money under a parol trust which was valid; plaintiff had the right to advance the money, and the payment to the wife was not voluntary.

Same deed:

Plaintiff's complaint alleged the conveyance of the premises to defendant upon a trust substantially as stated, the sale of the remaining lots, the receipt by defendant of the purchase money, and his refusal to pay over the same, and then further alleged that defendant "has fraudulently and dishonestly appropriated the said moneys, and converted them to his own use."

Construction:

This averment did not necessarily characterize the action as one of trover; and it might be rejected. *Bork* v. *Martin*, 132 N. Y. 280.

NOTE.—"A trust in the money may be established by parol. (Day v. Roth, 18 N. Y. 448; Robbins v. Robbins, 89 id. 258.) So, too, when the defendant says this money is the proceeds of the sale of his own land, the reply is, that the money is the proceeds of the land which plaintiff intrusted to the defendant to sell for his benefit; that the defendant can not, with the avails of his agency in his pocket, dispute his agency, or his principal's power to appoint him (Supervisors of Rensselaer Co. v. Bates, 17 N. Y. 242); that the statutes relate to land, not to money; that since the defendant has waived his statutory protection and converted the land into money, the court will accept both his waiver and performance so far as he has accomplished them, and take up his agency at the point where he had repudiated it; and since it would be unjust to treat the money as land, and thus allow the defendant to recede from his honest performance, the court will not permit it." (285–6.)

M., having thirteen children, of whom only one, defendant, was of age; and being about to die and wishing to provide for his family, deeded his property to his eldest son, with the understanding that the property should be held by him as a home for the family until the youngest arrived at age, when it or its proceeds should be divided among them all. The family kept up the property, paying taxes, etc. The defendant repudiated the trust and claimed to be the sole owner of the premises, though he had never been in possession of any part nor received the rents and profits

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thereof. In an action by one of the surviving children, *held*, that defendant was chargeable as trustee of the property and compellable to execute it as directed. *Moyer* v. *Moyer*, 21 Hun, 67.

A will, after giving certain legacies and creating a trust, gave various sums to benevolent and religious institutions which, in fact, failed because of testatrix's death within one month after the execution of the will. The last clause of the will provided: "If for any reason any legacy or legacies left by my will * * * shall lapse or fail, or for any cause not take effect in whole or in part, I give and bequeath the amount which shall lapse, fail or not take effect absolutely, to the persons named as my executors. In the use of the same I am satisfied that they will follow what they believe to be my wishes. I impose upon them, however, no conditions, leaving the same to them personally and absolutely, and without limitation or restriction." The latter clause created no trust *ex maleficio*, but the executors took the residuum as their own and had full power to dispose of it as they wished, and to place it where they knew the testatrix wished it to go. *Edson* v. *Bartow*, 15 Misc. 179, rev'd in part 10 App. Div. 104.

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A debtor confessed a judgment to his creditor, but by mistake of the attorney, the judgment was not docketed in the court of Albany, where the debtor owned lands. The debtor afterwards sold the land, both he and the purchaser supposing that the judgment was a lien, and the latter undertaking to pay it as a part of the consideration of his purchase. Afterwards, on learning that the judgment had not been docketed, he refused to pay it. The debtor was insolvent.

Construction:

On bill filed by the judgment creditor against the purchaser, it was decided that the latter held the lands charged with an equitable lien or trust for the payment of the judgment.

The premises were chargeable with the whole amount of the judgment, although it was larger than represented by the debtor, at the time of the purchase, there being no fraud or wilful misrepresentation. *Haverly* v. *Becker*, 4 N. Y. 169.

Where the trustee of a fund to which he would succeed in case of intestacy prevents the making of a will in favor of a third party by promising to hold the fund for the benefit of the intended legatee, the latter may recover its value as money had and received to his use. *Williams* v. *Fitch*, 18 N. Y. 546.

From opinion.—"In Chamberlain v. Chamberlain (Freem. Ch. R. 34), a testator having settled lands on his son for life, and proposing to make an alteration of his will, for fear there would not be enough of other estate to pay certain legacies to his daughters, was told by the son that he would pay them if the assets were deficient. It

was held that the son, having made to the testator a promise which prevented him from altering his will, should pay the legacies. In Devenish v. Baines (Prec. in Ch. 3), a copyholder intending to devise the greater part of his copyhold estate to his god-son was prevailed upon by his wife to nominate her to the whole, on her promising to give the god-son the part intended for him, and it was decreed against the wife accordingly. In Oldham v. Litchfield (2 Vern. 506), lands were charged with an annuity on proof of the devisee's promise to pay it, and by such promise prevented the testator from charging them in his will. In Barrow v. Greenough (3 Ves. 152), a provision made by will in favor of a wife, was increased upon proof that the executor and residuary legatee promised the testator to pay the increased amount, in consequence of which he refused to alter his will. (Reech v. Kennegal, 1 Ves. Sen. 123; Hodge v. Hodge, 1 Watts. 163; 1 Story's Eq. sec. 256; Podmore v. Gunning, 7 Simons 644.) The principle on which these authorities proceed, has, I think, never been seriously called in question, and it has a direct application to the present case. We are, therefore of opiuion, upon the facts found at the trial, that the defendant's intestate held the funds in question upon a trust for the benefit of the plaintiff, and consequently that the plaintiff is entitled to recover them from the defendant as administrator."

When five persons, acting as a committee to build sheds for the convenience of certain persons (themselves included) in the habit of attending a church, have received a conveyance of the premises on which it is proposed to build and subsequently entered into a written agreement with others, by which they are empowered, as such committee, to make the erections at the joint expense of all the subscribers, each subscriber to pay an equal share of the expense of the improvement, "upon completion thereof and a delivery of a proper title for each respective share thereof," the title is so far impressed with a trust in favor of the subscribers that partition between the grantees, the result of which would be to defeat the entire scheme, will not be allowed.

Under these circumstances, the grantees are no longer tenants in common in such a sense that either can compel a partition. They are all under a valid contract to convey, and, as the other parties are not in default, have become trustees of the legal title. A judgment of partition not only permits the plaintiff, but compels the defendants, to commit a breach of trust, and should not be upheld.

Where, further, the grantees have substantially completed the improvements, and, at a meeting which the plaintiff was requested to attend, allotted nearly all of the sheds to subscribers, who have taken possession, and the plaintiff has then, a day or two before suit, proposed "to withdraw from the committee and have nothing more to do with it if the defendants would pay him what he had expended on the premises," at the same time presenting an account of his expenditures, the amount of which is paid to him and received without objection, the day

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after suit commenced, and is retained by him, the plaintiff becomes a naked trustee, without any interest in the premises, unless as one of the subscribers to the agreement, and will not be permitted to maintain partition.

If one party to a contract agrees to pay the expense of a specified improvement, "agree" is to be deemed the word of both and implies an undertaking by the other party to make the improvement. *Baldwin* v. *Humphrey*, 44 N. Y. 609.

Life tenant in possession of a fund for her support is trustee for remainderman. *Smith* v. *Van Ostrand*, 64 N. Y. 278, digested p. 96.

Plaintiff sold to R. defendant's estate, certain stock for a sum paid down "and one-half of whatever price the same should be sold for, when sold, over and above that sum."

Construction:

Plaintiff could enforce the trust; before possibility of sale above price named, the sale was optional with R.; and assuming that this option existed after such possibility, it has ceased with death of R., whereupon plaintiff could compel a sale and after deduction of sum paid, payment of one-half of the residue: but plaintiff was not entitled to an account of dividends or income. *Jones* v. *Kent*, 80 N.Y. 585, rev'g 13 J. & S. 66.

Distinguishing Lorillard v. Silver, 36 N. Y. 579; Wemple v. Stewart, 22 Barb. 154; Moffit v. Laurie, 15 C. B. 583.

Trustee *ex maleficio*—one who, without authority, assumes the management of property in which others are beneficially interested—is, in equity, a trustee, by construction, for their benefit and is subject to the rules and remedies pertaining to constructive trustees. *Bennett* v. *Austin*, 81 N. Y. 308.

From opinion.—"The rule is laid down in Perry on Trusts that 'a person may become a trustee by construction, by intermeddling with and assuming the management of property without authority. Such persons are trustees *de son tort*, as persons who assume to deal with a deceased person's estate without authority are administrators *de son tort*. * * * If one enters upon an infant's lands and takes the rents and profits, he may be charged as guardian or trustee, and so if one takes personal property. * * * During the possession and management by such constructive trustees, they are subject to the same rules and remedies as other trustees.' (See sec. 245. and cases cited in notes.) By attempting to control the fund assigned to the Stewarts, and intermeddling with the same, Austin became a trustee *de son tort*, and as such is liable to the same rule which applies to other trustees.

"In Van Epps v. Van Epps (9 Paige, 237) a person who held a junior mortgage for the benefit of others attempted to purchase for himself the land mortgaged at a sale under the foreclosure of a prior mortgage; and it was held that the act of purchasing was inconsistent with his duty as trustee to have the sale made at the highest price,

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while his private interest was to buy as low as he could, and that he could not purchase to the prejudice of the *cestui que trust*. In Fulton v. Whitney (66 N. Y. 548) the same principle is asserted, and it is said by Rapallo, J., citing from Chancellor Walworth, in Van Epps v. Van Epps, *supra:* 'The rule is not confined to trustees or others who hold the legal title to the property to be sold, but applies universally to to all who come within its principle, which is that no party can be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property, which is inconsistent with the character of a purchaser on his own account,'"

It is no defense in an action by a person as an executor, to recover for conversion of assets of the estate, that the plaintiff in his individual capacity aided in despoiling the estate.

One receiving the property with knowledge that it is transferred by a trustee in violation of his trust, takes it subject to the right of the trustee to reclaim, as well as to the rights of the *cestui que trust*.

The executor's partner was liable for securities of the estate pledged for a debt of the firm and finally coming into the partner's hands and retained by him. *Wetmore* v. *Porter*, 92 N. Y. 76. Distinguishing Dillaye v. Greenough, 45 id. 438. Citing Briggs v. Davis, 20 id. 15; Austin v. Munro, 47 id. 360; Ferrin v. Myrick, 41 id. 315, and other cases.

A firm paid money to a bank to pay notes under the mistaken supposition that it owned them; the bank failed. *Held*, that it held the money in trust, not as a part of its assets. *Matter of Sartwell: People* v. *City Bank of Rochester*, 96 N. Y. 32. Distinguishing People v. M. & M. Bank, 78 id. 269.

Where it appeared that a note belonging to plaintiff went into and formed a part of the consideration of a bond and mortgage given to her husband, *held*, that these instruments were impressed with a trust in plaintiff's favor for the amount of the note; and that it was immaterial whether or not there was an express agreement to that effect on the part of the mortgagee. *Price* v. *Brown*, 98 N. Y. 388. Distinguishing Robinson v. Cushman, 2 Denio, 149; Pease v. Dwight, 6 How. U. S. 190.

Plaintiff's complaint alleged, in substance, that A. died seized of certain real estate which he devised to his two sons, J. and F., subject to the limitation as to F. that if he should die without issue his share should go to J. and his heirs; that F. conveyed his interest to defendant, who subsequently induced C., plaintiff's mother, to marry F. by means of the false and fraudulent representations that F. had a fine property so left to him that if he married and had an heir the land would go to the heir. The complaint further alleged that plaintiff was

the only child of such marriage; that the real estate was partitioned between J. and defendant as the grantee of F., and defendant since then has occupied and still occupies and claims to own the part set off to him. The relief asked was that plaintiff be declared the owner of the portion so set off to defendant and be placed in possession thereof. Demurrer to complaint.

Construction:

It set forth a good equitable cause of action and the demurrer was properly overruled; defendant was bound by his representations and must be considered as holding the property as trustee *ex maleficio;* and so, should be held to make good the thing to plaintiff, who would have had the property had the representations been true; it was immaterial that plaintiff was not living at the time the representations were made, as they were made in her favor and inure to her benefit; and the question was not affected by the fact that plaintiff's mother was induced to agree to the marriage by purely mercenary considerations.

The law of marriage as administered by courts, so far as property interests are concerned, is founded upon business principles, in which the utmost good faith is required from all parties, and the least fraud in regard thereto is the subject of judicial cognizance.

The distinction between the legal and equitable rules applicable to contracts and negotiations in reference to marriage, and those as to other matters pointed out. *Piper* v. *Hoard*, 107 N. Y. 73.

NOTE.—"The leading prineiple of this remedial justice is, by way of equitable construction, to convert the fraudulent holder of property into a trustee and to preserve the property itself as a fund for the purpose of recompense. (Perry on Trusts, sec 170.)

"There is no legal objection towards constituting such a trustee in favor of one who was not *in esse* when the fraud was perpetrated, so long as it can be seen that such person seeks to take the property which the defendant holds by virtue of his fraud, and which such person would be entitled to hold if the representations the defendant made in regard to it were true. Equity will fasten upon a legatee or devisee the character of a trustee, *ex maleficio*, where he procured the legacy or devise by fraudulently promising the testator to apply it for the benefit of others. (See cases cited in Matter of Will of O'Hara, 95 N. Y 403, 412, 413.) The principle would be just as applicable if the fraudulent legatee had made the promise by which the legacy was procured for the benefit of some one thereafter to be born. The refusal to perform after the party came into existence would be just as much a fraud as if refusal were in regard to one existing when the promise was made." (81–82.)

Whoever receives property knowing it to be the subject of a trust, and to have been transferred by the trustee in violation of his duty or

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power, takes it subject to the right, not only of the *cestui que trust*, but of the trustee to reclaim possession. In an action by the trustee for that purpose, it is not necessary to bring the plaintiff before the court in his individual character. *Zimmerman* v. *Kinkle*, 108 N. Y. 282. Citing Wetmore v. Porter, 92 id. 76.

A mortgagee, who has received moneys, the proceeds of sale of the mortgaged property, is not trustee of an express trust; if in any sense a trustee, it is simply of an implied trust, and, as to the liability growing out of such a trust, the ordinary rules of limitation apply. *Mills* v. *Mills*, 115 N. Y. 80, rev'g 48 Hun, 97.

Kane v. Bloodgood, 7 Johns. Ch. 90; Lammer v. Stoddard, 103 N. Y. 672.

Resulting trust in case of executors holding personalty when will is void. *Read* v. *Williams*, 125 N. Y. 560, digested p. 462.

There is a resulting trust when conveyance is fraudulently made to voluntary grantee, with intent to defraud wife of inchoate right of dower. *Douglas* v. *Douglas*, 11 Hun, 406.

Resulting trust—when implied—and the power of a court of equity to enforce it. *Bitter* v. *Jones*, 28 Hun, 492.

Where property is purchased by the mortgagee, no trust is created in favor of the mortgagor. *Lewis* v. *Duane*, 69 Hun, 28, aff'd 141 N. Y. 302.

Where an action is not maintainable to charge a sheriff as trustee for money paid to him in satisfaction of a legal judgment. *Converse* v. *Sickles*, 74 Hun, 429, rev'd 146 N. Y. 200.

Sale of goods induced by fraud—when it may be rescinded by the vendor—when a constructive trust is not created as to the proceeds of the portion of the goods sold by the vendee prior to the rescission of a sale induced by fraud. *American Sugar Refining Co.* v. *Fancher*, 81 Hun, 56.

Action to impress upon the real estate of a decedent a trust for funeral expenses. *Van Orden* v. *Krouse*, 89 Hun, 1.

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Where an agent deposits in a bank, to his own account, the proceeds of property sold by him for his principal, under instructions thus to keep it, a trust is impressed upon the deposit in favor of the principal, and his right thereto is not affected by the fact that the agent at the same time deposited other moneys belonging to himself; nor is it affected by the fact that the agent, instead of depositing the identical moneys received by him on account of his principal, substituted other moneys therefor. In such case, in an action brought by the principal against the bank, upon its refusal to pay upon presentation of the agent's check for the amount so deposited, the bank can not set up a want of privity. It is a question of title solely. The authorities, upon the right

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of *cestuis que trust*, to follow and reclaim trust funds, collated and commented on. *Van Alen* v. *American National Bank*, 52 N. Y. 1.

The executrix of the estate of N. E. received as collateral security the assignment of a mortgage held in trust, for the payment of a personal debt of the trustee due to the estate, for which assignment there was no legal consideration, and the executrix collected the moneys due on such mortgage and distributed the same among the next of kin and legatees of said estate. Action brought by the *cestui que trust* against such next of kin and legatees, to recover the moneys thus distributed to them as proceeds of said mortgage.

Construction:

Such next of kin and legatees were liable therefor.

The rights of the parties were not altered by the fact that the defendants received, at the same time, other moneys than those arising out of such mortgage.

Receiving the plaintiff's money without giving value for it, they are liable therefor, though mixed with other money belonging to them at the time of receiving it. *Green* v. *Givan*, 33 N. Y. 343.

Goods taken and continuing in specie in the hands of the wrongdoer may be recovered back by the executor or personal representatives of the owner; and if they have been disposed of, an action for money had and received will lie to recover their value. *Potter* v. *Van Vranken*, 36 N. Y. 619.

The owner of stolen negotiable securities, sold by thief, may follow and claim proceeds in hands of felonious taker, or of his assignee with notice: and this right continues and attaches to any securities or property in which proceeds are invested so long as they can be traced and identified, and the rights of a *bona fide* purchaser do not intervene.

A trust *in invitum* is raised out of the transaction in order that the substituted property may be subjected to the purposes of indemnity and recompense. *Newton* v. *Porter*, 69 N. Y. 133.

Trust funds, misappropriated by the trustee, may be followed into lands purchased by them, and the *cestui que trust* may elect either to hold the trustee personally responsible, to claim the lands, or to cause the lands to be sold for his indemnity and hold the trustee for the deficiency.[1]

[1]Lane v. Dighton, 1 Ambler, 409, per Lord Ellenborough; Taylor v. Plumer, 3 M. & S. 562; Thornton v. Stokill, 19 Jur. 751; Oliver v. Piatt, 3 How. U. S. 333, per Story, J.; Story Eq. Jur. sec. 1258 *et seq.*; Sheperd v. McEvers, 4 J. C. R. 136; Dodge v. Manning, 1 Comst. 298.

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It must clearly be proved that the funds were invested in the lands; no presumption arises from the payment for the lands with the trust funds. Perry v. Phelips, 4 Vesey, 108.

When the trustee had indistinguishably mingled the trust funds with his own, the *cestui que trust* can not claim a specific lien upon property purchased generally with moneys in trustee's possession. *Ferris* v. *Van Vechten*, 73 N. Y. 113, rev'g 9 Hun, 12.

NOTE. What is sufficient evidence that trust funds were invested in the purchase. (121, 122.) See, also, Matter of Leonard, 86 Hun, 289; Moore v. Williams, 62 id. 55.

The property of every corporation is to be regarded as a trust fund for the payment of its debts; the creditors have a lien thereon and may follow it into the hands of the directors or stockholders. *Hasting* v. *Drew*, 76 N. Y. 9.

The C. N. Bank, having received from a customer of the M. and M. Bank a check upon that bank, sent it to the drawee for payment; the M. and M. Bank charged the check to the drawer, whose account was then good for the amount, and returned the check to the drawer as paid; it sent to the C. N. Bank a draft on a New York bank for the amount of the check; two days after the M. and M. Bank closed its doors and a receiver of its assets was appointed; the draft was not paid. Application by the C. N. Bank for an order requiring the receiver to pay the amount of the check, upon the grounds that the assets came to the hands of the receiver impressed with a trust in favor of the C. N. Bank;

Construction:

The order was properly denied; in order to authorize the relief prayed for it was necessary to trace into the hands of the receiver money or property which belonged to the C. N. Bank, or which had, before the receivership, been set apart and appropriated to the payment of the check; charging said check and returning it to the drawer did not amount to a payment and setting apart of sufficient of the drawer's deposit to cover it, nor did it impress a special trust on any part of the drawer's assets, but by the transaction the drawee simply reduced its indebtedness to its depositor to the amount of the check, and constituted itself a debtor to the holder to a corresponding amount. *People* v. *Mechanics and Merchants' Bank of Troy*, 78 N. Y. 269.

Distinguishing In re Le Blanc, 14 Hun, 8.

Dividend fund is specific and can not be diverted by a bank and stockholders may follow it.

The moneys from which the banks made their several payments of the assess-

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ment upon the shares in question, having been taken from the fund accumulated for and appropriated to dividends, this money was not the money of the banks, but was the money of the stockholders, and was paid by the banks not in discharge of a debt of their own, but to pay a debt which was that of the stockholders. Carver v. Creque, 48 N. Y. 385; Hathaway v. Town of Cincinnatus, 62 id. 434; Horn v. Town of New Lots, 83 id. 100; Mason v. Prendergast, 120 id. 536 In such case an action for money had and received can be maintained for the recovery of the money from the party receiving it. Mason v. Prendergast, 120 N. Y. 536; Horn v. Town of New Lots, 83 id. 100.

As it was conceded that, although the banks had notified the plaintiff of the assessment, they had not consulted it with reference to the actual making of the payment, the plaintiff had sufficiently guarded its rights in the matter by addressing to the tax commissioners a communication in which it claimed exemption under the statute. Ingraham, J., dissenting. *Ætna Ins. Co.* v. *Mayor*, 7 App. Div. 145.

When money held by a person in a fiduciary capacity has been deposited by him in his general account at a bank, the party for whom the money is held can follow it, and has a charge on the balance in the banker's hands.[1]

If the depositor after such a deposit draws out sums by checks generally and in the ordinary manner, it must be presumed that he drew out his own in preference to the trust money.

The rule attributing the first drawings out to the first payments in, does not apply to such a case.[2] *Importers and Traders' National Bank* v. *Peters*, 123 N. Y. 272.

See, also, Heidelback v. Nat. Park Bank, 87 Hun, 117.

Insurance procured by trust funds unlawfully diverted and used to pay premiums—rights of *cestui que trust* in the insurance. *Holmes* v. *Gilman*, 138 N. Y. 369.

Right in equity to trace funds wrongfully used—equitable ownership of mortgages—priority of legal title over equitable rights—subrogation. Roosevelt v. Land & River Imp. Co., 3 App. Div. 563.

NOTE.—"There is no dispute concerning the rule in equity by which trust moneys are followed through a trustee's mixed account under circumstances such as are disclosed here. That rule, which is generally referred to as the rule in Hallett's case (Knatchbull v. Hallett, L. R. [13 Ch. Div.] 696), was announced in substance in Baker v. N. Y. N. E. Bank (100 N. Y. 31), and distinctly in Importers & Trader's Nat. Bank v. Peters, (123 id. 272). In the case at bar the money of the Howland trust was satisfactorily traced into the bank account of Weeks with the Bank of Commerce, and out of that account into the Danziger mortgages. The defendant Land Company is compelled to admit that by the 6th of November, 1892, there had been paid to Danziger on his mortgages out of the Howland money, at least the sum of $31,931.51. An analysis of the testimony on this subject shows that $60,000 of Howland money (within a small fraction) went into these mortgages. The $31,931.51 paid before November

[1] Cragie v. Hadley, 99 N. Y. 131; Anonymous, 67 id. 598.

[2] Knatchbull v. Hallett, L. R. 13 Ch. Div. 696; Baker v. N. Y. N. E. Bank, 100 N. Y. 31; N. Bank v. Ins. Co., 104 U. S. 54.

V. FOLLOWING TRUST FUNDS.

6th is conceded. The subsequent payments to Danziger, or for him, extended over a period from November 12th to December 19th. The dissection of Weeks's bank account made by Mr. Kenworthy, the expert accountant, shows that of the $60,000, all (but a few hundred dollars possibly) went into the mortgages. The separation of the personal funds and moneys specifically drawn out for other purposes than to pay to Danziger seems to be complete, and we think the court below was right in so finding. For all money of other persons that may have gone into Weeks's account he seems to have accounted to the owners, and the court below was justified in treating those moneys in the same way that it did the personal funds of Weeks. (Baker v. N. Y. National Exchange Bank, 100 N. Y. 31.)

"Our conclusion on this branch of the case may be summed up thus: The right of the plaintiff is based upon tracing the trust moneys into the mortgages at the outset, and not upon any theory of the substitution of the mortgages subsequently for the money. Those mortgages constituted an investment originally contemplated by Roosevelt and Weeks, to make which, railroad and municipal bonds of their trust estate were sold, and the moneys realized put into Weeks's bank account, to be in readiness for that identical investment, and upon an analysis of that account, applying the recognized rule of application of drawings, the evidence shows that the $60,000 of mortgages were paid for by the Howland moneys. Thus we ascertain that the Howland trustee is the equitable owner of these mortgages."

VI. BONA FIDE PURCHASERS PROTECTED.

Real Prop. L., sec. 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."

1 R. S. 728, sec. 54; Banks's 9th ed. N. Y. R. S. 1797 (repealed by Real Prop. L., sec. 300) was the same.

Where, in a conveyance in fee, operating under the statute of uses, in which a consideration appears to have been paid, the grantor makes an express declaration of the whole use, but a part of the use fails to take effect by reason of the uncertainty of the *cestui que use*, the consideration expressed in the deed is regarded as an equivalent for the whole use declared, including as well that part which fails as that which is valid; and therefore that part of the use which fails does not result to the grantor, but vests in the grantee named in the deed, who paid the consideration.

Where the whole use is disposed of by the deed, nothing can result to the grantor. *Van der Volgen* v. *Yates* 9 N. Y. 219; see 3 Barb. Ch. R. 242.

When a trustee is clothed with full power to manage and control the trust estate, an assignment by him of a mortgage impressed with the trust to a *bona fide* purchaser, or pledge, can not be impeached by the *cestui que trust.*

VI. BONA FIDE PURCHASERS PROTECTED.

By an antenuptial contract between plaintiff and her husband S. D. D., she constituted him "trustee of all her real and personal estate," and, as such, "to have the entire and sole management, direction and control thereof," which appointment was "declared to be irrevocable." As such trustee S. D. D., soon after the marriage, took possession of plaintiff's property and appropriated a portion of the avails to the payment of moneys previously borrowed by him to purchase certain real estate and to the erection of buildings thereon. He subsequently conveyed the real estate (plaintiff joining in the deed), receiving for a portion of the purchase money the mortgage of the grantees, covering the premises for a less amount than the sum thus appropriated. The grantees had no knowledge of such appropriation. S. D. D. assigned the mortgage by assignment absolute on its face, expressing full consideration. Through various mesne assignments the title to the mortgage became vested in the defendants. An action was brought to have the mortgage declared trust property for plaintiff's benefit.

Construction:

First, conceding the mortgage was impressed with a trust in favor of the plaintiff while held by S. D. D., a sale or pledge thereof by him was not a breach of trust, and an assignment to a *bona fide* holder could not be impeached by plaintiff; second, conceding that defendant's title could be impeached, if it or the previous assignees had notice of the trust, the antenuptial contract conveyed no such notice, actual or constructive; and the plaintiff having taken, without any notice, express or implied, for a full and valuable consideration, was a *bona fide* purchaser, and acquired a perfect title thereto, free and discharged of the trust. *Dillaye* v. *Com. Bank of Whitehall*, 51 N. Y. 346.

See, also, Doremus v. Doremus, 66 Hun, 111.

VI. EXPRESS TRUSTS.

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I. PURPOSES FOR WHICH EXPRESS TRUSTS MAY BE CREATED.

Real Prop. L., sec. 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;[1]

"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;[2]

"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;[3]

"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."[4]

1 R. S. 728, sec. 55, Banks's 9th ed. N. Y. R. S., p. 1797 (repealed by Real Prop. L., sec. 300). In the first sentence used "any or either" instead of "one or more;" in the third subdivision used "rules prescribed in the first article of this title" instead of "provisions of law relating thereto;" in the fourth subdivision used "in the first article of this title" instead of "by law."

1. WHEN A VALID EXPRESS TRUST IS CREATED.

A person entitled to both the possession and to the rents and profits of real property is deemed to have the legal title therein, except in

[1]See cases collected and analyzed in Chaplin's Express Trusts and Powers, p. 285, *et seq.* See, also, *post*, pp. 618, 619, 621, 623, 631.

[2]See cases, pp. 616–18, 620, 624, 631, 632, 641.

See, also, Chaplin's Express Trusts and Powers, p. 289, *et seq.*

[3]See cases digested, pp. 616–618.

See, also, cases considered in Chaplin's Express Trusts and Powers, pp. 352, *et seq.* For questions relating to the duration of the trust, see pp. 392–4.

[4]See cases, rules and cases, *ante*, pp. 499–530.

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cases where some power of actual disposition or management is given to a trustee by a trust created prior to January 1, 1830.

See Real Prop. L., sec. 72, p. 571.

A merely passive trust created by deed or devise vests no title in the trustee, but carries the legal estate immediately to the beneficiary.

See Real Prop. L., sec. 73, p. 573.

Uses and trusts relating to real property, except as authorized and modified by the article relating to that subject, have been abolished (see Real Prop. L., sec. 71). But where a trust is created for an unauthorized purpose, though no estate vests in the trustees, it may, if it can lawfully be performed as a power, be valid as a power in trust.

See Real Prop. L., sec. 79, p. 710; also, Powers, p. 878.

Moreover, where an authorized trust to sell or mortgage is created by will, it is further necessary that the trustees be empowered to receive the rents and profits, otherwise they do not take the estate which passes to the heir or devisee, subject to the execution of the trust as a power.

See Real Prop. L., sec. 77, p. 702; Steinhardt v. Cunningham, 130 N. Y. 292.

(1) A general devise in trust to executors vests no estate in them except for such of the declared purposes as require that the title be vested in them.

Manice v. Manice, 43 N. Y. 305.

(2) An intent to create a trust will not be implied in the absence of an express declaration to that effect, when the whole purpose can properly be accomplished under a power conferred. The scheme of the statute is in the direction of such a construction as will vest title to the realty in the heirs or devisees rather than the executors, if the wishes of the testator may be carried out under a trust power.

Heermans v. Robertson, 64 N. Y. 332; Henderson v. Henderson, 113 id. 1; Steinhardt v. Cunningham, 130 id. 292.

(3) Although the authority given could be executed by the creation of a mere power in trust, the instrument will not necessarily fail as a trust; the test is whether the instrument confers upon the trustee the authority to accomplish one of the purposes mentioned in the statute 1 R. S. 728, sec. 55.

Morse v. Morse, 85 N. Y. 53; Vernon v. Vernon, 53 id. 337.

To create a valid express trust, an intent to create a trust for one of the authorized purposes must be found.

Heermans v. Burt, 78 N. Y. 259; Savage v. Burnham, 17 id. 561.

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(1) A trust to receive rents and profits is not valid without a direction to apply for a term, nor a trust to sell, unless authorized for the benefit of creditors or of legatees or to satisfy a charge.

Holly v. Hirsh, 135 N. Y. 590; Cooke v. Platt, 98 id. 36; Henderson v. Henderson, 113 id. 1; Dillaye v. Greenough, 45 id. 438; Weeks v. Cornwell, 104 id. 325.

(2) Moreover, it must be the main purpose and not incidental to a power of sale.

Heermans v. Burt, 78 N. Y. 259; Woerz v. Rademacher, 120 id. 62.

(3) But it need not be stated in the very words of the statute.

Donovan v. Van DeMark, 78 N. Y. 244.

(4) And it is sufficient if such an intent can be collected from the instrument.

Morse v. Morse, 85 N. Y. 53; Woodward v. James, 115 id. 346; Greene v. Greene, 125 id. 506; Ward v. Ward, 105 id. 68.

(5) Thus, a trust "to pay over" is valid under subdivision 3 of section 55, 1 R. S. 728.

Leggett v. Perkins, 2 N. Y. 297; Moore v. Hegeman, 72 id. 376; Marx v. McGlyn, 88 id. 357; Townshend v. Frommer, 125 id. 446.

(6) Likewise to receive rents and profits "to the use of" another.

In re Livingston, 34 N. Y. 555.

(7) An annuity to be paid out of the testator's share of rents and profits, gives the trustees an implied power to receive rents and profits, and hence also the legal estate.

Vernon v. Vernon, 53 N. Y. 351.

(8) A power to lease carries the power to receive the rents.

Morse v. Morse, 85 N. Y. 53; Tobias v. Ketchum, 32 id. 319.

(9) A devise "in trust for the necessary maintenance and support of the beneficiary," gives the power to receive rents and profits.

Donovan v. Van DeMark, 78 N. Y. 244.

(10) Words expressive of a wish or desire, if sufficiently definite, will create a trust, if that appears to have been the intention of the testator.

Phillips v. Phillips, 112 N. Y. 197. (As to what words constitute a precatory trust, see further, Life Estates, *ante*, p. 113.)

(11) But an absolute estate, clearly given, will not be cut down by subsequent ambiguous words, inferential in their intent.

Clarke v. Leupp, 88 N. Y. 228; Lawrence v. Cook, 104 id. 632; Matter of Keleman, 126 id. 73.

(12) The creation of an express trust may be implied when necessary to perform imposed duties. But a trust will never be implied where it would render a will illegal and void.

Leggett v. Perkins, 2 N. Y. 297; Heermans v. Robertson, 64 id. 332; Greene v. Greene, 125 id. 506; Smith v. Edwards, 88 id. 92; Robert v. Corning, 89 id. 225.

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When a valid intention is once found, the trustee will take a legal estate commensurate with the equitable interest given, though no conveyance be expressed.

Leggett v. Perkins, 2 N. Y. 297, Tobias v. Ketchum, 32 id. 319; Brewster v. Striker, 2 id. 19; Toronto Genl. Trust Co. v. C., B. & Q. R. Co., 123 id. 37; Manice v. Manice, 43 id. 305.

The statute does not forbid a shifting use for the benefit, in case of the death of the primary beneficiary, of persons unknown or not in existence at the creation of the trust.

Gilman v. Reddington, 24 N. Y. 9.

The power of sale must be imperative to constitute a valid trust for any of the purposes referred to in the statute of uses and trusts.

Steinhart v. Cunningham, 130 N. Y. 292; Cooke v. Platt, 98 id. 25; Vernon v. Vernon, 53 id. 351.

A valid trust to pay annuities out of the rents and profits of land, may be created under subdivision 3 of section 55, 1 R. S. 728.

Cochrane v. Schell, 140 N. Y. 516.

When a trust and a power are irreconcilable, the trust must yield.

Crooke v. County of Kings, 97 N. Y. 421.

A trust of personalty is not within the statute of uses and trusts, and may be created for any purpose not forbidden by law.

Gilman v. McArdle, 99 N. Y. 451; Matter of Carpenter, 131 id. 86; Matter of Denton, 102 id. 200; Wetmore v. Hegeman, 88 id. 69; King v. Merchants' Exchange Co., 5 id. 547; Bunn v. Vaughan, 1 Abb. Ct. App. Dec. 253.

Necessity of naming a beneficiary.

See, Uncertainty of beneficiary, p. 821; Real Prop. L., sec. 93, p. 847.

Necessity of naming a trustee.

See, Appointment of trustee, p. 837; Real Prop. L., sec. 93, p. 847.

A gift to a corporation "in trust" for corporate purposes, creates no trust.

See, Who may be trustee, p. 715.

Nor does a charge on land.

Dill v. Wisner, 88 N. Y. 153.

Nor does an assignment to creditors for the purpose of satisfying their demand, with a provision for the return of the surplus.

Leitch v. Hollister, 4 N. Y. 211; Dunham v. Whitehead, 21 id. 131; Royer Wheel Co. v. Fielding, 101 id. 504.

By will made in 1815, the testator devised his real estate to his three grandchildren and their heirs, forever. He then directed such real estate to be "disposed of" by his executors and the survivor of them, and the executors or administrators of such survivor, as follows: "The

said real estate shall not, at any time hereafter, be sold or aliened, but my said executors, or the survivor of them, or the executors or administrators of such survivor shall, from time to time, lease or rent the same, on such terms as they shall deem most advantageous to my said heirs (grandchildren), and the rents, issues and profits of the same shall be annually paid to my said heirs in equal proportions; and if either of my said heirs or their children shall choose to occupy any part of my said real estate, he, she, or they shall have a preference over any other applicant on paying a reasonable rent for the same." By a subsequent clause it was declared that if any of his grandchildren should die without issue, the share of the one so dying should go to the survivors or survivor, and the heirs of such survivor forever.

Construction:

The executors took by implication the legal estate during the lives of the grandchildren, and therefore such grandchildren had no present legal interest which could pass by a sale under judgment and execution against them. *Brewster* v. *Striker*, 2 N. Y. 19.

There need be no express devise to trustees when it is necessary that they should have the legal title to perform the duties imposed on them.

Trust to receive rents and profits and pay over to a person, is a valid trust under 3d sub. of sec. 55 of uses and trusts. *Leggett* v. *Perkins*, 2 N. Y. 297. Hawley v. James, 16 Wend. 62.

Devise of income to pay over net income, creates a trust. *Winthrop* v. *McKim*, 6 Hun, 59. See, also, Duclos v. Benner, 62 id. 428.

A general assignment by a debtor of his property, in trust for the benefit of a particular class of creditors, reserving the surplus to himself, is fraudulent and void; and it makes no difference whether the surplus be large or small, or whether there be none at all.

But where an insolvent debtor assigned a chose in action to certain of his *creditors* for the purpose of securing their demands, reserving the surplus to himself, there being no extrinsic evidence of an intention to defraud other creditors, the assignment is in the nature of a mortgage, and is valid. *Leitch* v. *Hollister*, 4 N. Y. 211. Citing Barney v. Griffin, 2 Comst. 370; Goodrich v. Downs, 6 Hill, 438; Hone v. Heunquez, 13 Wend. 243.

The statutes regulating trusts in real property have no application to securities by mortgage.

A mortgage in fee, of lands, made to a person in trust for the payment of several bonds of the mortgagor held by different individuals,

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is not affected by those statutes, and is valid. *King* v. *Merchants' Exchange Co.*, 5 N. Y. 547. See, also, Judge v. O'Connor, 70 Hun, 384.

A testator devised his estate, real and personal, upon these trusts: 1. To sell the real estate after the death of his widow. 2. That she should, during her life, receive and take to her own use, one-third part of the clear yearly rents and profits of the real estate; the residue of the rents and profits, until the sale of the real estate, to be deemed part of the personal estate and subject to the same dispositions; which were. 3. To apply the income to the maintenance and education of six sons and four daughters, named in the will, in equal shares, until the sons should attain the age of twenty-one years and the daughters attain that age or be married, respectively. 4. To pay or transfer the principal in equal shares to the sons and daughters; the shares of the sons to become vested at twenty-one, and then to be sold or transferred; the shares of the daughters to be vested in the trustees, the income to be paid to them after twenty-one or marriage, during life, and upon the death of each daughter leaving issue, her share to go and vest in such issue.

Construction:

A valid trust as to the real estate within the statute was created. (1 R. S. 728, sec. 55.)

The trustees are to receive rents and profits, paying one-third to the widow during life, and applying the residue to the use of the other beneficiaries as income. They are not to go to the principal of the trust fund until the period for selling the estate arrives.

The law, in respect to trusts of personal property, has no application until the period arrives when the equitable conversion can take place under the terms of the trust. Until then, it is governed by the law of trusts in land.

Upon the circumstances of this case, the main intent of the testator, to secure the income of the daughters' shares to their separate use and the *principal* to their children, is preserved by supporting his primary dispositions, although the ulterior limitations are defeated.

Although limitations, bad by statute, are enveloped in a single trust with others that are good, the trust may be supported for its valid purposes. *Savage* v. *Burnham*, 17 N. Y. 561.

NOTE 1.—"A valid trust in lands vests the whole legal and equitable title in the trustees and is inalienable. (1 R. S. 729, secs. 60, 65; Coster v. Lorillard, 14 Wend. 265.) A sale of the lands during the life of the widow would be in contravention of the trust declared on the face of the will, and therefore void." (Sec. 65.) (569–570.)

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NOTE 2.—"There is indeed but one fund, which is embraced in a single trust, but the interests carved out of it are entirely distinct. The trust itself is necessarily divisible as often as the beneficial dispositions of the will call for a division and separation of any portion of the estate from the residue. When the share of any beneficiary vests according to the will and becomes payable, it is the duty of the trustees to pay it over accordingly, and the trust as to that share at once ceases. If a different rule of construction were to be applied to wills framed as this is, it would lead to endless prolixity in the preparation of such instruments, because although a testator might desire to make provisions precisely alike for numerous descendants, it would be necessary for him to frame a separate clause and perhaps a separate trust for each one. (Mason v. Mason's Ex'rs, 2 Sandf. Ch. R. 432; De Peyster v. Clendining, 8 Paige, 295; and s. c. on appeal, 26 Wend. 21.)" (571.)

An assignment by a debtor to a creditor of all his personal property and choses in action, for the payment of the debt, with a provision for a return of the surplus, is in effect a mortgage, and not void under the statute of trusts, as for the use of the person making it.

Distinction stated between a trust where the whole title vests in the trustee, and a transfer under which the debtor retains a residuary interest, which remains subject to the action of creditors.

Such an assignment by an insolvent, held valid, there being no extrinsic evidence of intent to hinder or defraud. *Dunham* v. *Whitehead*, 21 N. Y. 131.

A trust to receive the rents and profits of real estate and apply them to the use of the issue of the testator's infant children for a period not exceeding two lives in being, is not void because the beneficiaries are not ascertained.

The statute (1 R. S. 728, sec. 55) does not forbid a shifting use for the benefit, in case of the death of the primary beneficiaries, of persons unknown or not in existence at the creation of the trust. *Gilman* v. *Reddington*, 24 N. Y. 9, digested p. **297.**

Where the executors are clothed with full power and authority to rent, lease, repair and insure the estate during any period of time it shall remain unsold and undivided, they are vested with the legal title thereto. *Tobias* v. *Ketchum*, 32 N. Y. 319.

NOTE (1). "If land be devised to three persons and their heirs, in trust, to permit A. to receive the *net* profits for her life for her own use, and after her death to permit B. to receive the net profits for her life, etc., it has been held that the legal estate is in the trustees, for that they are to receive the rents and thereout pay the land tax and other charges on the estate, and hand over the *net* rents only to the tenant for life." (Lewin on Trusts, 248; Baker v. Greenwood, 4 Mees. & Wels. 421; White v. Parker, 1 Bing. N. C. 573.) (329.)

A. executed a trust deed to B. of real estate in trust, to receive rents and profits to the use of A. during his life, and upon his death to assign

and convey same to his lawful issue, and in case of dying without issue then to assign and convey same to nephews. The question came up on motion to remove the trustee.

Construction:

(1) Trust to receive rents and profits, etc., was valid.

(2) At death of A. law would carry real estate to those entitled without act of trustee.

(3) Nephews in lifetime of A. *were said* to have vested remainders because A. had no children. *In Re Livingston*, 34 N. Y. 555.

NOTE.—Nephews took by executory devise.

A general devise in trust to executors vests no estate in them, except for such of the declared purposes as require that the title be vested in them, and they take precisely such an estate in quantity or duration as is requisite to answer the lawful purpose of the trust, so that the estate of the trustees is measured by the lawful trust confided to them. *Manice* v. *Manice*, 43 N. Y. 305, digested p. 423.

An antenuptial contract was entered into, whereby the husband was appointed trustee of real and personal property, and as such trustee was to have the entire and sole management, direction and control thereof, but it was silent as to the persons to be beneficially interested in the trust.

Construction:

No trust was constituted, which the court could execute.

It seems that when the instrument creating the trust does not disclose the beneficiary, it does not necessarily result that the creator of the trust is such beneficiary. *Dillaye* v. *Greenough*, 45 N. Y. 438.

Will gave all estate to trustees and executors to be disposed of as directed; then a clause giving certain premises to wife, with power to executors to sell said premises at not less than a specified sum and invest proceeds for wife's benefit during her life.

Construction:

Executors took no title to premises demised to wife, as wife's interest was not limited to use only, and as the power of sale was contingent and not absolute no implication arose from direction as to the investment of proceeds of sale as would cut down her interest to a life estate, and she took a fee subject to the power of sale.

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Same will:

Testator gave wife an annuity of $7,000 to be paid by executors out of testator's share in rents of certain stores; if insufficient, from the interest of other property; executors were authorized to sell stores at a minimum price stated.

Construction:

Trustees had implied power to receive rents (Leggett v. Perkins, 2 N. Y. 297) and apply, and took legal title during life of wife for purposes of the trust, and there being no residuary demise, lands, subject to trust estate, descended to heirs. *Vernon* v. *Vernon*, 53 N. Y. 351.

F. executed an instrument under seal in terms conveying to the plaintiff, B., certain real and personal estate, with power to sell and convey the lands "by retail" and until such sale to rent and after deducting expenses and commissions, to pay over to F. the avails during his life, and upon his death, after payment of debts, to distribute the residue as prescribed. Subsequently F. executed to defendant, R., a written contract of sale of a part of the said premises and R. went into possession thereof. After F.'s death B. brought action to recover premises so contracted by F.

Construction:

(1) Even if instrument to B. conveyed, an estate in trust for leasing with power of sale during his life, as F. was entitled to enforce trust and to avails, his contract accomplished the same result, and R., not being in default, would not be disturbed by a court of equity.

(2) No express trust was created to come into effect at F.'s death; whether any authorized express trust was created, *quære.*

(3) An intent to create a trust will not be presumed in absence of express declaration to that effect, when the whole purpose can be accomplished under a power conferred by the deed.

(4) The statute of uses and trusts, in limiting express trusts, was to restrict them to cases in which it was necessary for the protection of those interested that the title should pass. When no such necessity exists, the intent was that the trust be executed as a power.

(5) An intent to create a trust for the payment of debts could not be implied from the instrument in question. *Heermans* v. *Robertson*, 64 N. Y. 332, aff'g 3 Hun, 464.

A provision to apply is equivalent to provision to pay over.. *Moore* v. *Hegeman*, 72 N. Y. 376, digested p. 430.

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F. executed a sealed instrument in terms purporting to convey to plaintiff, as trustee, certain real and personal estate, with power to sell the lands granted by retail and convey the same with covenants of warranty binding on grantor's heirs; and until sold, to rent the same, to collect all debts owing the grantor, to execute deeds of all lands then under contracts of sale, on payment of the debts owing thereon, and to dispose of the avails of such estate as follows:

(1) To defray the expenses of the trust.

(2) To pay over to the grantor all moneys received or to appropriate them to his use, under his direction.

(3) After his death, and payment of his just and legal debts, and expenses of the trust, to distribute the residue as directed in a supplemental writing to be thereafter executed. If no such writing should be executed, then to distribute said residue among the heirs of the grantor.

The action was to recover during the lifetime of the grantor, possession of a portion of the lands specified in the instrument.

Construction:

The instrument did not create any express trust authorized by the statute (1 R. S. 728, sec. 55) and hence the legal title to the land did not vest in the plaintiff.

The instrument did not create a trust to sell for the benefit of creditors, as it simply recognized the legal right of the creditors; payment before any distribution in no way added to their rights or security, also, as no trust to sell for payment of debts could arise until the death of the grantor.

The conveyance was not a trust to receive the rents and profits of the lands and apply them to the use of the grantor during life, as the main object was to sell and pay over the proceeds to the grantor during his life, and to his appointees after his decease, the direction to rent being merely incidental.

Whether the instrument created merely an agency for the management of the estate, or a valid irrevocable power in trust, *quære*. *Heermans* v. *Burt*, 78 N. Y. 259.

In creating a trust the motive is not material. *Von Hesse* v. *MacKaye*, 62 Hun, 458, aff'd 136 N. Y. 114.

does not create a trust authorized by statute. . *Knickerbocker Life Ins. Co.* v. *Hill*, 3 Hun, 577; see, also, *Roberts* v. *Carey*, 84 id. 328.

A mortgage upon real property, executed to the mortgagee in trust to collect and apply the principal and interest, is a trust in personal

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property; and if the trust is perfectly defined, so as not to rest in the discretion of the trustee, his executor may maintain an action for the foreclosure of the mortgage. *Bunn* v. *Vaughan*, 1 Abb. Ct. App. Dec. 253.

To create a valid trust under 2 R. S. 728, sec. 55, the trust need not be stated in the very words of the statute, if a purpose within the statute is clearly embraced in the language used, for the execution of which the trustee may be clothed with the legal title.[1]

S., by will, gave to C. all testator's real and personal estate "in trust * * for the necessary support and maintenance of" the testator's son during his natural life, and after his death to the lawful children of son. C., executor, was authorized to sell certain of the real estate.

Construction:

C. was directly or inferentially given power to manage the estate, to receive the rents and profits and apply them according to his judgment in the support and maintenance of A.; hence a valid trust was created and the legal title vested in the trustees. *Donovan* v. *Van De Mark*, 78 N. Y. 244, rev'g 18 Hun, 200.

Distinguishing Verdin v. Slocum, 71 N. Y. 345.

NOTE.—Tit. 2, pt. 2, ch. 1, art. 2, sec. 55 involved. A gift "unto my wife Mary Ann Hathaway as her dower in full the use or proceeds, after paying necessary expenses * * * during her natural life" created a valid trust. *Hathaway* v. *Hathaway*, 37 Hun, 265.

To create an express trust it is sufficient if the intention to create the trust can be fairly collected from the instrument.

Although the authority given could be executed by the creation of a mere power in trust, the instrument will not necessarily fail as a trust; the test is whether the instrument confers upon the trustee the authority to accomplish one of the purposes mentioned in the statute 1 R. S. 728, sec. 55.[2]

S. gave five-sixths of his residuary estate, consisting of a farm and some personal property, to five of his children named, "to be equally divided between them." The other sixth he gave to a trustee, in trust, to pay the interest thereof annually to E., a son, and, in a certain contingency, a portion of the principal, and at the death of E. to pay the surplus remaining "to his children, with power and direction to the

[1] Leggett v. Perkins, 2 N. Y. 297; Beekman v. Bonsor, 23 id. 298; Vernon v. Vernon, 53 id. 351; Heermans v. Robertson, 64 id. 332.

[2] Vernon v. Vernon, 53 N. Y. 337.

executor to sell the real estate when and in such manner as he should think proper, and to rent and lease the same until thus sold."

Construction:

The will created an express trust in the executor, who took the legal title of the farm and no estate therein vested in the children.

The power to lease carried the power to receive the rents and, although there was no express direction as to the disposition to be made of them, the reasonable implication was that they were to go to the persons beneficially interested in the estate; hence partition of the property was denied under 1 R. S. 347, sec. 1, as none of the children took a present estate in possession. *Morse* v. *Morse*, 85 N. Y. 53.

Citing Brewster v. Striker, 2 N. Y. 19; Sullivan v. Sullivan, 66 id. 37.

From opinion:—"Authority given to an executor to sell lands, unless accompanied with a right to receive the rents and profits, vests no estate in the executor, but the lands descend to the heirs or pass to the devisees of the testator, subject to the execution of the power. (2 R. S. 729, sec. 56; 4 Kent's Com. 321; Crittenden v. Fairchild, 41 N. Y. 289; Hetzel v. Barber, 69 id. 1; Prentice v. Janssen, 79 id. 478.)

"But the power of sale conferred upon the executor by the will of Stephen Morse, is accompanied with an authority to rent and lease the land, until the power should be exercised. If this constituted a valid express trust within the Revised Statutes, then the whole estate vested in the executor, subject only to the execution of the trust, and the children of the testator took no estate or interest in the lands, but may enforce the performance of the trust in equity. (1 R. S. 729, sec. 60.) A trust to sell, mortgage or lease lands, for the benefit of legatees, or 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 period, are among the express trusts authorized by the statute. (1 R. S. 728, sec. 55.) It is clear that the power of sale in the will in question, was conferred for the purpose of conversion, and with a view to the distribution of the proceeds of the sale of the land among the testator's children. This is not expressly declared, but the prior gift of the whole residuary estate to them, followed by the power of sale to the executors, permits of no other inference. (Fisher v. Banta, 66 N. Y. 468; Marsh v. Wheeler, 2 Edw. Ch. 156; Kinnier v. Rogers, 42 N. Y. 531.) * * * * *

"There was no reconversion from personalty into realty in the case now before us, by parties representing the whole beneficial interest. The object of the testator would be frustrated by allowing a part of the beneficiaries to bind the others and compel a sale, by an election to reconvert their particular shares. (Hetzel v. Barber, 69 N. Y. 1; Holloway v. Radcliffe, 23 Beav. 163; Craig v. Leslie, 3 Wheat. 577; Snell's Prin. of Eq. 169–171.)"

A trust will not be implied to be at once rendered void. *Smith* v. *Edwards*, 88 N. Y. 92, digested p. 433.

But the intention of the testator will not be contravened in order to sustain the will. *Cowen* v. *Rinaldo*, 82 Hun, 497.

During pendency of action the claim was assigned to J., who took the assignment simply at the request and solely in trust for a firm of

attorneys; and upon the death of J. his administrator assigned the claim to the present plaintiff upon the same trust, who was substituted as plaintiff.

Construction:

The plaintiff was trustee of an express trust within the meaning of the Code of Procedure (sec. 113), and could maintain an action without joining the beneficiaries, in absence of any allegation by defendant of equities set off or counterclaim against them.

J.'s administrator succeeded to J.'s rights and properly assigned to the plaintiff. The action of the attorneys was not violative of the statute (2 R. S. 288, sec. 71) prohibiting attorneys from buying or being interested in anything in action with intent to bring suit, as suit was pending before such purchase. *Wetmore* v. *Hegeman*, 88 N. Y. 69.

After various devises, testatrix devised all of her real estate, charging the same with the payment of "all just debts, funeral and testamentary expenses and all the pecuniary legacies," with no words of trust or power in the executor to execute a conveyance, or to sell or distribute the proceeds of sale.

Construction:

The devise did not create a trust in the executors authorizing an action by them for the construction of a will, nor did the refusal of the devisees to accept the devise, or their renunciation thereof, impose any such trust. Jurisdiction to construe will in action therefor is incidental to that over trusts. *Dill* v. *Wisner*, 88 N. Y. 153, aff'g 23 Hun, 123.

Valid trust to executors was implied to receive and apply rents and profits. A direction to pay over rents and profits is equivalent to a direction to apply them to the use of the beneficiary. *Marx* v. *McGlynn*, 88 N. Y. 357.

The gift of the estate to the wife and then "and do appoint my wife * * my * * attorney and sole executrix * * to take charge of my property after my death, and retain or dispose of the same for the benefit of herself and children above named," creates no trust. *Clarke* v. *Leupp*, 88 N. Y. 228, digested p. 118.

This rule has also been frequently applied in cases involving questions under our statute of uses and trusts, where a trust estate, if held to result from the language and dispositions of a will, would render it illegal and void. In such cases the courts, for the purpose of sustaining the will, construe an authority and duty conferred or imposed upon

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executors, where it is possible to do so, as a mere power in the trust, although the duty imposed, or the authority conferred, may require that the executors shall have control, possession, and actual management of the estate. (Downing v. Marshall, 23 N. Y. 366; Post v. Hover, 33 id. 593; Tucker v. Rucker, 5 id. 408.) But there are many authorities tending to sustain the proposition, that a trust will be implied in executors, when the duties imposed are active, and render the possession of the legal estate in the executors, convenient and reasonably necessary, although it may not be absolutely essential to accomplish the purposes of the will, and where such implication would not defeat, but would sustain the dispositions of the will. (Craig v. Craig, 3 Barb. Ch. 76; Bradley v Amidon, 10 Paige, 235; Tobias v. Ketchum, 32 N. Y. 329; Vernon v Vernon, 53 id. 351; Morse v. Morse, 85 id. 53. See, also, Brewster v. Striker, 2 id. 19.) *Robert* v. *Corning*, 89 id. 225, digested p. 437.

When trust and power are irreconcilable, trust must yield to the power. Trust for benefit of daughter for her life, and declaration that devise was on the condition "subject to the power and authority of daughter to dispose of the estate, both real and personal, by grant or devise." The power operated on the remainder, and trust related to life estate and both were valid. *Crooke* v. *County of Kings*, 97 N. Y. 421, digested p. 444.

It is essential to the validity of a trust to sell lands for the benefit of creditors or of legatees, that the power conferred shall be absolute and imperative, without discretion except as to the time and manner of performing the duty imposed.

A trust is not valid as a trust to receive the rents and profits of land under the statute of uses and trusts (1 R. S. 758, sec. 55, sub. 3) where there is no direction to apply them to the use of any person for any period, and where they are not distributable as such, but are incorporated into the mass of the estate to be divided by the executor. *Cooke* v. *Platt*, 98 N. Y. 35, digested p. 883.

A trust of personalty is not within the statute of uses and trusts, and may be created for any purpose not forbidden by law; it may be created without writing, and the delivery of the property is sufficient to pass the title.

M., an aged married woman, having no kindred living, placed in the custody of defendant a sum of money with directions to use the same for the support and maintenance of herself and husband during their

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lives; after the death of the survivor of them, to use the residue to pay their respective funeral expenses, and for the erection of a suitable monument to their memories, and to expend any residue for masses, for the repose of their souls, according to the ritual of the Roman Catholic church, of which church M. and her husband were members. Defendant receives the money upon the conditions stated, and promised to apply it in accordance therewith. Defendant was an undertaker; M. selected the kind of coffin, and described the monument she desired, and specified the time the masses were to be solemnized. She died first, then her husband, both intestate. Defendant expended a portion of the fund for the purposes specified, leaving a balance to be expended for masses.

An action by the administrator of the husband's estate to recover such balance.

Construction:

A trust, valid as between the parties, was created to provide for the support of M. and her husband, which placed the fund beyond their control, and vested the title in the trustee, and so long as the husband lived he had no title to any part of it; as to the surplus, without considering the question whether a valid trust was created in regard thereto (as to which *quære*),[1] a valid contract was entered into, and except in case of breach thereof plaintiff had no right of action.

As to whether in any event plaintiff as representative of the husband could have a right of action, *quære*.

It is only in respect to dispositions of property which are not to have any effect upon the death of the owner, and are revocable, that he is confined to a will. If they operate *in presenti* they may be valid as contracts, although they are not to be carried into execution until after the death of the party making them, or are contingent upon the survivorship of another. (Matter of Diez, 50 N. Y. 93.)

It seems that any trust of property which would be valid if created by will, can be created by the owner in his lifetime, provided it is then to go into operation, although to be executed after his death; and, in case of personal property, may be created by oral agreement, accompanied by delivery of the property. *Gilman* v. *McArdle*, 99 N. Y. 451, rev'g 17 J. & S. 463.

From opinion.—"We can not concur in the proposition that a mere agency was established. Passing for a moment the questions which arise upon the undertaking of the defendant as to the application of the surplus which might remain after paying

[1] See Holland v. Alcock, 108 N. Y. 312.

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for the support of Mrs. Gilman and her husband during their lives, we think that a valid trust was created to provide for such support, which trust placed the fund beyond the control of Mrs. Gilman and vested the title to it in the defendant as trustee. A trust of personalty is not within the statute of uses and trusts, and may be created for any purpose not forbidden by law. Such a trust may be created without writing, and the delivery of the property is sufficient to pass the title. (Perry on Trusts, 586; Day v. Roth, 18 N. Y. 448.) The trust may be for the support of the person who creates it and is valid except as to creditors. The statute of frauds (2 R. S. 135, sec. 1) provides that 'all transfers or assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person,' clearly implying that they are valid as between the parties. In this case, the trust was not merely for the support of Mrs. Gilman, but for that of her husband during his life, and was one which he could have enforced. In Stone v. Hackett (12 Gray, 227), it was held that the delivery, without consideration, of certificates of shares in a corporation with blank powers to transfer indorsed, in trust, to pay the income to the settlor during his life, and at his death to transfer the shares to certain charitable objects, was valid and vested the title to the shares in the trustee, even as against the widow of the settlor, and this, notwithstanding that a power was reserved to the settlor to modify the uses or revoke the trust. It was there *held*, that the delivery of the certificates with assignments of some of them, and powers of attorney to transfer others, was equivalent to a completed transfer, and passed the title to the trustee, and that the reservation of a power to revoke the trust was immaterial, a power of revocation being perfectly consistent with a valid trust. In the present case, the delivery of the money was complete, and there was not even a power of revocation reserved. In Davis v. Ney (125 Mass. 590), a depositor in a savings bank delivered her bank book, accompanied by an assignment of her deposit, to B., upon an oral agreement that B. should draw for her what money she wanted during her lifetime and pay the balance, if any, left at her death, to her son, and this was held to be a valid trust. * * * *

"The court below *held*, as to this surplus (the amount to be devoted to masses), that the defendant held it as a mere agent, whose authority was revocable, and also that no valid trust had been created; that there was nothing illegal or contrary to public policy in the purpose to which the defendant had undertaken to devote it, but that as a trust it was void for want of a beneficiary who could enforce it, both of the persons, for whose benefit the masses were to be solemnized, being dead.

"The conclusion of the learned court that a valid trust was not established in respect to the surplus admits of much discussion, and we do not propose now to decide that question. It is said by the learned annotator of the 11th edition of Kent's Commentaries (vol. 4, p. 305, note 2), that the essential requisites of a valid trust, are, first, a sufficient expression of an intention to create a trust, and second, a beneficiary who is ascertained, or capable of being ascertained; and that outside of the domain of charitable uses, no definiteness of purpose will sustain a trust if there be no ascertained beneficiary who has a right to enforce it. And in the case or Beekman v. Bonsor, the same learned jurist, in delivering the opinion of this court, says: 'A gift to *charity* is maintainable in this state if made to a competent trustee, and if so defined that it can be executed *as made by the donor*, by a judicial decree, *although it may be void according to general rules of law for want of an ascertained beneficiary.*' (Beekman v. Bonsor, 23 N. Y. 298, Comstock, J., at p. 310.)

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"Whether the doctrine above enunciated has in this state undergone any change, or whether the disposition made by Mrs. Gilman can, in respect to the surplus in controversy, be construed as a charitable, pious or religious use, and sustained on that ground, are questions upon which we reserve our opinion. * * * *

"In the Matter of James Schouler (134 Mass. 426), a case very similar to this was decided. The deceased, by an informal testamentary writing, authorized the Rev. T. L., after her death, to withdraw from a savings bank the contents of her bank book and to dispose of them, part for her funeral expenses and the residue for 'charitable purposes, masses,' etc. The court *held*, that the terms of the bequest clearly manifested the intention to create a trust in the Rev. T. L., and that it was valid; that masses were religious ceremonials of the church of which she was a member, and came within the religious or pious uses which are upheld as public charities, citing the case of Jackson v. Phillips (14 Allen, 538, 553). Rev. T. L. having died, the supreme court appointed Archbishop Williams trustee in his place, and ordered the administrator *de bonis non* of the deceased to pay the money to him, to be applied according to the directions of the will.

"By reference to the case cited it will be seen that in the state of Massachusetts the English doctrines on the subject of charitable uses, and the *cy pres* doctrine, still prevailed, and on that ground the court upheld a trust which, by reason of its indefiniteness, if for no other reason, could not be sustained in this state."

The provision of the Revised Statutes (1 R. S. 678, sec. 55), providing for express trusts to sell lands for the benefit of creditors, does not prohibit the grantee of an insolvent debtor from executing a mortgage to secure the payment of specific debts of the grantor in pursuance of a prior oral understanding entered into at the time of the execution of the conveyance.

A mortgage so executed is not rendered void by a provision therein requiring any surplus arising on foreclosure sale to be paid over to the mortgagor. *Royer Wheel Co.* v. *Fielding*, 101 N. Y. 504, rev'g 31 Hun, 274.

A provision in the will of D., after a gift to his daughter E., of $25,000, contained this: "And do order and direct that $8,000 of said sum be paid over to her son, Theodore B. Mead, when he shall arrive at the age of twenty-one years."

Construction:

The will authorized and by necessary implication required the executor to pay over the whole $25,000 to E., and constituted her a trustee for her son, to pay him out of the principal the sum of $8,000 at his maturity. *Matter of Accounting of Denton*, 102 N. Y. 200, aff'g 33 Hun, 317

Devise of residue of an estate to executors in trust, after certain devises to executors in trust, to use as they deemed for the best interest of the whole estate, with authority to mortgage to raise money for that

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purpose, and after paying taxes, etc., to divide and pay the remainder within ten years to legatees already named, was invalid as a trust because it was not for the benefit of legatees nor for the purpose of satisfying charges on land (1 R. S. 728, sec. 55); but was only valid as a power and did not unduly suspend the power of alienation, nor prevent estate vesting in devisees as provided in another clause of the will. *Weeks* v. *Cornwell*, 104 N. Y. 325.

The will of C., after a gift of his residuary estate to his daughter, the defendant, and "to her heirs and assigns forever," contained this provision, "I commit my granddaughter (plaintiff) * * * to the charge and guardianship of my daughter * * * I enjoin upon her to make such provision for said grandchild out of my residuary estate * * * in such manner and at such times and in such amounts as she may judge to be expedient and conducive to the welfare of said grandchild, and her own sense of justice and Christian duty shall dictate." Action wherein the plaintiff sought to have it adjudicated that a trust was imposed upon the residuary estate for her benefit, and wherein defendant, by her answer, recognized the moral obligation resting upon her and averred her intention of performing it.

Construction:

No such trust was created, nor did defendant take subject to a charge in favor of plaintiff; but she took an absolute title, the provision to be made for plaintiff being left wholly to her discretion, as to the amount and manner of the provision and the time when it should be made, the exercise of which discretion could not be interfered with by the court. *Lawrence* v. *Cooke*, 104 N. Y. 632, rev'g 32 Hun, 126.

The testator, by the fourth and fifth clauses of his will, gave certain real estate separately to his sons P. and S. and to two daughters in fee; in the seventh clause of the will it recited that the son P. had become intemperate and that the testator therefore annulled and made void the will as to him unless he reformed and continued sober, etc., for the space of two years after the testator's decease, and gave to the executors satisfactory evidence and assurance of a thorough reformation. The will proceeded, "and therefore it is my will that the property so willed to him shall be held in trust for him not to exceed three years after my decease, and if within that time such reformation does not take place I desire my said executors to divide his portion to such of my heirs as may seem to have most need of and deserve the same." The testator's son was one of the executors. *Held*, that the provisions in the seventh clause of the will were void both as to a trust and power in trust, and that P. took the estate devised to him by the fourth and fifth clauses. *Moore* v. *Moore*, 47 Barb. 257. See, also, Matter of Williams, 64 Hun, 163; Willets v. Willets, 35 id. 401, rev'd 20 Abb. N. C. 471.

A bequest was made to a wife in absolute terms, coupled with a "direction" out of the property given by the will to use so much thereof for the support and benefit of

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plaintiff "as my said wife shall from time to time in her discretion think best so to use." The apparent mandatory import of the "direction" was nullified by an unlimited discretion in executing it, which qualification was fatal to the creation of a trust.

An imperative duty imposed on the executor to pay plaintiff, out of the income of a trust fund, a definite sum at fixed periods after the widow's death, confirms the inference against an enforceable trust for the benefit of plaintiff during the widow's life, emphasizing the discretion with which the widow is invested in contributing to plaintiff's support. *Collister* v. *Fussitt*, 16 Misc. 395. Citing Lawrence v. Cooke, 104 N. Y. 632.

From opinion.—"In Phillips v. Phillips, 112 N. Y. 197, the court, distinguishing the case from Lawrence v. Cooke, said, per FINCH, J., that the important and vital inquiry is whether the bequest 'so depends upon the discretion of the general devisee as to be incapable of execution without superseding that discretion.' If so, there 'can neither be a trust or charge.' Manifestly, in the present case, the court can not enforce the asserted trust in favor of the plaintiff without 'superseding' the discretion allowed by the will to the defendant."

A will and a codicil thereto are to be taken and construed together as one instrument, and although the will contains no words creating a trust, if from the two instruments it can be implied that it was the testator's intent to establish a trust in the executors for objects declared and set forth in the will, it is sufficient.[1]

Where the duties imposed upon the executors are active and render the possession of the estate convenient and reasonably necessary, the executors will be deemed trustees for the performance of those duties to the same extent as though declared to be in the most explicit terms.[2] *Ward* v. *Ward*, 105 N. Y. 68.

Words, expressive of a wish or desire in a will, if so definite as to amount and subject matter as to be capable of execution by the court, may, and will, if such appears to have been the intention of the testator, create a trust or impose a charge. *Phillips* v. *Phillips*, 112 N. Y. 197.

Gift to a devisee who was a witness to will "to hold for the benefit" of his children if he so elects, created trust for benefit of children. *Barnard* v. *Crossman*, 54 Hun, 53. See, also, Fairchild v. Edson, 77 Hun, 298, aff'd 144 N. Y. 645.

The will of H., after authorizing and directing his executors to "partition, divide and apportion" his residuary estate among his children living at the time of such partition and the issue of any child or children who had died leaving issue, provided as follows: "And I do hereby give, devise and bequeath to each of my said children the share or por-

[1] Morse v. Morse, 85 N. Y. 53.

[2] Tobias v. Ketchum, 32 N. Y. 319; Robert v. Corning, 89 id. 225.

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tion of my said estate so to be partitioned, divided and apportioned to them, respectively, as aforesaid. * * * If any of my children shall die without issue before such partition and division shall be made, then I give the portion of such deceased child equally to the brothers and sisters of such deceased child. * * * If any of my said children shall die leaving issue, then the child or children (who shall be living at the time of such partition) of such deceased child of mine shall take and have the share or portion which the parent would have if living. * * * It is my will that my executor make the partition * * * as soon after my decease as practicable, having reference to the condition of my estate; but as he may find it necessary to realize upon securities, and sell and convert into money both real and personal property, * * * which he may not be able speedily to make without sacrifice and loss to my estate, he shall not be compelled to make such partition, etc., * * * until after the lapse of five years from the probate of this will." The executor was directed, until the partition of the estate, to pay $2,400 per annum to each of the children from the testator's decease, and to charge the payment to the child as part of his or her share of the estate. The executor was authorized to take entire charge of all the real and personal estate, to lease, collect rents, insure, repair, make investments, pay taxes, etc. All of the testator's children were living and of full age at the time of the decease.

Construction:

No valid express trust was created by the will (Cooke v. Platt, 98 N. Y. 36), and the legal title to the real estate vested in the testator's children at his death, subject to the power given the executor to partition; the direction to partition, etc., although ineffectual to create a valid trust, could be upheld as a power in trust.

A trust will not be implied when to do so will make the will conflict with the statute, and when the duties imposed upon the executor may be executed under a trust power.[1]

No unlawful perpetuity was created by authorizing the executor to delay partitioning the estate for five years, as the power of sale was not suspended; and there was no equitable conversion of the realty into personalty, the power of sale not being absolute.[2]

One or more of the testator's children could not maintain an action

[1] Post v. Hover, 33 N. Y. 601; Heermans v. Robertson, 64 id. 332. See Tucker v. Tucker, 5 id. 408; 5 Barb. 99.

[2] Robert v. Corning, 89 N. Y. 225.

for partition, pending the existence of the right in the executor to exercise his powers.

The provision restricting the limitation over to such of the issue of a deceased child as "shall be living at the time of such partition," was void, as it would prevent the absolute vesting of the share in the issue of a deceased child at the time of the parent's death; but as it was inconsistent with the earlier provisions of the same clause, and unnecessary so far as the perfecting of a testamentary scheme for disposing of the residuary estate is concerned, it should not be allowed to prevail over the preceding direction, when by cutting it off, and disregarding it as a void direction, the will could be effectuated according to the plain and just intent of the testator.

If the principal disposition of a will can be upheld, ulterior, contingent limitations, which threaten violation of statutory rules respecting the ownership of property, if separable from the principal dispositions, may and should be disregarded.[1] *Henderson* v. *Henderson*, 113 N. Y. 1, rev'g 46 Hun, 509.

Creation of trust for life of widow was inconsistent with her claim to manage and control any part of the estate. See sec. 47, considered under this case. *Asche* v. *Asche*, 113 N. Y. 232, digested p. 192.

J. died seized of a large estate, real and personal. He left a widow and collateral relations, but no children, father or mother. By will he gave to the widow the use of his city and country residences for life, and absolutely the furniture therein, and also one-half of the income of all his property of every kind, for life, "without restraint, deduction or interference of any kind;" she was appointed sole executrix. The testator gave to his "legal heirs" "the remainder of the income," accruing during the life of his wife, "*after* the payment and discharge of all taxes, assessments and charges, interest and obligations, against" his estate, and then "the reversion and ownership" of all his property, after the death of his wife, with the "reservation, exception and direction" that in the event of any of his said heirs making any attempt "to interfere with or restrain, in any manner," his wife "from the full enjoyment, use, management, and direction and disposition" of the property and income, such heir or heirs should be forever debarred from any interest, ownership or inheritance in any of his property, the share of such heir to be divided among the remaining heirs "according to law." The executrix was authorized, in her discretion, to sell such portions of the real estate as should be necessary to pay debts.

[1] Harrison v. Harrison, 36 N. Y. 543; Tiers v. Tiers, 98 id. 568.

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Construction:

The will created a valid trust; the legal estate was vested in the widow, as trustee, for the term of her life, and, therefore, a partition was properly denied. *Woodward* v. *James*, 115 N. Y. 346, modifying 44 Hun, 95.

From opinion.—"We are of the opinion that the authority and duty thus conferred and imposed upon the widow respects the whole estate and requires that the legal title should be vested in her, as trustee for the term of her life. It is true that the testator does not in direct terms devise to her such an estate, or use the expression 'trusts' or 'trustee.'[1] That fact is one to be noted and weighed, but does not prevent the creation of a trust by implication where the exigencies of the situation require it, and such an intention is indicated. Here the duties especially imposed upon the widow belong to one of the authorized trusts permitted and defined by the statute; that is to receive the rents and profits of lands and apply them to the use of the persons described, and under the power of sale given it is to sell lands for the purpose of satisfying a charge thereon. The objection taken to the implication of a trust is twofold in character. It is argued that the testator does not direct the executrix to collect and receive the rents or to pay them over to the use of the parties entitled. We think that he does. The management and direction of the estate on the one hand and its disposition on the other "as devised" or in accordance with the terms of the will, are especially confided to the executrix, and the purpose to exclude all interference with or restraint upon her control and administration of the property is emphasized by the provision for the forfeiture of the share of any devisee of the remainder who should in any manner interfere with her management and disposition. It is to be remembered, also, that the widow is given one-half the income of the whole estate, and not the income of one-half the property. The two things are very different; and so to reach the testator's results and accomplish his purposes, it was necessary that somebody should lease and invest the whole estate, collect and receive the income and profits, pay taxes, debts and annual charges, and distribute to the heirs so much of the one half of the gross income as should remain annually as a surplus. That person was the testator's wife, for no one else could do these things without an interference with her management and control, which was forbidden under a serious penalty. We think there was a necessity for a trust and an intention to create one."

The intention of a testator to create a trust although inaptly expressed must be given effect and words may be transposed for that purpose. *Mullins* v. *Mullins*, 79 Hun, 421. See, also, Shepard v. Gassner, 41 Hun, 326.

To sustain a grant, as creating an express trust, under the provision of the Revised Statutes (1 R. S. 728, sec. 55), authorizing the creation of an express trust to sell lands for the benefit of creditors, it must appear that this was the primary or sole purpose of the grant, and the duty of the grantee to sell for the benefit of the creditors must be imperative. *Woerz* v. *Rademacher*, 120 N. Y. 62.

[1]To constitute a testamentary trustee it is necessary that some express trust be created by the will; merely calling an executor or guardian a trustee does not make him such. (Wood v. Brown, 34 N. Y. 337; Cleveland v. Whiton, 31 Barb. 544). Matter of Hawley, 104 N. Y. 250.

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Where a will creates a valid trust, and title in the trustee to the trust estate is necessary for the purposes of the trust, it will be presumed that the testator intended to give it, although the will contains no words of gift. *Toronto General Trust Company* v. *Chicago, Burlington & Quincy Railroad Company*, 123 N. Y. 37.

See, also, Craig v. Craig, 3 Barb. Ch. 76.

C., a married woman, conveyed certain real estate to a trustee, in trust, to pay over the yearly income to herself during life, free from all claim of her husband, and upon the further trust that at her death the trustee shall "convey the said lands and every part of them in fee simple" to her children "living at her decease and the surviving children of such of them as may then be dead." At the time of this transfer there was a mortgage upon the lands which was subsequently foreclosed, C. and her husband and the trustee being made parties defendant, but certain children of C., who were then living, were not joined as such. The land was sold and the purchaser went into possession.

Action of ejectment in which plaintiff claimed under a conveyance from the children and grandchildren.

Construction:

The trust for the life of the grantor was valid as an express trust (1 R. S. 728, sec. 55, sub. 3), and under this part of the conveyance the trustee was vested with the whole legal and equitable estate, subject only to the execution of the trust, and every estate and interest not embraced in the trust and not otherwise disposed of remained in and reverted to the grantor (1 R. S. 729, secs. 60, 62), who had power to declare to whom the lands should belong on the termination of the trust (sec. 61); the further trust to convey was an express trust, but as it is not one permitted by the statute, it was void as such, but was valid as a power in trust (sec. 58); it conferred no interest in the estate during the grantor's life upon any member of the class of intended beneficiaries; and so, they were not necessary parties to the foreclosure suit; the extinguishment of the estate in the grantor and trustee by the foreclosure sale, destroyed it as to the beneficiaries of the power; and so, plaintiff acquired no interest under his deed.

It seems, that a trust, which is merely passive and does not direct or authorize the performance of some act by the trustee, may not be validated as a power in trust. (1 R. S. 728, secs. 47–49.)

A trust, however, to convey upon the happening of some event, is active, and so may be validated as a power, and this although the stat-

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ute will operate to execute the use in the intended beneficiaries, in case of failure on the part of the trustee to execute the power; as both the statute and the power are inoperative until the happening of the event specified. *Townshend* v. *Frommer*, 125 N. Y. 446.

See, Bennett v. Garlock, 79 N. Y. 302; United States Trust Co. v. Roche, 16 id. 120; distinguishing Bowen v. Chase, 94 U. S. 812; Watkins v. Reynolds, 123 N. Y. 211; Genet v. Hunt, 113 id. 158; Goebel v. Wolf, id. 405; Miller v. Wright, 109 id. 194; Stevenson v. Lesley, 70 id. 512; Woodgate v. Fleet, 64 id. 566; Bruner v. Meigs, id. 506; Adams v. Perry, 43 id. 487; In re Livingston, 34 id. 555; Gilman v. Reddington, 24 id. 9. See *ante*, p. 341.

NOTE 1.—The opinion discusses at length active and passive trusts

NOTE 2.—In cases where a trust is created, which is not authorized by the 55th section of the statute, but is validated as a power in trust by the 58th section, no estate passes at all, and the title remains in the grantor, or descends to the persons otherwise entitled, as the case may be; the grantee being merely the trustee of a power. (2 R. S. 729, secs. 58, 59; N. Y. Dry Dock Co. v. Stillman, 30 N. Y. 174; Downing v. Marshall, 23 id. 366.)

NOTE 3.—The rule in equity as to the joinder of parties in a foreclosure action, affects those who have vested estates in remainder or reversion, and does not concern itself with those who have future contingent interests merely. (Story's Equity Pld'gs, sec. 144.) (468.)

A trust estate will never be implied where it would render a will illegal and void.

To the constitution of every express trust there are three elements, a trustee, an estate devised to him, and a beneficiary; the trustee and the beneficiary must be distinct personalities; the legal estate of the trustee and the beneficial interest can not exist or be maintained separately in the same person, and a merger of the interests in one individual affects a legal estate in him of the same duration as the beneficial interest.[1]

W., by his will, after certain specific devises, gave all his residuary estate to his sons J., H. and S., "as trustees to carry out the provisions of this * * * will and to execute the trusts hereinafter specified;" after directing the trustees to pay certain pecuniary legacies, he constituted two trust funds for the lives of his wife and a sister. The testator then directed that "said trustees shall take and hold" the estate and "the whole thereof" for six years from and after his decease; and, that after the payment of the legacies and taxes, the property "shall be managed for the joint benefit" of his said three sons; they were empowered to sell, with certain exceptions, all the realty, but any partition or division thereof was prohibited for six years. At the expiration of that period, the will provided that so much of the residuary estate as

[1] 2 R. S. 727, secs. 47, 55; Woodward v. James, 115 N. Y. 346.

remained after payment of debts and legacies, should belong to the trustees. Then followed a clause termed an "explanatory and qualifying" one, which, after reciting that a partition of the estate "as at present situated" would be detrimental, and that the personalty would nearly suffice to pay the legacies, authorized the trustees, in case of an exigency, to mortgage the real estate to pay said legacies.

Construction:

The general devise, in trust, was applicable to the trust created for the testator's wife and sister, which was valid, and this vested the trustees with the requisite legal estate; the remaining trust sought to be created was invalid; the attempted limitations upon the free ownership of the property, *i. e.*, the inhibition against a partition or division for six years, and the restriction upon the power of alienation were also void; the devise vested in the three sons upon the death of the testator an estate in fee, subject to the payment of the legacies, etc. (1 R. S. 728, sec. 47); and, therefore, plaintiff had no interest in the lands sought to be partitioned. *Greene* v. *Greene*, 125 N. Y. 506, aff'g 54 Hun, 93.

NOTE.—"If it is urged that the inhibition against a partition, or a division of the estate, for a period of six years, and the restriction upon the power of alienation are provisions which, for their illegality, affect the will, the answer is that, as invalid limitations upon the free ownership of the property devised, they are void, and may be disregarded. (Henderson v. Henderson, 113 N. Y. 1, 15; Harrison v. Harrison, 36 id. 543.)" (512.)

A trust is void if there be no beneficiary. *Bliss* v. *Fosdick*, 76 Hun, 508. See, also, Gross v. Moore, 68 id. 412, aff'd 141 N. Y. 559; Wilcox v. Gilchrist, 85 Hun, 1.

Where, upon probate of a will, no question is raised as to the validity of the will itself, but an issue is presented as authorized by the Code of Civil Procedure (sec. 2624), for the determination of the surrogate as to "the construction, validity and effect," of a disposition of personal property contained therein, extrinsic parol evidence as to the circumstances under which the will was executed is incompetent, nor is such evidence admissible to establish a trust *ex maleficio*, as of such a question a surrogate's court has no jurisdiction.

K., by her will, gave legacies to certain charitable institutions, one of which was also made residuary legatee. A codicil executed four days after the will, after stating that doubt had arisen as to the validity of the said bequests for charitable purposes, modified the will by making W. residuary legatee; the testatrix requested him to carry into effect her wishes with respect to said charitable bequests, stating, however,

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that this was not to be construed into an absolute direction on her part, but as merely her desire. By reason of her death, within two months after the execution of the will and codicil, said bequests were invalidated. probate of the will was not contested, but the next of kin answered, alleging the invalidity of the charitable bequests; also, that the residuary bequest in the codicil was void because it was either an evasion of the statute or a fraud upon the testatrix or next of kin.

Construction:

The sole question raised of which the surrogate had jurisdiction was as to whether the bequest to W. was absolute or in trust; it was absolute, and so, valid upon its face.

It seems, if by any extrinsic evidence it could be made to appear that there were grounds for imposing a trust *ex maleficio* upon the residuary estate in favor of the next of kin an action might be brought in equity for that purpose. *Matter of will of Keleman*, 126 N. Y. 73, aff'g 57 Hun, 165.

Distinguishing In re O'Hara, 85 N. Y. 403.

While no particular words in a will are necessary to create a trust, and one may be implied where, from the whole will, it is apparent that to accomplish the purposes of the testator, it will be convenient and advantageous that the executors should be vested with the legal estate; the scheme of the statute is in the direction of such a construction as will vest title to the real estate in the heirs or devisees rather than the executors, if the wishes of the testator may be carried out under a trust power.

In such a case, therefore, although there is a devise in terms to executors or trustees to sell or mortgage the real estate, the title descends to the heirs or passes to the devisees subject to the execution of the power.

It is essential to the constitution of a valid trust, for any of the purposes referred to in the statute of uses and trusts (1 R. S. 728, sec. 55), that the power of sale conferred upon the trustees be absolute and imperative; a discretionary power of sale is not sufficient.

The will of F., after directing the payment of his debts, etc., by its terms gave all of his estate to his executors, *i. e.*, his wife and H., "to have and to hold the same to themselves, their heirs and assigns forever, upon the uses and trusts following." The will then gave various legacies to the testator's children; these were followed by a residuary clause by which he gave all the residue of his estate, "after providing for the

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aforesaid bequests, * * * absolutely and forever" to his wife. "Full power and authority" was given to the "said trustees, executor and executrix * * * to sell any or all" of the real estate "as they may deem best." The executors were appointed trustees and guardians of the children during their minority. H. omitted to qualify as executor, and letters testamentary were granted to the widow alone. In an action to foreclose a mortgage on certain real estate of which F. died seized, the widow was made a party, but H. was not. Defendant, who acquired title under the foreclosure sale, contracted to sell the same to plaintiff.

Construction:

No valid trust was created by the will; the purposes of the testator could be accomplished through a trust power; the trustees took no title in the real estate, but the same vested in the widow; and, therefore, H. was not a necessary party to the foreclosure suit, and defendant acquired a good title under the sale. *Steinhardt* v. *Cunningham*, 130 N. Y. 292, aff'g 55 Hun, 375.

When a clause, giving control of the property, will not be held to create a trust. *Aldrich* v. *Funk*, 48 Hun, 367.

Trusts of personal property may be created without writing for any lawful purpose, and are not, in respect either of the mode or purposes of their creation, within the statute of uses and trusts. *Matter of Carpenter*, 131 N. Y. 86.

Citing Day v. Roth, 18 N. Y. 448; Gilman v. McArdle, 99 id. 451.

A trust "for any child or children of mine living at the time of my decease, under age" is void as to realty but valid as to personalty. *Hagerty* v. *Hagerty*, 9 Hun, 175.

A bequest to have prayers said in a church for the repose of the testator's soul is valid. *Holland* v. *Smyth*, 40 Hun, 372.

A devise in trust to receive rents, issues and profits, where there is no direction to apply to the use of any person for any period, and a power to sell property, which is not authorized for the benefit of creditors, or of legatees, or to satisfy a charge upon the same, can not be deemed to be among the express trusts enumerated in the section. *Holly* v. *Hirsch*, 135 N. Y. 590, 594, digested p. 887.

Citing Downing v. Marshall, 23 N. Y. 366, 377; Cooke v. Platt, 98 id. 36; Henderson v. Henderson, 113 id. 1.

Under the provision of the statute of uses and trusts (1 R. S. 728, sec. 55, sub. 3), authorizing the creation of an express trust "to receive the rents and profits of land and apply them to the use of any person," such a trust may be created for the payment of annuities. *Cochrane* v. *Schell*, 140 N. Y. 516, digested p. 816.

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Trusts, to apply income and principal, if needed, to the support of beneficiaries.—Where the will does not authorize the executors or trustees to determine the amount to be paid for the support of the beneficiary, and does not authorize the beneficiaries themselves to determine the amount, such amount must be fixed by the court. *Bundy* v. *Bundy*, 38 N. Y. 410, digested p. 984.

A devise "subject to the support and maintenance" of a third person, does not create such a trust that equity will refuse specific performance of the devisee's contract to convey as involving a breach of trust. Title is vested in the devisee subject to that incumbrance, and there is no difficulty in his conveying such title as he has. *Downer* v. *Church*, 44 N. Y. 647.

Estate to legatee, for support for life, had remainder properly limited thereon. *Smith* v. *Van Ostrand*, 64 N. Y. 278, digested p. 96.

Devise to three sons and direction that as long as plaintiff remained single his house should be her "home, free of expense as to paying any rent or privilege in said house."

Construction:

The plaintiff had not simply a right to live in the house, but was entitled to such support and maintenance as she had received during her father's life, she rendering such services as a child under the same circumstances would be expected to render in the parent's family. *Lyon* v. *Lyon*, 65 N. Y. 339.

Under a bequest to the widow, for life, of the interest on a specified sum, or so much thereof as the executors may deem necessary for her comfort, she is entitled to so much as is requisite to give security from want, and furnish reasonable physical, mental and spiritual enjoyment.

The fact that she is supported by a son, under an agreement to maintain her for life, does not excuse the executor's neglect to make regular and sufficient payments.

She is entitled to choose her own place of abode. *Forman* v. *Whitney*, 2 Abb. Ct. App. Dec. 163. See p. 1105.

See, also, Smith v. Bowen, 35 N. Y. 83; Tobias v. Cohn, 36 id. 363; Bundy v. Bundy, 38 id. 410; 47 Barb. 135; Vedder v. Saxton, 46 id. 188; Burns v. Clark, 37 id. 496; Gilman v. Reddington, 24 N. Y. 9; 1 Hilt. 492; Hull v. Hull, 24 N. Y. 647; Terpenning v. Skinner, 30 Barb. 373; Hart v. Hart, 22 id. 606; overruling in effect 14 How. Pr. 418; McKillip v. McKillip, 8 Barb. 552; Hawley v. Morton, 23 id. 255; Loomis v. Loomis, 35 id. 624; Butler v. Tucker, 24 Wend. 447; Pool v. Pool, 1 Hill, 580; Merritt v. Seaman, 6 N. Y. (2 Seld.) 168; Ferris v. Purdy, 10 Johns. 359.

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Gift to wife of all real and personal estate during her life, she to provide and care for their children until they came of age, and direction that after her death "all the real estate which may be found" should be divided among the sons and the personal estate among the daughters. The widow died during the minority of children.

Construction:

The provision for the support of the children terminated at widow's death, and thereupon the sons became entitled to the real estate, not charged with the support of the daughters. *Brandow* v. *Brandow*, 66 N. Y. 401; 4 T. & C. 385.

J. devised and bequeathed her estate to C., daughter, with power to convey, the income to be expended for support of H., a lunatic, during life, and then principal to belong to C.

Construction:

C., save for the purposes connected with the trust, could only assign her interest, *i. e.*, her right, to the principal, in securities arising from sale of land, and an assignee thereof received them subject to the rights of the *cestui que trust*. *Reid* v. *Sprague*, 72 N. Y. 408, aff'g 9 Hun, 30.

Education and support—application of income to. *Moore* v. *Hegeman*, 72 N. Y. 376, digested p. 430.

Testator gave, after his wife's death, his residuary estate to his son R. in trust, to apply one-half the net income to the use and for the maintenance and support of R., his wife and children, during the life of R. R. had at the date of the will and of the death of his mother in 1874, a wife and one child, who married in 1875, and who, prior to this action, was living separate from his father, having a household of his own, and their relations were not amicable.

Construction:

The beneficiaries, R., his wife and child, were not absolutely entitled to one-third of the net income of the trust estate; the trustee had a discretion but not an uncontrolled discretion as to its application, and a court of equity could direct the exercise of such discretion.

Plaintiff, the child of R., should have none of the income prior to the commencement of this action; R.'s application of the income previous to that time having been acquiesced in, but after the commencement of the action the plaintiff should have one-third of the net income.

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The wife having obtained separation from her husband R., and alimony for $1,000 annually, which was duly paid her, and her board and expenses having been paid theretofore, was not entitled to any more of the net income prior to the commencement of the action, but thereafter to one-third thereof. *Ireland* v. *Ireland*, 84 N. Y. 321, rev'g 18 Hun, 362.

NOTE.—It is stated in the citations and arguments of counsel that where an estate or income is given to support and maintain parents and children they share equally. (Foose v. Whitman, Alb. Law J. of Dec. 11, 1880; Chase v. Chase, 2 Allen [Mass.], 101; Smith v. Bowen, 35 N. Y. 83; Jubber v. Jubber, 9 Sims. 503; Woods v. Woods, 1 Mylne & Craig, 401; Franklin v. Schermerhorn, 18 Hun, 112; Hilton v. Bender, 69 N. Y. 86; Raikes v. Ward, 1 Har. Ch. 445; Ireland v. Ireland, 18 Hun, 362.)

When father was not allowed from child's property anything for its support—extraordinary expenditures were allowed him. *Beardsley* v. *Hotchkiss*, 96 N. Y. 201, digested p. 994.

A trust for support was created in personalty. *Gilman* v. *McArdle*, 98 N. Y. 451, digested p. 630.

The will of H. appointed S. trustee and gave his residuary estate to him in trust for the benefit of plaintiff during his natural life, with "full power and authority to use so much of the said trust fund, either interest or principal," as shall, in the "judgment and discretion" of said trustee, "be necessary for the proper care, comfort and maintenance" of said beneficiary during life.

Construction:

Plaintiff was entitled to his support and maintenance according to his condition in life, although able to support himself by his own exertions; it was not necessary for him to remain idle in order to entitle him to the benefit of the provision so made for him, nor did the fact that he was frugal and saving and had accumulated a fund deposited in a bank deprive him of the right to the support provided for him; it was a matter within the sound judgment and discretion of the trustee as to whether the money necessary for plaintiff's support should be paid to him, or the necessary board, clothing, etc., should be purchased and provided by the trustee, and so long as plaintiff remained rational, prudent, industrious and saving there was no abuse of discretion in paying to him the annual or semi-annual appropriations for his support. *Holden* v. *Strong*, 116 N. Y. 471.

Discretionary power to appropriate principal for support of a person

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for life was no objection to the trust, or remainder limited on the life estate. *Van Axte* v. *Fisher*, 117 N. Y. 401, digested p. 302.

As a general rule, under an obligation by one person to support and maintain another, where no place is specified, the beneficiary may live wherever he chooses, provided his choice does not involve needless expense.[1]

It seems, this rule is subject to exceptions in cases where there is great inadequacy of consideration, where family arrangements are made involving the support of some of its members by others who have been accustomed to live together, or where the circumstances of the case and the language of the instrument indicate an intent that support shall be furnished in a particular manner, at a particular place, or by particular persons.[2]

McD. executed a will, by which, for the declared purpose of giving her son L., who was her only child and heir, a good and sufficient support, she gave all her property to defendant G., her executor, in trust to receive the rents and profits, and apply them to the use of L. during life, with remainder to G. The only property of any material value owned by the testatrix was a farm, upon which she and her son, who was a lunatic, resided. She thereafter executed a deed of the farm to G., the consideration stated being "one dollar and other valuable considerations." G. was an aged clergyman, in no wise related to McD., living at a distance from her farm. L., while not violent or dangerous, was unmanageable. McD. continued to live upon the farm with L. until her death, and thereafter he remained in possession. G., shortly after the death of McD., executed and caused to be recorded an instrument under seal, which stated that because of the conveyance he considered himself bound to appropriate to the comfortable support of L. during life, all the rents of the farm, less necessary expenses, or if it should be sold, then that such support should be the first lien thereon, the obligation resting upon him however to be limited to the rents or, in case of sale, to the interest on the purchase money.

Construction:

Said instrument constituted a valid and enforceable trust imposing

[1] Wilder v. Wittemore, 15 Mass. 262; Stillwell v. Pease, 4 N. J. Eq. 74; Proctor v. Proctor, 141 Mass. 165; Conkey v. Everett, 11 Gray, 95; Pettee v. Case, 2 Allen, 546; Rowell v. Jewett, 69 Me. 293.

[2] McKillip v. McKillip, 8 Barb. 552; Pool v. Pool, 1 Hill, 580.

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upon its creator the obligations and duties of a trustee; said trust was irrevocable and could not be limited or affected by subsequent acts or contracts of the trustee with a stranger: the trust was not limited to support to be furnished L. on the premises, but constituted a general obligation to appropriate the rents and profits or the interest on the purchase money, in case of sale, to the support of L., whenever it might be needed; and an active duty was imposed upon G. to exercise care and supervision over the person and wants of L., and to provide for him within reasonable limits, without reference to his place of abode, to the extent of the rents and profits.

Same will:

G. took possession of the farm and subsequently deeded it to defendant D. for the consideration of $400, which was secured by mortgage on the farm. D. also covenanted that he would "provide and furnish" L. during life "suitable clothing, food, lodging and necessary medical attendance." It was also provided in the deed that the support and maintenance of L. should "constitute and remain an indefeasible lien upon the premises." D. leased about an acre and a quarter of the farm with the buildings to P. in consideration that the latter would board L. and do his washing and mending. In case G. did not stay on the farm then P. was to pay a rental of forty dollars a year. D. assisted P. in taking possession of the house; L. opposing it, was personally assaulted by a servant of D., and his bed and furniture were forcibly taken from the room he had occupied, and packed away; he refused to remain and live with P., and thereafter lived with and was practically supported by plaintiff; he was needy and dependent, frequently sick and practically unable to support or care for himself. P. paid the rent agreed upon to D. Neither the latter nor G. have given to L. any attention or support. D. paid to G. annually the interest on the mortgage, which the latter appropriated to his use.

Construction:

After the purchase by D. his liabilities and those of G. were coextensive; G. did not, by his contract with D., relieve himself from the duty of seeing that his obligations to L. were performed; but as between him and D., the latter was primarily liable; conceding the declaration of trust was limited to support to be furnished on the premises, no adequate or sufficient provision was made therefor, and the duties of the trust were wholly neglected; G. and D. were liable for such damages as

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L. had sustained on account of their default, *i. e.*, the sum required for his reasonable and comfortable support, to the extent of the rents and profits from the time the trustees took possession; and so plaintiff was entitled to judgment for the sums required annually for that purpose, with interest, the same to be charged primarily upon the land, in case of deficiency, on sale, said deficiency to be paid by D., and in case of his inability, by G. *McArthur* v. *Gordon*, 126 N. Y. 507, modifying 51 Hun, 511.

Trust or power to provide for support. *Culross* v. *Gibbons*, 130 N. Y. 447.

Power to life tenant to use *corpus* or estate for support. *Swarthout* v. *Ranier*, 143 N. Y. 499, digested p. 112.

Where a promise is made by one person to another for the benefit of a third, in the absence of any liability of the promisee to such third person, the latter can not enforce the promise.[1]

F., in 1857, conveyed certain premises to two of her grandchildren, taking back a mortgage which was conditioned for the payment by the mortgagors to her of specified sums annually, and that they should provide for her board, clothing and all things proper for her comfort and support during her life, and five years after her death that they should pay $1,000 to M., a sister, and $500 to E., a granddaughter of the mortgagee. This mortgage was soon after satisfied of record, and said mortgagors executed and delivered to F. another mortgage on the same premises, with substantially the same conditions save a slight alteration as to her clothing and support. Thereafter, up to the time of the death of F., there was a series of conveyances to and from F. and the grantees in the first deed or their wives, and of mortgages executed by them, containing substantially the same conditions except that in the later mortgages the condition as to the payments to M. and E. were omitted. These mortgages, save the last one, were each satisfied by the mortgagee in their order. In an action to foreclose the mortgages containing the conditions so omitted, wherein plaintiffs claimed as representatives of the interests of M. and E., the referee found that each subsequent mortgage was intended as a substitute for the preceding one and that F. received them upon the understanding and belief that the arrangement was testamentary in its character and that she retained possession and control of each mortgage until it was satisfied; also that neither M. nor

[1]Lawrence v. Fox, 20 N.Y. 268; Gifford v. Corrigan, 117 id. 257, are distinguished.

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E. had any knowledge or took any delivery of, or in any manner accepted or assented to any of the mortgages.

Construction :

No trust in favor of M. and E. was created by the mortgages, but the finding that the provisions for the payments to M. and E. were in their nature testamentary was proper, and so they were subject to alteration at any time by the assent of the parties to the mortgages. *Townsend* v. *Rockham*, 143 N. Y. 516, aff'g 68 Hun, 231.

Distinguishing, McPherson v. Rollins, 107 N. Y. 316 ; Martin v. Funk, 75 id. 134.

II. HOW AN EXPRESS TRUST IS CREATED.

1. As the trustee is the legal owner of the property it becomes necessary in creating a trust, where the trustee is to be a person other than the creator of the trust, to satisfy the forms required by law for the transfer of property.

(1) To create a trust the owner must either transfer the property to a trustee, or declare that he holds it himself in trust.

Wadd v. Hazelton, 137 N. Y. 215.

(2) The objection that a trust is voluntary and without consideration, has no weight if it was, in fact, fully and completely constituted.

Van Cott v. Prentice, 104 N. Y. 52 ; Young v. Young, 80 id. 422 ; Chester v. Jumel, 125 id. 237.

(3) To constitute a valid trust in a third person, the act constituting the transfer must be consummated and not remain incomplete, or rest in intention.

Martin v. Funk, 75 N. Y. 134 ; see Trusts arising from deposit in bank, *post*, p. 667.

(4) And once consummated it is no objection that the trust is not to be executed until some future time.

Van Cott v. Prentice, 104 N. Y. 35 ; Gilman v. McArdle, 99 id. 451.

1. In the case of real property, such a trust may be created by will, duly executed, or by deed in accordance with the statute of conveyances (Real Prop. L., sec. 207), which provides that all trusts of real property, except those created by will, by declaration of trust, or by operation of law, shall be created by deed, or conveyance, in writing, subscribed by the creator of the trust or his agent, with written authority.

See Real Prop. L., sec. 207, *post*, p. 652

II. HOW AN EXPRESS TRUST IS CREATED.

(1) The grantor in an absolute conveyance of land can not, in the absence of fraud or mistake, prove that the grant was in trust for himself.

Sturtevant v. Sturtevant, 20 N. Y. 39.

2. In the case of personal property such a trust may be created by will, by deed or by any act sufficient to pass title.

Gilman v. McArdle, 99 N. Y. 451; Matter of Carpenter, 131 id. 86.

(1) No particular form of words is necessary to create a trust in personalty by parol.

Hirsh v. Auer, 146 N. Y. 13.

(2) A trust may be created by depositing funds in a bank in the name of another, that they may be paid over to the parties entitled.

Falkland v. St. Nicholas Nat'l Bank of N. Y., 84 N. Y. 145; see, Trusts arising from deposits in bank, p. 667.

(3) But the mere fact of a deposit in the name of another will not create a trust where the circumstances indicate a contrary intention.

Beaver v. Beaver, 117 N. Y. 421; s. c., 137 id. 59; See Trusts arising from deposits in bank, p. 667.

(4) Nor does a direction to pay a surplus after satisfying his claim to a third person create a trust in favor of that third person.

Montignani v. Blade, 145 N. Y. 111.

II. Where, however, the owner of property is himself to be the trustee, no transfer of title is necessary, but by merely declaring his intention to hold the property in trust for another he creates in the beneficiary the right to enforce the performance of the trust.

(1) To constitute a valid declaration of trust the acts or words relied on must be unequivocal, implying that the owner holds the property as trustee for the benefit of another.

Young v. Young, 80 N. Y. 422; Crouse v. Frothingham, 97 id. 105: Berry v. Lambert, 98 id. 300; Wadd v. Hazelton, 137 id. 215; Budd v. Walker, 113 id. 637; Kelly v. Babcock, 49 id. 318.

(2) A defective gift can not be converted into a declaration of trust merely on account of that imperfection.

Young v. Young, 80 N. Y. 422; Wadd v. Hazelton, 137 id. 215.

1. In the case of real property the statute of conveyances (Real Prop. L., sec. 207) requires a declaration of trust to be *proved* by a writing subscribed by the person declaring the same.

See Real Prop. L., sec. 207, p. 652.

II. HOW AN EXPRESS TRUST IS CREATED.

(1) A declaration of trust of real property may be proved by the recital of a conveyance.

Wright v. Douglass, 7 N. Y. 564.

Or admissions in a pleading.

Cook v. Barr, 44 N. Y. 156.

Or a power of attorney or any writing subscribed by the declarant.

Hutchins v. Van Vechten, 140 N. Y. 115.

(2) But the evidence must all be in writing and sufficient to show that there is a trust, and what it is.

Cook v. Barr, 44 N. Y. 156.

2. In the case of personal property a declaration of trust may be established by any legal evidence.

Day v. Roth, 18 N. Y. 448.

(1) The declaration may be by letter.

Hamer v. Sidway, 124 N. Y. 538; Day v. Roth, 18 id. 448; Govin v. De Miranda, 140 id. 474,; or other written instrument; Locke v. F., L. & T. Co., id. 135; Milbank v. Jones, 127 id. 370.

(2) Or oral.

Barry v. Lambert, 98 N. Y. 300; Goldsmith v. Goldsmith, 145 id. 313.

(3) The deposit of funds in a bank in the name of the depositor "in trust" for another may constitute a declaration of trust.

Noel v. Kingsland, 3 Abb. Ct. App. Dec. 526: Martin v. Funk, 75 N. Y. 134; Boone v. Citizens Savings Bank, 84 id. 83; Mabie v. Bailey, 95 id. 206; Fowler v. Bowery Savings Bank, 113 id. 450; Willis v. Smyth, 91 id. 297; Schluter v. Bowery Savings Bank, 117 id. 125; see Trusts arising from deposit in bank, p. 667.

(4) But the mere fact of such deposit is not conclusive and it may be shown that the real motive was not to create a trust.

Mabie v. Bailey, 95 N. Y. 206; Cunningham v. Davenport, 147 id. 43; see Trusts arising from deposits in bank, p 667.

(5) Taking a policy of insurance "in trust" for another constitutes the insured a trustee.

Garner v. German Life Insurance Co., 110 N. Y. 266; see Trusts arising from contracts of insurance, *post*, p. 681.

(6) An insurance company is in no sense a trustee of any particular fund for a policy holder under the tontine system, their relation is simply that of a debtor and creditor.

Uhlman v. N. Y. Life Ins. Co., 109 N. Y. 421; see Trusts arising from contracts of insurance, *post*, p. 681.

(7) Notice to the *cestui qui trust* is not essential.

Martin v. Funk, 75 N. Y. 134; see Trusts arising from deposits in bank.

II. HOW AN EXPRESS TRUST IS CREATED.

Real Prop. L., sec. 207. "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."

2 R. S. 134, secs. 6, 7; Banks's 9th ed. N. Y. R. S. p. 1884-5. (repealed by Real Prop. L. sec. 300) as originally enacted omitted the provision in regard to the manner of proving declarations of trust, which was inserted by L. 1860, ch. 322 (repealed by Real Prop. L., sec. 300). The Revised Statutes also contained a provision allowing the uses of a fine to be declared by deed or other instrument in writing after the fine had been levied.

1 R. L. 79 L. 1787, ch. 44 (repealed L. 1828, second meeting, ch. 21, sec. 1, par. 16), sec. 12. "All declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing, signed by the party who is or shall be by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void, and of none effect;" * * * This section also contains the provision in regard to fines reenacted in the Revised Statutes.

Sec. 13 excepts from the operation of this chapter the creation and extinguishment of trusts by operation of law.

Sec. 14. "All grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by his or her last will in writing, or else shall likewise be utterly void and of none effect."

Where it was found by a special verdict that the attorney of a foreign corporation who had bid in real estate upon an execution against its debtor, received a deed of it in his own name, and had no interest whatever in it, but took the title for the purpose of selling and conveying it for the corporation, and while he held it, it was held solely for the benefit and entirely subject to the control of the corporation, the court will hold the fact found upon proper and sufficient evidence, and will presume the trust was created by deed in the manner required by 2 R. S. 134, sec. 6.

In a tripartite deed by which the party of the first part, reciting that the lands therein described had been conveyed to and the title thereof vested in him, as the trustee and for the use of the party of the second part, and that at its request he conveys to the party of the third part, the recital was a valid declaration of trust between the trustee and beneficiary, that the trust had existed from the time the premises were

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conveyed to the trustee, and all the parties to the deed were bound by it.

The statute prescribes no particular form by which a trust in lands may be created, except that it should be by deed or conveyance in writing, subscribed by the party creating or declaring it. It may be contained in the recital of a conveyance to which the trustee and *cestui que trust* are parties.

Where a conveyance is received to the use of another so that the *cestui que trust* is entitled to the actual possession of the lands and the receipt of the rents and profits, its effect is to vest the estate at law in the *cestui*. It is not necessary that the trust clause should be expressed on the face of the conveyance to bring the case within the statute (R. S. 134, sec. 6). It is enough that the trust actually existed, and it may be proved by another deed. *Wright* v. *Douglass*, 7 N. Y. 564; see, 3 Barb. 544.

See, also, Van Epps v. Van Epps, 9 Paige, 237.

In order to constitute a trust in respect to money or personal estate, no formal or written agreement is necessary. Any declaration or admission by the person in possession of the fund will have that effect, if founded on a consideration, and if the intention be evinced with sufficient clearness.

And such declarations or admissions are evidence of the trust, not only against the party who made them, but also for the purpose of charging lands afterwards purchased by another person, and wholly or partly paid for out of the trust fund.

V. W. R., having in his hands £1,500, lately received from the plaintiff in England, wrote to her a letter containing an admission that he held the money for investment on her account, and asking her to send him a power of attorney to act in respect to the fund, which was sent to him accordingly. It did not otherwise appear upon what understanding he had received the money. Afterwards, the £1,500 was invested in the purchase and improvement of certain real estate, the conveyance of which was taken to his brother N. R.

Construction:

The letter was proper evidence against both the brothers for the purpose of establishing the fact that V. W. R. held the money in trust, and not as a mere debtor to the plaintiff.

Although the plaintiff, it seems, understood that her money was to be invested in the real estate and assented thereto, yet not having consented that an absolute deed be taken to another person without any recognition of her interest, the transaction was in fraud of her rights,

and the estate was chargeable with an equitable lien in her favor in the nature of a resulting trust. *Day* v. *Roth*, 18 N. Y. 448.

NOTE.—"The doctrine of equity is, that by their own force they (declarations) impress the fund with a peculiar character, and hence they are receivable on the same grounds as a precise and formal agreement. A person in the legal possession of money or property, acknowledging a trust, becomes from that time a trustee, if the acknowledgment is founded on a valuable or meritorious consideration. His antecedent relation to the subject, whatever it may have been, no longer controls, and therefore it is not the material fact to be ascertained. (2 Story's Eq. sec. 972; 18 Vesey, 140; 1 Hare, 469; 1 Keen, 553; 1 Wend. 625; 2 Spence's Eq. Jur. 53.)" (452–3.)

The grantor in an absolute conveyance of land, not alleging fraud or mistake, can not prove by parol that the grant was in trust for himself.

This was held where the plaintiff sought to recover the purchase money of land sold by the defendant, as money had and received to his use, and to prove by parol that a previous absolute conveyance of the land by the plaintiff to the defendant was in fact in trust for the grantor.

Hodges v. Tennessee Insurance Company (4 Seld. 416) considered, and the case of trust distinguished from that of mortgage. *Sturtevant* v. *Sturtevant*, 20 N. Y. 39.

See, also, Hutchinson v. Hutchinson, 84 Hun, 482.

As to fraud and mistake, see Parol trusts, *ante*, p. 594.

The statute of frauds, as to trusts concerning lands, since the act of 1860 (Laws of 1860, ch. 322), is in effect substantially the same as the English statute (29 Charles II, ch. 3, sec. 7), and no longer requires that the trust should be proved by a deed creating it, but it may be proved by any writing subscribed by the party declaring the same.

Such writing is not necessarily *inter partes*, but admissions in a pleading, in an action with third persons, will be sufficient, if they contain the requisite evidence.

An admission that mortgages were given by the defendant for the accommodation of the plaintiff and to enable the latter to borrow money, is not an admission as to the defendant's title or the purpose for which the lands were conveyed to him.

To establish a trust the evidence must all be in writing, and sufficient to show that there is a trust, and what it is. Parol evidence can not be resorted to for the purpose of supplementing or aiding the proof furnished by written admissions. *Cook* v. *Barr*, 44 N. Y. 156.

A parol trust in reference to land or a parol agreement to reconvey land to a person at his request, in the absence of fraud, is void under the statute of frauds and not enforceable in equity. *Hutchinson* v. *Hutchinson*, 84 Hun, 482.

An agreement in a bill of sale or instrument of transfer of personal property, that a portion of the purchase money of the goods sold may be

paid to and among the creditors of the vendor, without a covenant or agreement upon the part of the vendees thus to pay, creates no trust; the balance unpaid is a debt due the vendor, and can be reached by and held under an attachment against his property. *Kelly* v. *Babcock*, 49 N. Y. 318.

See, also, Dry Dock Co. v. Stillman, 30 N. Y. 174, digested p.

In March, 1874, Y. placed in two envelopes certain coupon bonds; he indorsed upon each of the envelopes a memorandum, signed by him, to the effect that a specified number of the bonds therein contained belonged to his son W., and the residue to his son J., but that the interest to become due thereon was "owned and reserved" by him during his life, and that at his death "they belonged absolutely and entirely to them and their heirs." Y. exhibited the packages, with the indorsements thereon, to the wives of the two sons, with statements to the effect that what he had thus done was in pursuance of a settled purpose, and that he believed he had made a valid disposition of the bonds. Y., at the time, lived at the house of W., where there was a safe, which Y. formerly owned, but which, it was said, he had given to a son of W., reserving a right to use it, and which he did use as a deposit for his valuable papers. W. also used a compartment in the safe as a receptacle for his papers, but he rarely went to it, Y. being in the habit of depositing and removing the papers when W. requested it. After exhibiting the packages, Y. replaced them in the safe. After this the packages were generally kept, not in the pigeon-holes used by Y., where the bonds had been kept previously, but in the compartment where the papers of W. were kept, and there they were found after the death of Y., which occurred in November, 1875. As installments of interest became due Y. cut off the coupons, W. sometimes assisting him. W. never exercised any ownership over the bonds as against his father, and they were at all times under the control of the latter, up to his death. J., the other donee, never had any control over the bonds, or access to the safe. At one time Y., when solicited for a loan, said he supposed he might, with the boys' consent, take some of their bonds; and he told another person that what he had left he had given to W. and J. Y. had, before making the indorsements, given J. $1,000, and he afterwards took a $1,000 bond from one of the packages, which was stated in the indorsement as belonging to J., and gave it to a third person.

Construction:

The facts did not show a valid executed gift, as the donees at no time

during the life of Y. had exclusive possession of the bonds, or the legal right to such possession.

The transaction could not be sustained as a declaration of trust.

As the writing, so made and signed by Y. was without consideration, equity could not interfere and effectuate the intent by compelling the execution of a declaration of trust, or charging the bonds with a trust in favor of the equitable owners.

Equity will not interpose to perfect a defective gift or voluntary settlement made without consideration, nor can it convert an imperfect gift into a declaration of trust merely on account of that imperfection.

To create a trust, where the donor retains the property, the acts or words relied upon must be unequivocal, implying that he holds the property as trustee for the benefit of another. *Young* v. *Young*, 80 N. Y. 422.

Citing, Day v. Roth, 18 N. Y. 448; Story's Eq. 706, 787, 793, b, c, d; Antrobus v. Smith, 12 Ves. 39, 43; Edwards v. Jones, 1 My. & Cr. 226, 7 Sim. 325; Price v. Price, 8 Eng. L. & Eq. 281; Hughes v. Stubbs, 1 Hare, 476; Martin v. Funk, 75 N. Y. 134; Heartley v. Nicholson, 44 L. J. Chy. App. (N. S.) 279; Holloway v. Headington, 8 Sim. 325; Jefferys v. Jefferys, 1 Graig & Philips, 138, 141; (Milroy v. Lord, 4 DeG., F. & J. 264, per Lord Knight Bruce; Richards v. Delbridge, L. R., 18 Eq. Cas. 11, per Sir Geo. Jessel).

Morgan v. Malleson (L. R., 10 Eq. Cas. 475); Richardson v. Richardson, L. R. (3 Eq. Cas. 686), stated as overruled; Martin v. Funk (75 N. Y. 134), distinguished.

If the declarations of a party can, under any circumstances, be received to raise a trust or create an interest in lands in another, as to which *quære*, they must be clear and explicit, and point out with certainty the subject matter and the extent of the beneficial interests.[1] *Crouse* v. *Frothingham*, 97 N. Y. 105, rev'g 27 Hun, 123.

Trustees under a will directed to keep the funds invested may combine them with funds of other parties in order to make a sufficient sum for a profitable investment, and may act as trustees for such parties.

In an action brought to have a trust declared in plaintiff's favor in a bond and mortgage, executed to defendant and to M. as executors, it appeared that the plaintiff delivered to M. $2,000, and on the same day the latter, with defendant, loaned $1,800 of this same money, together with the $6,000 belonging to the estate and $200 belonging to M., tak-

[1]See, also, People v. St. Nicholas Bank (In re Lathrop), 77 Hun, 139.

What is a sufficient declaration of a trust. *Westlake* v. *Wheat*, 43 Hun, 77.

Statements that will not amount to a declaration of trust. *McCahill* v. *McCahill*, 71 Hun, 221.

To create a trust there must be an explicit declaration of trust or circumstances must show beyond a reasonable doubt; an intent to create a trust; an ineffectual gift is not necessarily a trust. See Beeman v. Beeman, 88 Hun, 14.

ing as security therefor the bond and mortgage in question. Plaintiff was then permitted to prove, under objection and exception, declarations of M. made in the presence of plaintiff and others soon after the transaction, when she was in feeble health and her early death anticipated, to the effect that she had received the $2,000 to make up the sum loaned, and that plaintiff was to have an interest in the mortgage as security, and to receive her share of the interest as it was paid, and that she intended to make an acknowledgment to that effect in writing. *Held*, that the evidence was properly received, and constituted a good declaration of trust; that it was an act done in the performance of the executor's duty, which operated upon and was enforceable against, the estate to the extent of the money of the plaintiff which was invested in said securities. *Barry* v. *Lambert*, 98 N. Y. 300.

From opinion.—"While there is no proof of any express stipulation made between the parties at the time the money was delivered, that the security for the loan was to be taken in such form as to disclose the plaintiff's interest therein, yet an understanding to the effect that the plaintiff was the owner of one-fourth of the mortgage, and of the interest accruing thereon must be implied, from the absence of any agreement transferring the title of the money advanced to the executors. A trust by implication arises from the use of the money according to such understanding and agreement, and notwithstanding the security was taken in the name of the executors, equity will protect the interest of the beneficiary and follow the property in which the money was invested, and impose a lien thereon in favor of the plaintiff to the extent of the sum belonging to her thus advanced and invested. (Price v. Blakemore, 6 Beav. 507; Perry on Trusts, sec. 842; In the Matter of Frazer, 92 N. Y. 240. In re European Bank, L. R., 5 Ch. App., 358; Pennell v. Deffell, 4 DeG., M. & G. (53 Eng. Ch.) 372.

"No difficulty arises from the blending of the money of the estate with that of another person in the same loan, for the units of which it is composed being of equal value it is clearly severable and distinguishable, and sufficient data are given to enable such severance to be made. The cases above cited show numerous instances in which such separation has been decreed. Conceding for the present that the admissions of Mrs. Lambert were incompetent to establish the facts upon which a trust *in invitum* can be decreed, it is nevertheless true that her statement also operated as a valid declaration of trust. It is well settled that a trust in personal property may be created by parol, and that no particular form of words is necessary for its creation, but the words or acts relied on to effect that object, should be unequivocal, and plainly imply, that the party making them intended to divest himself of his interest in the property, and to hold it thereafter for the use and benefit of another. (Hill on Trusts, 130; Martin v. Funk, 75 N. Y. 140; Young v. Young, 80 id. 438; Willis v. Smyth, 91 id. 297.) This is all that is required to create a trust even as against the owner, and although he continues to retain possession of the property devoted to the trust. But when the legal title is in one party and the equitable ownership in another, it is only necessary for those facts to appear, in order to constitute the holder a trustee for the benefit of the other. (Pye's Case, 18 Vesey, 140.) * * * * * * * *

"Coexecutors, however numerous, constitute an entity, and are regarded in law as an individual person. Consequently the acts of any one of them in respect to the ad-

ministration of estates, are deemed to be the acts of all, for they have all a joint and entire authority over the whole property. (Williams on Executors, 810; Wheeler v. Wheeler, 9 Cow. 34.) Thus one of two executors may assign a note belonging to the estate of the testator. (Wheeler v. Wheeler, *supra*), or make sales and transfers of any personal property of the estate. (Bogert v. Hertell, 4 Hill, 492.) He may release or pay a debt, assent to a legacy, surrender a term, or make an attornment without the consent or sanction of the others. (Williams on Executors, 812; Jackson v. Shaffer, 11 Johns. 513; Douglass v. Satterlee, id. 16; Murray v. Blatchford 1 Wend. 583.) It was said in Wheeler v. Wheeler (*supra*), 'that if a man appoint several executors, they are esteemed in law as but one person representing the testator, and that acts done by any one of them which relate to the delivery, gift, sale or release of the testator's goods are deemed the acts of all.' It would seem to follow from this principle, that they have the power of joiut and several agents of one principal, and that any act done or performed by one within the scope and authority of his agency, is a valid exercise of power and binds his associates.

"It is quite true, however, that neither executors nor administrators, whether acting separately or jointly, have authority to create an original liability on the part of the estate, or enter into an executory contract binding upon, or enforceable against it. (McLaren v. McMartin, 36 N. Y. 88; Ferrin v. Myrick, 41 id. 315; Austin v. Munro, 47 id. 366.)"

A trust of personalty is not within the statute of uses and trusts and may be created without writing, and the delivery of the property is sufficient to pass title.

It seems that any trust of property which would be valid if created by will, can be created by the owner in his lifetime, provided it is then to go into operation, although to be executed after his death; and, in case of personal property, may be created by oral agreement, accompanied by delivery of the property.[1] *Gilman* v. *McArdle*, 99 N. Y. 451, digested p. 630.

A valid trust may be created by a deed transferring the property to

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[1]A pledge of bonds, with power of sale, creates a trust. *Purdy* v. *Sistare*, 2 Hun, 126.

Complete delivery essential to. *Meiggs* v. *Meiggs*, 15 Hun, 453.

A trust for the payment of outstanding checks of its creator, is established by delivery of securities, with intent to create a trust, and a general assignee of the creditor of the trust takes subject to it. *Watts* v. *Shipman*, 21 Hun, 598.

An assignment of property, though not valid as a gift *inter vivos*, by reason of a clause allowing the donor to revoke the gift at any time, was valid as a trust. *Rosenberg* v. *Rosenberg*, 40 Hun, 91.

Delivery of trust deeds is presumed from their acceptance by the trustee and recording, although afterwards found in the grantor's possession. *Bliss* v. *West*, 58 Hun, 71, aff'd 132 N. Y. 589.

Valid gift, *causa mortis* or *inter vivos*, was upheld through a trust, by delivery of the property to a third person in trust for the donee, and the acceptance thereof was implied. *Bump* v. *Pratt*, 84 Hun, 201.

Delivery of the bonds to the husband by a bank in which they are deposited, created a trust. *Durland* v. *Durland*, 83 Hun, 174.

the trustees, and containing directions that the trust fund be disposed of according to certain sealed instructions which were not to be opened until the death of the grantor. *Van Cott* v. *Prentice*, 104 N. Y. 45, aff'g 35 Hun, 317.

In an action for an accounting as to moneys alleged to have been placed in the hands of S., defendant's testator, by plaintiff for investment, the only evidence presented was a letter from S. to plaintiff, which, after acknowledging the receipt of the money, and that it was drawing interest at seven per cent., continued as follows: "If I can find an opportunity of purchasing a mortgage * * * whereby I can, without risk, secure a greater profit, I shall do so unless you wish to make any other use of the money; should you desire to use it, please let me know."

Construction:

The relation of plaintiff to the decedent was that of a creditor upon a simple contract, not that of a beneficiary under a trust; that the amount was payable at once, and the statute of limitations then began to run, and after the lapse of six years, was a bar to the action. *Budd* v. *Walker*, 113 N. Y. 637.

S., defendant's testator, agreed with W., his nephew, plaintiff's assignor, that if he would refrain from drinking liquor, using tobacco, swearing and playing cards or billiards for money until he should become twenty-one years of age, he would pay him $5,000. W. performed his part of the agreement; he became of age in 1875. Soon, thereafter, he wrote to S., advising him of such performance, stating that the sum specified was due him, and asking payment. S. replied, admitting the agreement and the performance, and stating that he had the money in bank, set apart, which he proposed to hold for W. until the latter was capable of taking care of it. It was thereupon agreed between the parties that the money should remain in the hands of S. on interest. In an action upon the agreement, *held*, that it was founded upon a good consideration, and was valid and enforceable.

S. died in 1887 without having paid any portion of the sum agreed upon.

Construction:

Under the agreement made in 1875, the relation of the parties thereafter was not that of debtor and creditor, but of trustee and *cestui que trust;* and therefore the claim was not barred by the statute of limitations. *Hamer* v. *Sidway*, 124 N. Y. 538.

II. HOW AN EXPRESS TRUST IS CREATED.

From opinion.—"A person in the legal possession of money or property, acknowledging a trust with the assent of the *cestui que trust*, becomes from that time a trustee, if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject, whatever it may have been, no longer controls. (2 Story's Eq. sec. 972.) If before a declaration of trust, a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands and stipulating for its investment on the creditor's account, will have the effect to create a trust. (Day v. Roth, 18 N. Y. 448.)

The voluntary creation by heirs of certain property of a trust therein for the joint benefit of themselves and D., in performance of a contract between such heirs and D., precluded any claim on their part that the contract was void or that it did not give him a present interest in the property; and the distribution of the proceeds of the property was to be controlled by the terms of the trust.[1] *Chester* v. *Jumel*, 125 N. Y. 237.

By the contract set forth in the complaint and proved on the trial, defendant acknowledged the receipt from plaintiff of $5,000, which he agreed to return to plaintiff in case a certain resolution set forth therein was not passed by the common council of the city of New York, which resolution authorized the street commissioner to enter into a contract for lighting the streets, etc., of the city. It did not appear that defendant was a member of the common council or a city official, and no evidence was given on the part of plaintiff outside of the instrument itself.

Construction:

The contract by its terms created a valid trust (Day v. Roth, 18 N. Y. 448–453), and was not upon its face within the condemnation of the law as against public policy. *Milbank* v. *Jones*, 127 N. Y. 370, rev'g 25 J. & S. 135; s. c., 141 N. Y. 340.

Trusts of personal property may be created without writing, for any lawful purpose, and are not, in respect either of the mode or purposes of their creation, within the statute of uses and trusts. *Matter of Carpenter*, 131 N. Y. 86, digested pp. 642, 840.

Day v. Roth, 18 N. Y. 448; Gilman v. McArdle, 99 Id. 451.

Where an intention to give absolutely is evidenced by a writing which fails because of its non-delivery, the court may not give effect to it by construing it to be a declaration of trust, and, therefore, valid without delivery.

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[1]Assignment of property, in consideration of a covenant by the assignee to support the assignor, does not constitute a trust. *Hungerford* v. *Cartwright*, 13 Hun, 647.

No trust is created by a contract with a promise for the benefit of a third person. *Coleman* v. *Hiler*, 85 Hun, 547.

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While a trust may be implied from acts or words of the person alleged to have created it, to establish it there must be evidence of such acts or words on his part as that the intention to create it arises as a necessary inference therefrom and is unequivocal. The settlor must either transfer the property to a trustee or declare that he holds it himself in trust.

In an action to compel defendants, as executors of H., to surrender to plaintiff a certain bond and mortgage, it appeared that H., after he had by his will made some provision for plaintiff, stated to his attorney that he had made up his mind to give her about $2,000 in addition to the provision in his will. H. was then the owner of the bond and mortgage in question, which was for the amount stated; he requested C., one of the executors named in his will, to draw an assignment of them to plaintiff, and "said something about his intention to give" them to her. C. drew the assignment and returned all the papers to H., who subsequently signed it. A few days before his death, H. delivered the assignment which was not acknowledged or recorded, with other papers belonging to him to C., with directions to him to deposit them in bank. After the death of H. the bond and mortgage went into the possession of defendants. It did not appear that the assignment was ever personally delivered to plaintiff.

Construction:

The plaintiff was not entitled to recover; the evidence failed to establish a complete gift, or a trust. *Wadd* v. *Hazelton*, 137 N. Y. 215, rev'g 62 Hun, 602.

From opinion.—"While it is true that no particular form of words is necessary to create a trust of this nature, and while it may be created by parol or in writing, and may be implied from the acts or words of the person creating it, yet it is also true that there must be evidence of such acts done or words used on the part of the creator of the alleged trust, that the intention to create it arises as a necessary inference therefrom and is unequivocal; the implication arising from the evidence must be that the person holds the property as trustee for another. The acts must be of that character which will admit of no other interpretation than that such legal rights as the settlor retains are held by him as trustee for the donee; the settlor must either transfer the property to a trustee or declare that he holds it himself in trust. An intention to give, evidenced by writing, may be most satisfactorily established, and yet the intended gift may fail because no delivery is proved. And where an intention to give absolutely is evidenced by a writing which fails because of its non-delivery, the court will not and can not give effect to an intended absolute gift by construing it to be a declaration of trust and valid, therefore, without a delivery. These principles have been decided in this court and must be regarded as settled. (Martin v. Funk, 75 N. Y. 134; Young v. Young, 80 id. 423; Matter of Crawford, 113 id. 560; Beaver v. Beaver, 117 id. 421.) It is true that in Richardson v. Richard-

son (L. R. 3 Eq. Cas. 686), Vice-Chancellor W. Page Wood does say, in speaking of Ex parte Pye (18 Ves. 140), that the holding in that case amounted to a decision that an instrument executed as a present and complete assignment (not being a mere covenant to assign on a future day) is equivalent to a declaration of trust. The expression was unfavorably criticised by Jessel, M. R., in Richards v. Delbridge, L. R. 18 Eq. Cas. 11), while in Baddeley v. Baddeley, L. R. 9 Ch. Div. 113, Vice-Chancellor Malins says he is not disposed to disagree with Richardson v. Richardson, notwithstanding the remarks of Sir George Jessel in Richardson v. Delbridge.

"In this court, however, and in the case already cited of Young v. Young, this doctrine is substantially repudiated. We are of opinion that no such rule obtains or ought to obtain in this state. An intended absolute gift by way of a written assignment, which can not take effect because of the absence of delivery, ought not to be enforced as a declaration of trust when there is no such declaration and when there is no evidence of an intention to create a trust. (Milroy v. Lord, 4 D. F. & J. 274.")

Under the provision of the statute of frauds (2 R. S. 135, sec. 7), as amended in 1860 (L. 1860, ch. 322), providing that a declaration of trust in lands may be proved by any writing subscribed by the party declaring the same, it is not necessary to produce a deed or formal writing in order to prove such a trust, but letters or informal memoranda, signed by the party, are sufficient if they show the nature, character and extent of the trust interest.[1]

In an action for an accounting, etc., wherein plaintiff claimed that defendant, under and by a deed to him of certain lands, became seized and has held an undivided one-half thereof, in trust for H., plaintiff's testator, plaintiff produced a power of attorney executed by defendant to P., authorizing him to sell the land, referring to the deed under which he held title, and giving its date and the parties thereto, and a letter written and signed by defendant, addressed to P., referring to the power of attorney, and stating that whatever was realized on the sale belonged to H. and defendant "jointly and equally;" also a paper unsigned, but in defendant's handwriting, which, after describing the land, contained this statement: "The above is a description of the property as contained in the deed to me; nothing about our being entitled to 600 inches." Plaintiff also produced letters written by defendant, after the execution of the power of attorney, to H. and a son of his in regard to taxes on the land; also a letter to one then a tenant of part of the land, in which defendant stated, that although the title to the whole property was in him, there was another party who had an interest.

[1] Forster v. Hale, 3 Vesey Jr. 696; Fisher v. Fields, 10 Johns, 494; Wright v. Douglass, 7 N. Y. 564; Cook v. Barr, 44 id. 156; Loring v. Palmer, 118 U. S. 321; 2 Story Eq. Jur. sec. 972; McArthur v. Gordon, 126 N. Y. 597; Urann v. Coates, 109 Mass. 581; Crane v. Powell, 139 N. Y. 379.

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Construction:

The proof was sufficient to authorize a finding that defendant took and held the land in trust for the benefit of himself and H. in equal shares as tenants in common; the trust entitled H. in equity to a beneficial interest, and vested in him an estate of the same quality and duration as such interest (1 R. S. 727, sec. 47); and so, plaintiff was entitled to the relief sought. *Hutchins* v. *Van Vechten*, 140 N. Y. 115, aff'g 66 Hun, 69.

Citing Elwood v. Northrup, 106 N. Y. 172-9.

NOTE 1. "We agree with the learned counsel for the defendant that a trust can not be impressed upon what appears by the deed alone to be an absolute title in the defendant, without clear proof showing a beneficial interest in another as well as its nature, character and extent, and that a failure to execute or deliver the necessary legal evidence to qualify the title is fatal to such a claim. (Wadd v. Hazelton, 137 N. Y. 215; Van Cott v. Prentice, 104 id. 45.)" (120-1.)

A trust of personal property may be effectually framed in which the author of the trust is himself the trustee.[1]

S., plaintiff's testator, in his lifetime, executed an instrument in triplicate which stated that he was the owner of 400 shares of the stock of a corporation named, evidenced by four certificates, the numbers of which were given; that he did thereby "dedicate and set apart * * * in whose possession soever the said several certificates of stock may come without actual transfer," all the income and dividends thereafter to accrue thereon, in trust to himself or to any custodian in whose hands the said certificates might be deposited by him, or by his order, for the uses and purposes specified. These were that the net income and dividends, as received from time to time, should be apportioned into ten equal parts, three to be paid over to the use of M., three to the use of A., two to be paid to H. during life, and two to M. M. during life. In case of the decease or marriage of M., or the decease of A., it was provided that "when the portion so allotted to such person shall, from and after the happening of such event, be paid over" to the use of a religious society named, and "the portion allotted to the other shall, after her decease" or marriage, if it be M., be paid over to the use of a charitable institution named. At the termination of the life interests of H. and M. M. "the portion allotted" to each, it was provided, should also go to a charitable institution named. A power of revocation was reserved. One of the triplicates, with the certificates of the stock in a sealed envelope, S. deposited in his box in a deposit company. Upon the envelope was indorsed in the handwriting of S. the words, "Declar-

[1] Martin v. Funk, 75 N. Y. 137; Barry v. Lambert, 98 id. 306.

ation of trust with certificates * * * belonging to trust," following which was a description of the certificates and a statement that a "duplicate declaration of trust had been filed with the beneficiaries" and with another person named; also a further memorandum directed to a person named, for and in behalf of the within named beneficiaries, "as follows: "In case of my decease please see that the inclosed trust is faithfully carried out." The provisions of the instrument were carried out until the death of S., about four years after its execution. In his will S. recited the deposit of "the deed of trust" and directed his executors to carry out its provisions.

Construction:

A good and valid declaration of trust was made, and upon its execution the settlor held the legal title to the stock in trust for those to whom he had given the income; four separate and several trusts were created, and each life tenant took independent of the others.[1] Each trust terminated upon the death of the life beneficiary and then the entire interest and absolute ownership of the trust fund went to the corporation named as the ultimate beneficiary. *Locke* v. *The Farmer's Loan and Trust Company*, 140 N. Y. 135, rev'g 66 Hun, 428.

Note 1.—"The settlor kept and meant to keep in himself, for the time being, the nominal legal title. The reserved power of revocation made that a convenient and useful measure but it is perfectly consistent with an explicit purpose to hold that legal title as trustee for those to whom he had given the whole beneficial interest. (Young v. Young, 80 N. Y. 438.)" (142.)

Note 2.—"I have not failed to reflect upon the adverse view of the majority of the general term. They say that if we hold that there are here several trusts 'it will be impossible for the creator of a trust, however much he may desire to do so, to express any intention to have a fund remain *in solido*.' No case denies him that right. We here do not deny it. If this settlor had expressly said, in terms admitting of no other construction, that the fund should so remain forever, or made his dispositions which required it to so remain, we should say so and let the consequences follow. There are many such cases, generally where there are provisions of survivorship involving contingencies which compel the fund to remain unbroken until it can be known who shall take and in what proportion. Such cases and those like the present were distinguished and separated in Lorillard v. Coster (5 Paige, 172; 14 Wend. 265), and again in Everitt v. Everitt (29 N. Y. 39), upon the broad distinction between a taking by the beneficiaries as joint tenants and a taking by them as tenants in common, and so distributively (In matter of Verplanck, 91 N. Y. 443); and none of the latter make it at all difficult for a settlor or testator, by creating a joint tenancy among the beneficiaries, or by direct and implicit provisions for continuing the fund *in solido* in the hands of the trustees for a specific period, to effect that precise result. Here the settlor has not said that the fund should remain *in solido* forever in decisive terms, nor is it a necessity flowing from his dispositions. His language is at least equivocal and

[1] Savage v. Burnham, 17 N. Y. 571; Stevenson v. Lesley, 70 id. 512.

his intention matter of inference, and we are at liberty to consider and determine what is the true inference, and so to separate the trusts. (144–145.)"

Upon the death of P., defendant's testator, there was found in his safe a sealed envelope indorsed, "A declaration in favor" of plaintiffs, whose names were given. In the envelope was a paper, signed and acknowledged by P., stating among other things, that there was in said safe "a parcel containing $29,000 in bonds" of a certain railroad company named, of which $10,000 belonged to a person named and the balance to the plaintiffs. The paper closed with this statement: "No person shall have the right to oppose this declaration, because it is founded on conscience and justice. I reserve this money only for what I may consider proper." There was no parcel such as described, but in the same box were found thirty-eight $1,000 bonds of said company. Action brought by plaintiffs to recover nineteen of said bonds.

Construction:

It was to be inferred from the language of the paper, in the absence of any evidence explaining or contradicting it, that plaintiffs were the owners of the bonds claimed; the declaration to that effect was not qualified by the closing clause, but it simply indicated that said bonds were in the possession of P. under some agency, or possibly a trust, he having authority to convert them and apply the proceeds consistently with the plaintiff's ownership.

Same case:

The bonds bore interest at the rate of four per cent. Judgment was rendered for the value of the bonds, and interest at four per cent. from the time of demand; this was modified by the general term by an allowance of six per cent. interest.

Construction:

No error; plaintiffs were entitled to lawful interest on the value of the bonds as damages for their unlawful detention. *Govin* v. *Demiranda*, 140 N. Y. 474, aff'g 76 Hun, 414.

In November, 1890, the testator borrowed $300 from a bank, giving his note therefor. In December following he executed to the president and cashier of the bank a transfer of ten shares of stock, with power of sale, which he sent to the transferees with a letter directing them to pay with the proceeds his indebtedness to the bank, and the balance to M. In 1891 the testator paid the note but left the stock in the hands of the bank and soon procured another loan, and at his death there was about

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$150 to his credit in the bank. The second loan had not been paid, but the bank had not resorted to said collateral.

The testator's will provided that "from the cash funds" belonging to the testator in the bank, his funeral and burial expenses and other just claims against him should be paid, and the residue, if any, paid to M. M. was the testator's housekeeper, and he was in the habit of giving her money to pay the household expenses. The trial court adjudged that an express trust was created in the stock for the benefit of M.

Construction:

This portion of the decision was invalid; the action being simply for the construction of the will, and the court had no power to go outside of it and construe an independent business agreement.

It seems, that no trust was created in the stock, nor was there a gift thereof to M. *Montignani* v. *Blade*, 145 N. Y. 111, modifying 74 Hun, 297.

Citing Young v. Young, 80 N. Y. 438.

When a person, through the influence of a confidential relation, acquires title to property, the court, to prevent an abuse of confidence, may impress upon the property an implied trust, and so grant relief.

G., the mother of the parties to this action, was the owner of a house and lot in the city of B., which was incumbered by a mortgage. The children lived with their mother, and the premises furnished a home for the family. In February, 1887, G., having become incapacitated for further care and management of the property, deeded the same to defendant without consideration, in pursuance of a parol agreement and promise on his part that he would hold the same for the benefit of the plaintiffs in common with himself, and would give them their shares in it. The plaintiffs were at that time minors. It was agreed that defendant should have all the accruing rents and his board in the family without charge, he to pay the interest on the mortgage and the taxes on the property. G. died in March thereafter. The agreement was carried out during her life, and for some time thereafter. Defendant then sold the property, and with a portion of the avails, purchased another house and lot; he was asked to take the deed in the name of all the children, but objected, promising, however, to execute a separate paper acknowledging and securing plaintiffs' rights in the property. Thereafter he repudiated the agreement and claimed to be the sole and absolute owner. Action to compel the performance of the agreement.

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Construction:

The arrangement was founded upon the relation of mother and son and brothers and sisters, and involved the trust and confidence growing out of these relations; the denial by defendant of the rights of plaintiffs was a fraud upon them and upon the purpose of the deceased mother; conceding no express trust was created, a trust might be implied and properly enforced to prevent and redress the fraud, which trust is unaffected by the statute of frauds.

Also, although an intended fraud was not explicitly and by the use of that word charged in the complaint, yet, as all the facts showing it were therein fully and clearly stated, the omission was not, after judgment, material. *Goldsmith* v. *Goldsmith*, 145 N. Y. 313, aff'g 6 Misc. 12.

1. TRUSTS ARISING FROM DEPOSITS IN A BANK.

To constitute a valid gift, the act constituting the transfer must be consummated, and not remain incomplete, or rest in mere intention, and this is the rule, whether the gift is by delivery only or by the creation of a trust in a third person, or in creating the donor himself trustee. Enough must be done to pass the title, although, when a trust is declared, whether in a third person or the donor, it is not essential that the property should be actually possessed by the *cestui que trust*, nor is it even essential that the latter should be informed of the trust.[1]

S. deposited her money in savings bank, declaring, at the time, that she wanted the account to be in trust for plaintiff, a distant relative, who was in ignorance of same. The account was so entered, and a pass book given to S., containing an entry, in substance, that the account was in trust for the plaintiff. S. retained pass book, and with the exception of one year's interest drawn by S., the money remained in the bank and accumulated until the death of S.

Construction:

There was a valid declaration of trust, and passed the title of the deposits. *Martin* v. *Funk*, 75 N. Y. 134.

Citing on question of knowledge by the *cestui qus trust*, Wetzel v. Chapin, 3 Bradf. 386; Millspaugh v. Putnam, 16 Abb. Pr. R. 380.

And citing, on general question, Smith v. Lee, 2 N. Y. Sup. C. R. 591; Kelly v. Manhattan Institution (N. Y. Common Pleas not reported); Minor v. Rogers, 40 Conn. 512; Ray v. Simmons, 11 R. I. 266; Richardson v. Richardson, L. R., 3 Eq. Cas., 684; Morgan v. Malleson, L. R., 10 Eq. Cas., 475; Warriner v. Rogers, L. R., 16 Eq. Cas., 340; Pye's Case, 18 Vesey, 140; Wheatley v. Purr, 1 Keen, 551.

Citing, as to retention of instrument creating trust by donor, Exton v. Scott, 6

[1]Milroy v. Lord, 4 De Gex, F. & J. 264.

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Simons, 31; Fletcher v. Fletcher, 4 Hare, 67; Souverbye v. Arden, 1 J. Ch. R. 240; Bunn v. Winthrop, id. 329.

Where a deposit is made in a savings bank in trust for another, the beneficiary may recover it from the executor of the trustee, if the executor has drawn it out, such action lies against the executor individually. *Anderson* v. *Thomson*, 38 Hun, 394.

A deposit of money in the name of the depositor, in trust for another, transfers the title to the fund to the latter. *Scott* v. *Harbeck*, 49 Hun, 292.

Deposit of money in a savings bank by the depositor as trustee for another, creates a valid trust. *Macy* v. *Williams*, 55 Hun, 489.

Whether a deposit made "subject to the control" of a father in the name of his child creates a trust is determiued by surrounding circumstances. *Millard* v. *Clark*, 80 Hun, 141.

When a trust is not created by deposit in a savings bank by one person "in trust' for another; evidence constituting the *res gestæ* is competent to show the real motive of the depositor. *Macy* v. *Williams*, 83 Hun, 243, aff'd 144 N. Y. 701.

Where an uncle intrusts money to his nephew upon his agreement to deposit in his own name in a bank, but for the uncle's benefit, the nephew becomes a trustee of an express trust. *Davis* v. *Davis*, 86 Hun, 400.

A debtor, who, after the service of the usual order in supplementary proceedings, enjoining him from disposing of his property, draws out money previously deposited in bank upon an account opened in his name "in trust," and applies a part of such moneys to his own use, or that of his family, is liable to punishment as for contempt.

The fact that he was doing business as agent for his wife, and that the funds were held by him in trust for her, is no defense. The legal title, nevertheless, under such a deposit in his own name "in trust" was in himself. *People ex rel. Noel* v. *Kingsland*, 3 Abb. Ct. App. Dec. 526.

S. deposited money with the defendant and received a pass book, which stated that the account was with her "in trust for Christopher Boone," plaintiff's intestate. S. died and her administrator drew the money.

Construction:

S. constituted herself the trustee, and at her death the fund devolved upon her administrator,[1] and payment to him was proper in absence of notice from the beneficiary forbidding payment to the administrator, or demanding it himself. *Boone* v. *Citizens' Saving Bank of the City of New York*, 84 N. Y. 83.

Rev'g 21 Hun, 235, and distinguishing Martin v. Funk, 75 N. Y. 134.

[1] Banks v. Ex'rs of Wilkes, 3 Sandf. 99; Bucklin v. Bucklin, 1 Abb. Ct. of App. 242; Bunn v. Vaughan, id. 253; Emerson v. Bleakley, 2 id. 22; Trecothick v. Austin, 4 Mason, 16, 29.

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The firm of R. Bros., ship brokers, having become embarrassed in business, caused the moneys thereafter received by them in their business as agents for others, to be deposited with defendant in the name of their bookkeeper, plaintiff's intestate, in order to protect such funds from being attached by their creditors and that they might be paid over to the parties entitled thereto. Defendant having discounted a note for said firm, when it became due charged it to said account and refused to pay over the amount so deducted, to plaintiff. Action to recover the amount so retained.

Construction:

The defendant was not entitled to set off the amount of the note against the deposits, as the deposits were not the property of R. Bros., but were deposited and held in trust for the benefit of those for whom the moneys were received.

It was immaterial that none of the parties entitled to the deposits had made claim therefor, as they could enforce their claims against the plaintiff.

It was immaterial that defendant was not notified that said intestate so held the funds in trust; the deposits being in his name he was under no obligation to give notice that others had an interest therein.

The discharge of R. Bros. in bankruptcy did not affect the rights of the parties for whose benefit these deposits were made; such discharge, while it might destroy the claims against them, did not deprive those for whom the funds were deposited of their right thereto. *Falkland* v. *St. Nicholas Nat. Bank of N. Y.*, 84 N. Y. 145, rev'g 21 Hun, 450.

B., defendant's testator, deposited $400 in a savings bank, which was credited in an account opened with him in trust for plaintiff, and received a pass book, in which the account was so entered; B. exhibited to plaintiff's mother, B.'s stepdaughter, the pass book and other pass books showing similar accounts for other members of her family, and stated as a reason for not letting them have the money that it would do them more good thereafter, and in subsequent conversations the deposits were recognized as a provision for the family. The bank paid larger interest on sums under $500, and B. made a large number of other and similar deposits before and after the one in question, in his name, as trustee, some without naming a beneficiary and others giving a letter representing nobody; B. subsequently drew out all the deposits.

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Construction:

The evidence showed conclusively, and as a matter of law, an intention to create a trust. The trust once created unreservedly was irrevocable.[1]

The mere fact of such deposit does not conclusively establish a trust, but contemporary facts and circumstances, constituting *res gestæ*, may be proved to show that the real motive of the depositing was not to create a trust.

The withdrawal of the deposit was not in hostility to the trust, as it was competent for B. to withdraw it for purposes of other investment, or some other purpose not inconsistent with the trust,[2] and the right of action did not accrue until the death of B., the presumptive period when the trust terminated. *Mabie* v. *Bailey*, 95 N. Y. 206.

J. deposited a sum of money with defendant in trust for E., his wife, plaintiff's testatrix. A pass book was delivered to him. After the death of both husband and wife and the issuing of letters testamentary to plaintiff, he called with them at defendant's bank and demanded payment of the deposit; he was told by one of its officers that it would be paid to him when he came with the pass book, which was then in possession of the executor of J.; thereafter the latter presented the pass book, together with proof of his appointment, and thereupon defendant paid the deposit to him on surrender of the pass book. In an action to recover the sum deposited it appeared that plaintiff, after learning of the payment, brought suit against J.'s executor to recover the money so paid and recovered judgment therein, and being unable to collect the same, brought this action.

Construction:

Plaintiff had an election of remedies, *i. e.*, either an action against defendant to recover the deposit, or an action against J.'s executor for money had and received; but he was not entitled to both, and by electing the latter remedy he lost the former, as by so doing he adopted and ratified the action of defendant in making the payment, and this would be a good defense in an action by defendant against J.'s executor to recover back the money paid to him.

If the money had been left on special deposit, plaintiff could have pursued it in the hands of said executor without losing his remedy against defendant.

[1] Minor v. Rogers, 40 Conn. 512; 16 Am. Rep. 69; Martin v. Funk, 75 N. Y. 134.
[2] Boone v. Citizens' Sav. Bank, 84 N. Y. 83.

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Where a trustee is bound to pay money to a beneficiary as a debt, if he makes payment to another person, this is not a payment of the debt and the moneys paid are not the property of the beneficiary.

In such a case the beneficiary may ignore the payment and sue the trustee as his debtor, or he may ratify and adopt the payment and sue the person who received the money, but he can not do both, and his election once effectually made, is conclusive upon him. (Cases on the election of remedies reviewed.)

The defense that the payment by the bank had been adopted and ratified by plaintiff was not set up in the answer. This objection was not raised upon the trial, and all the facts pertaining to such defense were proved without objection and were found by the court. The objection was not available here. *Fowler* v. *Bowery Savings Bank*, 113 N. Y. 450, rev'g 47 Hun, 399.

From opinion :—"It is clear that the plaintiff was legally entitled to receive payment of the deposit from the defendant, and that after the notice and demand by him it had no right whatever to pay the same to Flynn ; and, but for facts yet to be stated, the cases of Martin v. Funk (75 N. Y. 134), Willis v. Smyth (91 id. 297), Mabie v. Bailey (95 id. 209), would be ample authority for the maintenance of this action. After payment by the defendant to Flynn, the plaintiff, in the fall of 1883, commenced an action against him to recover, among other things, the moneys thus paid. Issue was joined and the action was tried in the fall of 1884, and a verdict was rendered in favor of the plaintiff and a judgment was thereon entered. The plaintiff was unable, however, to collect anything on the judgment, and he thereafter commenced action.

"The relation between a savings bank and a depositor therein is that of debtor and creditor, and the defendant, therefore, became a debtor for the sum deposited with it by John White. (People v. Mechanics & Traders' Savings Inst., 92 N. Y. 7.)"

U., in 1850, deposited money in a savings bank, which was credited to an account then opened with her, in trust for S. J. U., her daughter, and a pass book was issued accordingly. This deposit was subsequently drawn out. In 1874 U. deposited, from the proceeds of a house sold, $2,000 to said account, the same being entered on said pass book retained by U.; $25 to a similar account for her grandchild, and the balance in another book to her own credit.

Construction :

There was an intention to create a trust for the benefit of S. J. U., who was entitled to the fund.

The fact that, at the time of the second deposit daughter was married and bore a different name, was not material, nor was U.'s control of the

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fund, nor the fact that she drew the interest thereon. *Willis* v. *Smyth*, 91 N. Y. 297.

See, Martin v. Funk, 75 N. Y. 134; see Young v. Young, 80 id. 422; Boone v. Citizens' Bank, 84 id. 83; Heartley v. Nicholson, 44 L. J. Ch. App. N. S. 277.

T. deposited certain moneys in a bank and in a trust company to the credit of his daughter C. The first deposit was made in her presence and for her personal use. The deposits were entered in a pass book, which was delivered by T. to C. The latter drew out the deposits in bank and deposited them in the trust company, where they were included in the account with the deposit then made by T.

Construction:

There was a valid and irrevocable gift, fully completed and executed, vesting the absolute title to the deposits in C.

Same case:

T. purchased certain coupon bonds, payable to bearer, which were kept by him up to the time of his death, and he cut off and collected the coupons as they fell due, except those falling due during six months prior to his death. At the time of the purchase of the bonds, T. stated that he wanted them for C., and afterwards he directed his banker, who made the purchase for him, to have them registered in her name. The banker took them to the office of the company which issued them, and the name of C. was indorsed upon each bond, with date of indorsement and name of the transfer agent. It did not appear that C. knew anything of the transaction.

Construction:

As there was no delivery of the bonds, there was no completed gift.[1]

Same case:

The bonds were issued by a foreign corporation, and made payable in New York or Philadelphia.

Construction:

The act of 1871 (Laws of 1871, ch. 84), providing for the registry of railroad and other corporate mortgage bonds, did not apply; it applied only to bonds which have been or may be issued and are payable in this state; but even if said act was applicable, the registry did not change the legal title to the bonds while the original owner continued to hold

[1] Martin v. Funk, 75 N. Y. 34, is distinguished.

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them; the title would not pass until a delivery of the bonds to the intended donee or to some one for her, although the general negotiability of the bonds might have been destroyed by the indorsement.

Same case:

T. left a will, executed after all of the deposits, except one small one, were made, by which various legacies were given to C.

Construction:

There was no ademption of the legacies by the gifts of the moneys deposited, nor were they adeemed *pro tanto* by the deposit made after the execution of the will. *Matter of Crawford*, 113 N. Y. 560.

Where a deposit is made in a savings bank in the name of a depositor, as trustee for another, the depositor thereby constitutes himself a trustee, and the title to the fund is thereby transferred from the depositor individually to him as trustee.[1]

Payment of such a deposit, however, to the administrator of the depositor, in the absence of any notice from the beneficiary, is good and effectual to discharge the bank, and this is so where the payment is to a foreign administrator.[2]

In 1872, one K., a married woman living in this state, deposited with defendant a sum of money in trust for an infant daughter, which was so entered upon its books and in the pass book delivered to K. The parents with the child subsequently moved to New Jersey, where K. died. Letters of administration on her estate were issued to her husband in New Jersey, and on demand, no other claim having been made or notice given by the beneficiary, defendant paid the deposit to said administrator. Thereafter a will of K. was admitted to probate in this state. In 1885, the child, who continued to reside in New Jersey, died, and plaintiff was appointed administrator of her estate in this state, and on refusal of defendant to pay to him the deposit brought this action to recover the same. It appeared by the statutes of New Jersey, which were put in evidence, that surrogates in that state have jurisdiction to issue letters of administration in cases of intestacy.

Construction:

Defendant was discharged by the payment to the administrator of K.; the admission to probate of K.'s will did not make the letters of admin-

[1]Boone v. Citizens' Savings Bank, 84 N. Y. 83.

[2]Parsons v. Lyman, 20 N. Y. 103; Peterson v. Chemical Bank, 32 id. 21; In the Matter of the Estate of Butler 38 id. 397; Wilkins v. Ellett, 9 Wall. 740.

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istration previously granted void; but, until they were revoked, all persons acting in good faith in dealing with the administrator were protected.[1]

Under the act of 1867 (Laws of 1867, ch. 782), K. was capable of being a trustee, and having constituted herself such here, and the trust fund having remained here, although by the laws of New Jersey a married woman could not be appointed a trustee, the trust could be enforced here. *Schluter* v. *Bowery Savings Bank*, 117 N. Y. 125.

To constitute a trust there must be either an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created.

A trust may not be implied from a mere deposit in a savings bank by one person in the name of another.

To constitute a valid gift of personal property, there must be on the part of the donor an intent to give, and a delivery, in pursuance of such an intent, of the thing given to or for the donee.[2]

The delivery may be either by actually transferring the manual custody of the thing given to the donee, or by giving to him the symbol which represents possession.

The delivery, however, whether actual or constructive, must be such as will operate to divest the donor of possession of and dominion over the subject of the gift.

An acceptance may be implied where the gift, otherwise complete, is beneficial to the donee.

While a deposit in a savings bank by one person of his own money in the name of another, is consistent with an intent on the part of the depositor to give the money to the other, it does not alone, unaccompanied by any declaration of intention, authorize a finding that the deposit was made with that intent; at least where the deposit was to a new account and the depositor received and retained a pass book, the possession and retention of which, by the rules of the bank, known to the depositor, is made the evidence of the right to draw the deposit.

On July 5, 1866, J. made a deposit in a savings bank of moneys belonging to him, in the name of his son A., who was seventeen years old and resided with his father. In compliance with a rule of the bank, J., at the date of the deposit signed with his own name a request to the

[1] Roderiges v. East River Sav. Inst., 63 N. Y. 460; 76 id. 316; Kittredge v. Folsom, 8 N. H. 98; Patton's Appeal, 31 Pa. 465.

[2] Young v. Young, 80 N. Y. 438; Jackson v. Twenty-third St. Ry. Co., 88 id. 520; In re Crawford, 113 id. 560.

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bank to receive the deposit, a declaration of assent to the by-laws, and a promise to abide by them, running in the name of A. At the same time the bank credited A. with the deposit and issued and delivered to J. a pass book with a similar entry. In both the account and pass book were originally written the words "Payable to" J., but these were erased before the pass book was delivered, how or why did not appear. A subsequent deposit was also made and credited on the pass book. In 1867 J. drew a sum from the account and signed a receipt therefor in the pass book in his own name. From time to time J. presented the pass book to have the interest credited, and the bank officer had no dealings with any other person in respect to the account. There was no evidence that A. ever had the pass book in his possession or knew of the deposits; he died in 1886. J. died in 1888, having retained possession of the pass book at all times until his death. He had eight or nine pass books in the bank representing deposits made in the names of other persons. The rules of the bank, which were printed upon its pass books, provide that drafts may be made personally or by the order in writing of the depositor if the bank have his signature, "but no person shall have the right to demand any part of his principal or interest without producing the original book that such payment may be entered thereon;" also, that all payments to persons presenting its pass books shall be valid. Action brought by executor of A. to recover said deposit.

Construction:

The deposits belonged to the estate of J.; no trust or gift was established in favor of A. *Beaver* v. *Beaver*, 117 N. Y. 421, rev'g 53 Hun, 258.

Distinguishing, Martin v. Funk, 75 N. Y. 134; Howard v. Savings Bank, 40 Vt. 597; Blasdel v. Locke, 52 N. H. 238; Gardner v. Merritt, 32 Md. 78.

From opinion.—"We think, for the reasons stated, that the plaintiff failed to establish a gift, or to justify a finding of a gift. The question of gifts, in connection with deposits of savings banks, has of late years been frequently considered by the courts in various states. The preponderance of authority seems to be in favor of the views we have expressed. (Robinson v. Ring, 72 Me. 140; Burton v. Bridgeport Savings Bank, 52 Conn. 398; Marcy v. Amazeen, 61 N. H. 131; Schick v. Grote, 42 N. J. Eq. 352; Scott v. Berkshire Co. Savings Bank, 140 Mass. 157: Am. and Eng. Encyclo. of Law, tit. gifts, and notes.)

"The cases of Howard v. Savings Bank (40 Vt. 597), Blasdel v. Locke (52 N. H. 238), Gardner v. Merritt (32 Md. 78), go furthest towards sustaining transactions similar to the one in question, as gifts, of any we have noticed, but they are distinguishable in material respects from this."

NOTE.—"In case of bonds, notes or choses in action, the delivery of the instrument which represents the debt is a gift of the debt, if that is the intention; and so, also, where the debt is that of the donee it may be given, as has been held, by the delivery

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of a receipt acknowledging payment. (Westerlo v. DeWitt, 36 N. Y. 340; Gray v. Barton, 55 id. 72; 2 Schouler on Pers. Prop. sec. 66, *et seq.*) The acceptance, also, may be implied where the gift, otherwise complete, is beneficial to the donee." (428.)

NOTE.—"It may be true that as between parent and child a presumption of a gift may be raised from circumstances, where it would not be implied between strangers. (Ridgway v. English, 22 N. J. L. 409.) But where a deposit is made in the name of another, without any intention on the part of the depositor to part with his title, he would be quite likely to select a member of his own family to represent the account, and in this case this is the natural explanation of the transaction." (431.)

E., who had money on deposit in various savings banks, delivered a box containing his bank books, to plaintiff, stating to the latter that he was about to go to the hospital to have an operation performed which he apprehended might cause his death, and that, if he did not return, he gave plaintiff the box and its contents. E. went to the hospital; the operation was performed, which was not dangerous and was apparently successful; but, while at the hospital, he died suddenly of a disease with which he was afflicted when he went to the hospital, other than that for which the operation was performed. Before he went he had been living with plaintiff; he left a letter in his room directed to plaintiff, which stated it to be his "last will and request," in case he did not survive the effects of the operation. The letter contained this clause: "You will take full charge of all my personal effects of every kind, and to have and to hold the same unto yourself, your heirs and assigns forever. You will find my papers and all my accounts in the box." Action to determine the plaintiff's rights to the deposits in one of the savings banks.

Construction:

While the letter alone might not be sufficient to establish a gift, it was competent as corroborating evidence that the gift was consummated by the delivery of the bank books; no other formality was necessary to vest the possession and title in the donee; and, therefore, plaintiff was entitled to the deposits.

Same will:

A by-law of the bank, printed in the bank book in question, required an order or power of attorney to authorize any one aside from the depositor, to draw out the deposits.

Construction:

This did not affect plaintiff's rights; any owner of the book was entitled to draw upon presentation of the book, and giving satisfactory

evidence of ownership, and the bank could not require an order or power of attorney as a condition of payment.

The gift was not rendered invalid by the fact that the donor did not die of the disease from which he apprehended death.

To sustain a gift *causa mortis*, it must be made under apprehension of death from some present disease, or other impending peril, and it becomes void by a recovery from the disease, or escape from the peril. It is not necessary that it should be made *in extremis* and when there is no time or opportunity to make a will; nor is it essential, in order to render the gift effectual, that the donor should die from the apprehended disease; it is sufficient, if, before his recovery from that disease, he die from some other disease existing at the same time.

Death from a surgical operation made necessary by a present disease, is death from the disease, and this, although the decedent voluntarily submitted himself to the operation, and a gift may be sustained in such case as a gift made in the apprehension of death from the disease.

Any delivery of property which transfers either the legal or equitable title is sufficient to effectuate a gift. *Ridden* v. *Thrall*, 125 N. Y. 572, aff'g 45 Hun, 185.

From opinion.—"Gifts *causa mortis* as well as gifts *inter vivos* are based upon the fundamental right everyone has of disposing of his property as he wills. The law leaves the power of disposition complete, but to guard against fraud and imposition, regulates the methods by which it is accomplished.

"To consummate a gift, whether *inter vivos* or *causa mortis*, the property must be actually delivered and the donor must surrender the possession and dominion thereof to the donee. In the case of gifts *inter vivos* the moment the gift is thus consummated it becomes absolute and irrevocable. But in the case of gifts *causa mortis* more is needed. The gift must be made under the apprehension of death from some present disease or some other impending peril, and it becomes void by recovery from the disease or escape from the peril. It is also revocable at any time by the donor, and becomes void by the death of the donee in the lifetime of the donor. It is not needful that the gift be made *in extremis* when there is no time or opportunity to make a will. In many of the reported cases the gift was made weeks, and even months, before the death of the donor when there was abundant time and opportunity for him to have made a will. These are the main features of a valid gift *causa mortis* as they are set forth in many text-books and reported cases. (Just. Insts. lib. 2, tit. 7, sec. 1; Mackeldey's Roman Law, sec. 793; California Civil Code, secs. 1149, 1151; 1 Roper on Legacies, 26; 2 Schouler's Personal Property, 157; 2 Kent's Com. 444; Story's Eq. Juris. secs. 606, 607; Pomeroy's Eq. Jur. sec. 1146; Grymes v. Hone, 49 N. Y. 17; Williams v. Guile, 117 id. 343; Basket v. Hassell, 107 U. S. 602.)

"Counsel for the appellants would add one more prerequisite to an effectual gift, and that is that the donor, when the gift has been made in the apprehension of death from disease, must have died of the same disease, and he calls our attention to expressions of judges to that effect. I have examined all the cases to which he refers, and

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many more, and find that these expressions were all made in cases where the donor died from the same disease from which he apprehended death when he made the gift, and that none of them were needful to the decisions made. The doctrine meant to be laid down was that the donor must not recover from the disease from which he apprehended death. I am quite sure that no case can be found in which it was decided that death must ensue from the same disease, and not from some other disease existing at the same time, but not known." (579–80.)

NOTE.—"The decisions are not entirely harmonious as to the sufficiency of the mere delivery of such deposit books to constitute a valid gift, either *inter vivos* or *causa mortis*. But the general rule in England and in this country, and particularly in this state, is that any delivery of property which transfers to the donee either the legal or equitable title, is sufficient to effectuate a gift; and hence it has been held that the mere delivery of non-negotiable notes, bonds, mortgages or certificates of stock is sufficient to effectuate a gift. (2 Redf. on Wills, 312; Westerlo v. DeWitt, 36 N. Y. 340; Champney v. Blanchard, 39 id. 111; Penfield v. Thayer, 2 E. D. Smith, 305; Walsh v. Sexton, 55 Barb. 251; Johnson v. Spies, 5 Hun, 468; Allerton v. Lang, 10 Bosw. 362; Camp's Appeal, 36 Conn. 88; Bates v. Kempton, 7 Gray, 382; Chase v. Redding, 13 id. 418; Pierce v. Boston Savings Bank, 129 Mass. 425; Tillinghast v. Wheaton, 8 R. I. 536; In re Mead, L. R. [15 Ch. D.] 651; Moore v. Moore, L. R. [18 Eq.] 474.)" (577.)

To establish a valid gift, the evidence must show a delivery of the property, with intent on the part of the donor to divest himself of title and the possession, and must be inconsistent with any other intention.

Julia Cody deposited a sum of money in a savings bank in her own name. Subsequently she deposited it in an account entitled "Julia Cody or daughter, Bridget Bolin," The mother lived with and was supported by her daughter, and, because of infirmities was the object of solicitude and care. The pass book came into the hands of the daughter, who thereafter retained the custody of it, as she did all of her mother's property. On the accounting of the daughter, she claimed the deposit as a gift.

Construction :

Untenable; the facts did not authorize the inference of a gift or a transfer of title.[1] *Matter of Bolin*, 136 N. Y. 177.

From opinion:—"The principle decided in Sanford v. Sanford (45 N. Y. 723, and again in 58 id. 69) seems to be applicable to the facts before us, and to so hold. (See, also, Fowler v. Butterly, 78 N. Y. 68, 72; Scott v. Simes, 10 Bosw. 314.)"

[1]The deposit of money in a savings bank by a husband to the credit of his wife or himself, or the survivor of them, imports a gift to the wife in case she survives her husband. Where, under such circumstances, the husband has informed his wife of his purpose to give her the deposit, a delivery of the pass book by the husband to the wife is not necessary to perfect the gift in her; and her administrator is entitled to hold the deposit as against the executors of the husband. *McElroy* v. *National Savings Bank of Albany*, 8 App. Div. 192.

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In an action to determine the conflicting claims of the parties to a deposit in a savings bank, these facts appeared: In 1866 J., defendant's intestate, made the deposit in question of his own money; it was credited to his son A., plaintiff's testator. J. signed in his own name the request to the bank to receive the deposit; he received the pass book, in which were printed the rules of the bank; these provided that drafts may be made personally or by written order of the depositor, if the bank have his signature, but that no person shall have the right to demand any portion of the deposits without producing the pass book, and that all payments to persons presenting it shall be valid. A. was at the time a minor, living with his father. J. retained possession of the pass book until his death, in 1888; in 1867 he drew out a portion of the deposit. It did not appear that A. ever knew of this deposit. In 1876 he executed to his father a receipt "in full of all debts, dues and demands." In 1870 A. opened an account of his own in the same savings bank, which he drew out in 1886, a few days before his death. On the day of A.'s death, J. stated that he started his son in life "and gave him $1,000, put it in the bank for him," and told him to let it be there. The trial court found that J. deposited the moneys with the purpose and intent that they should thereafter be and remain the property of A., and with intent to pass the title thereto to him.

Construction:

The evidence and findings failed to establish a completed gift, as the intent to give was not sufficient, and the evidence not only failed to show that the intent was consummated, but showed no subsequent intent on the part of J. to perfect the gift; also it did not warrant the inference of a trust. *Beaver* v. *Beaver*, 137 N. Y. 59, rev'g 62 Hun, 194; reported on former appeal in 117 N. Y. 421.

An irrevocable trust in favor of another than the depositor, is not established, where the facts disclosed are to the effect that a depositor opened an account in a savings bank in his own name; that he thereafter changed it to his own name in trust for his brother; that the brother subsequently died, and three days thereafter the depositor changed the account back to his own name; that the depositor at all times retained possession of the bank books until delivered up to the bank; that the brother was not informed of the account, and the depositor is alive, denying the trust and claiming never to have intended to give the money represented by the account to his brother, nor to have ever intended it for his benefit, although the depositor does not

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disclose his reasons for opening the account in trust for his brother. *Cunningham* v. *Davenport*, 147 N. Y. 43, rev'g 74 Hun, 53.

Distinguishing Martin v. Funk, 75 N. Y. 134; Willis v. Smith, 91 id. 297; Mabie v. Bailey, 95 id. 206.

The question whether or not a trust in personal property is created by a donor when he opens an account and makes deposits in a bank, where the trust is sought to be established by proof of such acts on his part, depends upon his intention at the time.

The question as to the creation of a trust under such circumstances is one of fact, which is to be determined in each particular case from the acts and declarations of the parties and from the circumstances surrounding the transaction at the time of the performance of the several acts.

It appeared that William Haux, on the 3d day of January, 1870, deposited with the Dry Dock Savings Institution, the sum of ten dollars, "in trust for Rosa, Charles and Henry Haux," who were his children; that he subsequently made other deposits, amounting at the time of his death to $3,000; that these children died during his lifetime, but that after their death he continued to make use of the same account; that, originally, the account consisted of the savings of all his children, including two not named in the account, but that after 1886, and when his account in another savings bank had reached $3,000, he began to deposit all his profits in the Dry Dock Savings Institution; that he always retained control of the moneys; on one occasion withdrew a part, and that upon the same day when the account in question was opened, he had opened another account in the same institution, entitled, "William Haux, in trust for William Haux," and that he had delivered the pass book of this account to his son, William Haux, Jr., who always retained its possession.

Construction:

There was no intention upon the part of the depositor to create a trust in respect to the balance of the account in question which remained in the bank at the time of his death. *Haux* v. *Dry Dock Savings Institution*, 2 App. Div. 165; citing Cunningham v. Davenport, 147 N. Y. 43.

Where moneys have been deposited in a savings bank by a party (since deceased) in his name in trust for another, and the interest has been drawn by the depositor during his life, and a portion of the principal of the fund has been paid over to the *cestui que trust*, who received during the depositor's life a letter of instruction as to the disposition to be made of the fund, the transaction constitutes a valid trust, and is not a gift. Martin v. Funk, 75 N. Y. 134; Willis v. Smyth, 91 id. 297; Mabie v. Bailey, 95 id. 206, 207.

The fact that the depositor retained the bank book and drew the interest during his life, is not inconsistent with an inteution to create a trust.

The fact that part of the money represented by the deposit was paid to the beneficiary by the depositor, is not evidence of a loan, the presumption being that it was given in satisfaction of an antecedent debt.

The fact that the money was intended to go to the beneficiary, only on the depositor's death, does not render the transaction a testamentary disposition, the interest of the defendant being vested at the time of the deposit.

If, as a condition of the deposit, the defendant promised to pay any part of the deposit to others, such parties must pursue their own remedies against the defendant,

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and the executors of the deceased depositor are not charged with the duty of enforcing the execution of any such obligation. *Grafting* v. *Heilmann*, 1 App. Div. 260.

2. TRUSTS ARISING FROM CONTRACTS OF INSURANCE.

A life insurance company issuing policies on the tontine or "ten years dividend system," is in no sense a trustee of any particular fund for the holder of such a policy; their relations are simply that of debtor and creditor, and the policyholder, at the expiration of the ten years, is not entitled to an accounting, in the absence of any evidence of misappropriation, wrong doing or mistake on the part of the company.

The apportionment made by the company is not absolutely and at all events conclusive upon the policyholders. It is to be equitably made, and in the first instance by the officers and agents of the company, and *prima facie*, as so made, is to be regarded as equitable. The policyholder, however, has the right, upon proper allegations of fact, showing that the apportionment is not equitable or has been based upon erroneous principles, to have a trial and make proof of these allegations, and if proved, it is for the court to declare the proper principles upon which the apportionment is to be made.

The mere fact that an account in issue is complicated, does not in all cases oblige the court to take equitable jurisdiction; it is a matter largely within the discretion of the court, and if, considering all the circumstances, it appear that it would be of very great inconvenience and possibly oppressive to the defendant, the plaintiff will be remitted to his action at law. *Uhlman* v. *N. Y. Life Ins. Co.*, 109 N. Y. 421, aff'g 13 Daly, 47.

Citing Cohen v. N. Y. Mutual Life Ins. Co., 50 N. Y. 610; People v. Security Life Ins. Co., 78 id. 114; Bogardus v. New York Life Ins. Co., 101 id. 328; Foley v. Hill, 2 H. of L. Cas. 28–32, and distinguishing Marvin v. Brooks, 94 N. Y. 71, and Pierce v. Equitable Life Assurance Society (Mass.), 12 North East Rep. 858.

Upon the application of L., made expressly as trustee for his three children, defendant issued in 1863 a policy upon his life, which described the premium as paid by him "in trust for his children," naming them, and covenanted in terms to pay the sum assured to the three children or their guardians upon the death of their father. The policy remained in L.'s possession and the premiums were paid by him until 1878. The premium for that year was not paid when due, but four days thereafter L. surrendered the policy to defendant and took out a new one for the same amount, and calling for the same annual premiums, which was made payable to his second wife. There was no new examination of L.; the new policy bore the same number of the one

canceled and stated the age of L. as thirty-nine "in 1863." The first premium was paid in part by a dividend earned by the earlier policy, and the new policy acknowledged the receipt by defendant of the premium and of $1,429.44 "to be paid on delivery of this policy." That amount was paid by the cancellation of the old policy and the transfer of its surrender value to defendant in reduction of the annual premiums. L. died in 1879 and defendant paid the amount due thereon to his widow. Action upon the first policy, brought by the assured named therein.

Construction:

The plaintiffs were entitled to recover; after notifying the beneficiaries of the trust and acting upon it until it had become valuable to them, L. had no right to end it without notice to them; the plaintiffs had a vested interest in the policy at the time of its surrender, measured and represented by its surrender value, with which L. could not deal in contravention of their rights; his possession of the policy was consistent with the trust; the original policy did not lapse, the failure to pay the premium of 1878 having been waived by defendant by issuing the new policy, which was, in effect, a continuation of the original.

Good faith can not be asserted by one who aids in the diversion of a known trust fund from its lawful owners.

The trust was not so far executory as to be revocable; each payment of premium added to its surrender value of the policy and fully executed the gift to the extent of that value, and, so far as executed, L. could not destroy the trust, or, either alone or together with the insurer, wrest from the beneficiaries the product of the trust and divert it into other channels. *Garner* v. *Germania Life Ins. Co.*, 110 N. Y. 266.

Citing Barry v. Brune, 71 N. Y. 261; and distinguishing Whitehead v. N. Y. L. I. Co., 102 id. 143.

Trusts may be created in personal property by parol, and to accomplish this no particular form of words is necessary.

It is not material that the trust agreement deals with a contingent interest; when the interest becomes vested and the trustee received the fund the trust attaches to it.

H., the father of plaintiffs, at the time of his death held a policy or certificate of insurance on his life for $2,000, payable, and which was paid, to his sister, C., the original defendant and the present defendant's testatrix. In an action to recover the amount so paid plaintiffs proved a parol agreement between H. and C., to the effect that when she col-

lected the policy she would expend not to exceed $500 thereof for his funeral expenses, etc., and would divide the balance equally between plaintiffs, who were his children.

Construction:

The agreement was valid; C. received the amount of the insurance impressed with the trust created by the agreement, and so a verdict was properly rendered for the $1,500. *Hirsh* v. *Auer*, 146 N. Y. 13, aff'g 79 Hun, 493.

What memorandum attached to a policy of insurance by the assured, and action on his part impresses it with a trust. *Phipard* v. *Phipard*, 55 Hun, 433.

Insurance policy—payable to one party in trust for another—right of the party whose life is insured and who pays for the policy after delivery thereof to the trustee, to have a power inserted to substitute a new trustee—effect of paying the loss, after the death of the original trustee, to a substituted trustee—right of the legal representatives of the original trustee to recover the amount from the company. *Butler* v. *State Mut. Life Assurance Co.*, 55 Hun, 296.

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Section 84 of the Real Prop. L. provides that "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."

Section 85 of the Real Prop. L. provides that "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."

(1) A conveyance in contravention of the trust is void.

Hillen v. Iselin, 144 N. Y. 365; Douglas v. Cruger, 80 id. 15; Fitzgerald v. Topping, 48 id. 438; Briggs v. Davis, 20 id. 15; Lent v. Howard, 89 id. 169.

(2) Also a mortgage.

Mutual Life Ins. Co. v. Shipman, 108 N. Y. 19; U. S. Trust Co. v. Roche, 116 id. 120; Rathbone v. Hooney, 58 id. 463.

(3) Nor can the trustee change in any way the rights of the beneficiary in contravention of the trust.

Chester v. Jummel, 125 N. Y. 237; Leitch v. Wells, 48 id. 585.

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[1] When a trustee may sell mortgage or lease under authority of the court, see Real. Prop. L., secs. 85, 86, p. For destruction of trust by act of *cestui que trust*, see *post*, p. 813.

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(4) But land bought in by executors on a foreclosure sale may be sold by them although no power of sale is contained in the will and the beneficiaries can not dispute the title of a purchaser.

Lockman v. Reilly, 95 N. Y. 64.

(5) And where land is purchased by an unauthorized use of trust funds, a mortgage of the same is a valid instrument.

McLean v. Ladd, 66 Hun, 341.

This provision of the statute applies also to trusts of personalty.

Genet v. Hunt, 113 N. Y. 158; Lee v. Horton, 104 id. 538.

(1) So a release of a mortgage, held in trust, in contravention of the trust, is void.

McPherson v. Rollins, 107 N. Y. 316; Kirsh v. Tozier, 143 id. 390.

The creator of an express trust is powerless to destroy it.

Wallace v. Berdell, 97 N. Y. 13; Short v. Bacon, 99 id. 275; Briggs v. Davis, 21 id. 574; 20 id. 15.

(1) When an express trust may be revoked.

See Duration and Termination, *post*, p. 692.

(2) A trust obtained by fraud or duress may be avoided.

Barnard v. Gantz, 140 N. Y. 249.

The court likewise is powerless to destroy a valid express trust.

Douglas v. Cruger, 80 N. Y. 15; Lent v. Howard, 89 id. 169; Matter of Home Provident Safety Association, 129 id. 288; Cuthbert v. Chauvet, 136 id. 326; Matter of McComb, 117 id. 378.

Power of a beneficiary to terminate the trust by a release of his interest.

See Duration and Termination, *post*, p. 692.

A trust is not destroyed by a life tenant thereunder acquiring the remainder.

Ashe v. Ashe, 113 N. Y. 232.

A trust may be destroyed by the loss or destruction of the trust property.

See Personal Liability of Trustee, *post*, p. 747.

The grantees of land in trust for creditors reconveyed to the grantor by deed reciting that the trusts had been executed, when in fact there were *cestuis que trust* entitled to a sale and distribution of the proceeds. The debtor then mortgaged the land for a valuable consideration to one having constructive, but not actual, notice of the trust and reconveyance.

Construction:

The mortgagee took, subject to the execution of the trust.

The purchaser takes no benefit from the declaration of the trustee

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that the trust has ceased, but must ascertain at his peril that such is the fact.

The re-conveyance being in contravention of the trust is absolutely void, and the legal estate remained in the trustees. The mortgagee, therefore, is not within the principle which protects the *bona fide* purchaser of a legal title against a prior equity, of which he had no notice. The debtor, however, irrespective of the re-conveyance, had the legal estate as against all persons except the trustees, and those claiming under them. The mortgage, therefore, is not void, but entitles the mortgagee to redeem the land by satisfying the claims of the *cestuis que trust.*

The mortgagee, though a proper, is not a necessary party to an action by the beneficiaries of the trust to enforce its execution.

The purchaser under the judgment in such an action, to which the mortgagee was not a party, may litigate with him the validity and extent of his lien, and upon redemption of sale is entitled to the amount due the beneficiaries whom he represents, not being limited to the amount for which he purchased. *Briggs* v. *Davis*, 20 N. Y. 15.

Where there is a valid trust, for the sale of land, the party creating the trust and those holding derivative titles under him, have no rights, legal or equitable, until the purposes of the trust are satisfied.

Their interests are subject to the execution of the trust absolutely; so that a subsequent grantee, from the creator of a trust to sell for the payment of debts, acquires no right to redeem the land. *Briggs* v. *Davis*, 21 N. Y. 574, correcting decision in 20 id. 15.

C., the trustee of an express trust, brought an action of ejectment against defendant to recover possession of the premises deeded to him in trust. In the deed it was provided that the trustee might release or sell the trust estate only under the control and direction of the supreme court. For the purpose of discontinuing that action, C. executed a stipulation, under seal, containing this clause: "In consideration of the consent of defendant that this suit be discontinued, I hereby release him from all claims and demands of every description relating to the property." Upon this stipulation the court granted an order dismissing the complaint. C. having died, plaintiff was appointed trustee and brought ejectment. Defendant offered the stipulation in evidence, which was objected to and objection sustained.

Construction:

No error. The stipulation could not operate as a release or conveyance, as then it would be a conveyance in violation of the trusts, and

the granting the order thereon was not a direction or sanction to such release or sale. *Fitzgerald* v. *Topping*, 48 N. Y. 438.

Trustees can not by setting aside bank stock release other property from a trust. *Leitch* v. *Wells*, 48 N. Y. 585, digested p. 836.

S. died seized of certain premises, leaving a will by which she devised the same to B. in trust to receive the rents and profits and apply to the benefit of R. during her life, remainder to B. in fee. B. and R. united in executing a mortgage, in their individual capacity, upon the premises, which was foreclosed, they being made parties defendant. There was no allusion in the mortgage or subsequent proceedings to the trust, or to B. in the character of trustee. In an action of ejectment brought by plaintiff, who succeeded to the interest of B. as trustee, defendant claimed under the foreclosure sale. *Held*, that the mortgage bound the interest of B. in the remainder, but did not affect the life estate held by her in trust, as she had no power of disposition over it (1 R. S. 729, sec. 65) and as R. had no estate or interest in the land; and that the judgment of foreclosure did not operate as an estoppel to preclude plaintiff from asserting title. *Rathbone* v. *Hooney*, 58 N. Y. 463.

The supreme court can not destroy a valid trust. Cruger v. Jones, 18 Barb. 467.

E. in 1837, a minor and ward in chancery, was owner in fee of certain lands and was about to marry J. Prior to the marriage J. executed a marriage settlement, by which he agreed to convey to N., as trustee, the interest which upon his marriage with E. he would have in her real estate, in trust, to reserve the rents and profits and apply them to her use during their joint lives; if she should die before him, then the remainder to go to her children. The marriage and settlement was approved by the chancellor, and the deed was duly executed by J. soon after the marriage. In November, 1848, on the certificate and order of a justice of the supreme court, N. executed a deed purporting to convey to E. all the interest so conveyed, and in 1857 E. and J. executed a mortgage on the lands. N. died thereafter and no trustee was appointed in his place. E. and J. had children living born of the marriage.

Construction:

The mortgage covered E.'s and J.'s interest in the land at the time of the execution. E. then owned the fee subject to the life estate of her husband, which passed under the trust deed to N.; the trust was valid and was not extinguished by the conveyance by N., as that conveyance was void (sec. 65); but upon his death it vested in the supreme court

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under 1 R. S. 728, secs. 55, 63, 65, and the conveyance was not validated by the order of the supreme court and no greater authority was given the court by the act of 1848, "for the more effectual protection of the property of married women," and L. 1849, ch. 375, conferring authority did not affect it, as the deed was executed prior to the passage of that act.

The mortgage contained no covenant or representation of title, and E. was not estopped thereby, nor was she estopped from asserting that her mortgage was in contravention of the statute. *Douglas* v. *Cruger*, 80 N. Y. 15.

Sparrow v. Kingman, 1 N. Y. 242; National Fire Ins. Co. v. McKay, 5 Abb. Pr. N. S. 445.

The executors were directed by the will to set apart the sum of $10,000 on bond and mortgage, the income to be expended for the maintenance of the daughter during life; it also gave to the widow an annuity of $700, the executors being directed to invest sufficient to produce it. The executors had not, at the time of the trial, made any investments, and had, before that time, transferred to the plaintiffs, who were the widow and daughter, the latter then being of age, and who were the only persons interested, all the real and personal estate of the testator in their hands. Plaintiffs asked that the trusts be extinguished.

Construction:

The court had no authority to permit the alienation or abrogation of such a trust. *Lent* v. *Howard*, 89 N. Y. 169.

Land bought in by executors on a foreclosure sale may be sold by them, although no power of sale is contained in the will, and the beneficiaries can not dispute the title of a purchaser. *Lockman* v. *Reilly*, 95 N. Y. 64.

Citing Clark v. Clark, 8 Paige, 152; Schoonmaker v. Van Wyck, 31 Barb. 457; Valentine v. Belden, 20 Hun, 537; Cook v. Ryan, 29 id. 249; Long v. O'Fallon, 19 How. (U. S.) 116; see, also, Haberman v. Baker, 128 N. Y. 253; Yonkers Bank v. Kinsley, 78 Hun, 187; Duane v. Paige, 82 id. 139.

Although a trustee uses trust funds to make an unauthorized purchase, the legal title to the premises vests in him, and as the title does not come to him under the will, an unauthorized mortgage of the same is a valid instrument. *McLean* v. *Ladd*, 66 Hun, 341; see, also, Valentine v. Belden, 20 id. 537; Yonkers Savings Bank v. Kinsley, 78 id. 186.

Where a trust deed is actually delivered to the grantee, the rights of the *cestui que trust* attach, and the effect of the delivery can not be impaired by any mental reservations by the grantor, or oral conditions repugnant to the terms of the deed attached to the delivery. Hence, it

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can not be shown, to defeat the deed, that the delivery was with the intent that the delivery should not take effect, unless again delivered, or unless the grantor afterward determined that it should take effect, or upon any other contingency contrary to the terms of the instrument.

The deed once given, is irrevocable, and can not be affected by any subsequent act of the grantor in exercising control over the property conveyed, or the omission of the trustee to perform the duties of the trust. *Wallace* v. *Berdell*, 97 N. Y. 13.

Distinguishing Fisher v. Hall, 41 N. Y. 416; citing Warrall v. Munn, 5 id. 229, 238; Lawton v. Sager, 11 Barb. 349; Arnold v. Patrick, 6 Paige, 310, 315; see, also, Meiggs v. Meiggs, 15 Hun, 453; Hyde v. Kitchen, 69 id. 280.

The right which an assignor for the benefit of creditors has to discharge the trusts, by payment of the debts before sale by the assignee, and to declare to whom the lands held in trust shall belong upon its termination and his right to grant or devise the land subject to the execution of the trust, are merely equitable, and do not impair or diminish the estate of the assignee, which remains perfect and exclusive until the purposes of the trust, in fact, have been accomplished. *Short* v. *Bacon*, 99 N. Y. 275.

H., defendant's intestate, executed to the executors of S. two written instruments, by each of which he promised to pay to them as such executors at his death, if he died without heirs, a sum specified, which the instrument described as a fund held by the executors in trust, in which H. had a life estate, with remainder over to his heirs. H. died leaving an heir. Action to recover the sum specified.

Construction:

As the condition in the instrument, if carried out, would cause the fund to fall into the estate of H., subject to administration, it would result in an unlawful disposition of the money, and so it was illegal and void; the money was repayable on the death of H., irrespective of the question whether he left heirs or not; and plaintiff was entitled to recover.

Also, as the cause of action did not accrue until after the death of H., the statute of limitations did not begin to run until then, and, as the action was brought within the time limited after such death, it was not barred. *Lee* v. *Horton*, 104 N. Y. 538.

D., for the purpose of making a provision for F., a daughter, and two grandchildren, conveyed to her certain premises, she executing to him a mortgage thereon, which stated that it was given as security, among other things, for the payment to him or to the general guardian

of plaintiff, one of the granddaughters of D., of the sum of $50 annually for the benefit of plaintiff until she should arrive at the age of fifteen, and thereafter the further sum of $100 until she should arrive at the age of twenty-one. The deed and mortgage were recorded. Thereafter D., at the request of F., and without consideration, executed a certificate of satisfaction of the mortgage which was recorded and a memorandum was made in the margin of the record of the mortgage to the effect that it was discharged of record. Subsequently the premises were conveyed by F. for a full and valuable consideration, the grantee having no actual notice of the execution of the mortgage. Action to foreclose the mortgage.

Construction:

A valid and irrevocable trust was created thereby, and as the same had in no way been renounced by the *cestui que trust*, the discharge was in contravention of the trust and was, therefore, void.

Also, the grantees were chargeable with notice that plaintiff had a beneficial interest under the mortgage, and the satisfaction thereof was an act not in the execution of the trust and was beyond the power of the trustee. *McPherson* v. *Rollins*, 107 N. Y. 316.

Distinguishing Field v. Schieffelin, 7 Johns. Ch. 150, and following Martin v. Funk, 75 N. Y. 134.

A mortgage was construed not to be in violation of the trust. *Mutual Insurance Co.* v. *Shipman*, 108 N. Y. 19, digested p. 950.

Conveyance of trust property, when void.—The statute makes every conveyance or other act of the trustees of an express trust in lands, in contravention of the trust, absolutely void, and, by analogy, the same rule governs trusts of personal property. *Genet* v. *Hunt*, 113 N. Y. 158, 168, digested p. 456.

Citing, 1 R. S. 730, sec. 65; Graff v. Bonnett, 31 N. Y. 9; Campbell v. Foster, 35 id. 361.

A trust is not destroyed by life tenant thereunder acquiring the remainder. *Ashe* v. *Ashe*, 113 N. Y. 232, aff'g 47 Hun, 285, digested p. 192.

See, also, Raymond v. Rochester Trust, etc., Co., 75 Hun, 239.

Diversion of trust funds. Trust fund can not be diverted even by court. *Matter of McComb*, 117 N. Y. 378, digested p. 940.

A mortgage was construed not to be in contravention of the trust. *United States Trust Co.* v. *Roche*, 116 N. Y. 120, digested p. 341.

Trustee can not change rights of the beneficiaries. *Chester* v. *Jumel*, 125 N. Y. 237, digested p. 660.

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While the court has power, in proceedings for the voluntary dissolution of a corporation, to decree a distribution of its funds among those entitled thereto, it may not take from a trustee funds placed in his hands by the corporation for a specific purpose, pursuant to a contract obligation, and itself distribute them through its receiver instead of through the trustee; the latter is, notwithstanding the dissolution, entitled to the possession of the trust fund, and the authority of the court is limited to compelling the trustee to distribute the fund, as provided for by the contract, and under the supervision and orders of the court. *Matter of Home Provident Safety Fund Association*, 129 N. Y. 288.

The supreme court has no power to compel a trustee to consent to a destruction of the trust, and, it seems, the statutes of this state have denied to him the power to do any act of his own volition which will accomplish that result. (1 R. S. 679, secs. 63, 65.)

The supreme court had no power to grant an order in an action for partition between heirs and devisees, authorizing and directing a testamentary trustee of certain express trusts, which included the real estate in suit, to enter into a stipulation, providing that a judgment shall be entered adjudging the will void as a will of real property; and this, although the parties interested sanctioned and desired this disposition of the matter. *Cuthbert* v. *Chauvet*, 136 N. Y. 326.

Citing Douglas v. Cruger, 80 N. Y. 19; Lent v. Howard, 89 id. 169.

NOTE.—"The will of Lasak (the will in question in above) was admitted to probate by the surrogate of Westchester county after a prolonged contest, having for its foundation an alleged want of testamentary capacity, and his decree has been affirmed by this court. (In re Lasak, 131 N. Y. 624.)" (328.)

C., a woman eighty years of age, executed and delivered to H., her son-in-law, who was also her trusted and confidential adviser and agent, and to her son J., an instrument under seal, by which she conveyed to them certain railroad bonds, which had been for some time previous in the custody of H., in trust, to pay a portion of the income to each of certain beneficiaries named during life, and upon the death of each, the principal to go to the trustees. No power of revocation was reserved in the instrument. H. died, and C. executed another instrument, by which S. was appointed trustee in the place of H. C. thereafter executed an instrument, revoking and annulling the trust deed and the appointment of S. In an action to procure a revocation of the trust, the referee found that C. did not, at the time of the execution and delivery of the first instrument, know that its legal effect was to make the disposition of the bonds irrevocable. It appeared that at the time she

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signed the instrument, S., although the bulk of her property was apparently disposed of thereby, also executed a will.

Construction:

Under the circumstances, it devolved upon the trustees to show that the transfer was the voluntary, intelligent act of the party making it, and that its nature and effect were clearly understood by her, and as the proof did not warrant that conclusion, the general term was warranted in reversing the judgment entered upon the report of the referee in favor of the defendants. *Barnard* v. *Gantz*, 140 N. Y. 249.

NOTE 1.—"If it appears that the power to revoke should have been expressed in the instrument, a court of equity will now regard as done, whatever the parties really intended, and which in good conscience should have been done, and thus the relief will be adapted to the exigencies of the case. (Van Rensselaer v. Van Rensselaer, 113 N. Y. 208, 214; Bell v. Merrifield, 109 id. 202, 207; Murtha v. Curley, 90 id. 372; Valentine v. Richardt, 126 id. 272; Code, sec. 1207.)" (255.)

NOTE 2.—"The law is not so impracticable as to refuse to take notice of the influence of greed and selfishness upon human conduct, and in the case supposed it wisely interposes by adjusting the quality and measure of proof to the circumstances, to protect the weaker party, and, as far as may be, to make it certain that trust and confidence have not been perverted or abused. (In re Smith, 95 N. Y. 522.)

"The principle has been applied to a great variety of contracts and dispositions of property between persons standing in the same or similar relations to each other. (Nesbit v. Lockman, 34 N. Y. 167; Marx v. McGlynn, 88 id. 357; Green v. Roworth, 131 id. 462.)" (257–258.)

A person dealing with a trustee must take notice of the scope of his authority, and, while an act within his authority done by him with intent to defraud the estate and which accomplished that purpose, will bind the estate, or the beneficiaries, as to third persons acting in good faith and without notice, where the act is beyond the scope of the trustee's authority, such third person is not protected.

Defendant L., who, pursuant to an arrangement, had bid off at a foreclosure sale certain lands in which three infants had an interest as children and heirs at law of the deceased mortgagee, upon a receipt of a deed from the widow of the mortgagor of her interest in the lands, executed a mortgage thereon to defendant O., in trust for the three children for $1,000, payable in three installments, with interest, which mortgage was duly recorded. Subsequently, L. conveyed the lands to O., who thereafter, and on February 19, 1886, executed, without consideration, and acknowledged a discharge of the mortgage, which he caused to be recorded on March 9, 1886. The first installment of the mortgage was not then due. In an action by the children to reinstate the mortgage and to foreclose the same it appeared that before the execution of the

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discharge, O. applied to defendant, the B. Savings Bank, for a loan on the property, which application was granted February 1, 1886. On examination of the title an abstract by the county clerk was submitted to the bank; this contained a memorandum of the mortgage, which was described as given in trust for said minor children. Across this was written: "Discharged March 6, 1886." The bank made the loan, having no notice or knowledge of the mortgage except as given by the abstract and the record of the mortgage.

Construction:

The acceptance by O. of the mortgage containing the declaration of trust was an acknowledgment of the trust and bound him to perform it; the satisfaction of the mortgage was a breach of trust; the bank was chargeable with knowledge of the trust, also of the facts that the relation of the trustee to the property had changed so that when he executed the satisfaction he was himself the owner of the land, and in satisfying the mortgage was dealing with the trust, and he satisfied it before it became due; there was no indication in the mortgage of authority in the trustee to accept payment before it became due, or to vary the trust security; the bank was bound to inquire by what authority the trustee acted, and having failed to do so, and in the absence of proof of any affirmative power conferred upon him, it was not protected,[1] and plaintiffs were entitled to the relief sought. *Kirsch* v. *Tozier*, 143 N. Y. 390, aff'g 63 Hun, 607.

Citing McPherson v. Rollins, 107 N. Y. 316.

"In this state trust estates are inalienable by force of statute, although there is nothing in the nature of such an estate which makes them inalienable *ipso facto*. (Robert v. Corning, 89 N. Y. 226.)" *Hillen* v. *Iselin*, 144 N. Y. 365, 379, digested p. 471.

See, also, Cochrane v. Schell, 140 N. Y. 516, digested p. 519; O'Donohue v. Boies, 92 Hun, 3; Cruger v. Jones, 18 Barb. 469.

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Section 90 of the Real Prop. L. provides that "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 expressly prescribed by law. The estate

[1] Baker v. Bliss, 39 N. Y. 70, and cases cited; Story Eq. Jur. sec. 400, *et seq.*

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."

Hoag v. Hoag, 35 N. Y. 469 ; Kip v. Hirsh, 103 id. 565.

(1) The section of the statute (1 R. S. 730, sec. 67, and L. 1875, ch. 545), which was superseded by the above (Real Prop. L. sec. 90,) applied to personalty.

Mills v. Husson, 140 N. Y. 99.

(2) It also applied to assignments made before as well as those made after its passage.

Kip v. Hirsh, 103 N. Y. 565 ; Mills v. Husson, 140 id. 99.

(3) But the trust ceases when the debts are in any mode paid or discharged.

Selden v. Vermilya, 3 N. Y. 525.

Sec. 89 of the Real Prop. L. provides that "when the purposes for which the express trust is created ceases the estate of the trustee shall also cease."

Selden v. Vermilya, 3 N. Y. 525 ; Manice v. Manice, 43 id. 305 ; Vanderpoel v. Loew, 112 id. 167 ; Genet v. Hunt, 113 id. 158 ; Miller v. Miller, 109 id. 194 ; Watkins v. Reynolds, 123 id. 211 ; Matter of Smith, 131 id. 239 ; Locke v. Farmers' Loan and Trust Co., 140 id. 135 ; Hopkins v. Kent, 145 id. 363 ; Clark v. Clark, 147 id. 639.

(1) Where the trust is "to apply" during an authorized term the trust ceases on the death of the beneficiary before the expiration of the term.

Stevenson v. Lesley, 70 N. Y. 512; Provoost v. Provoost, id. 141; Crooke v. County of Kings, 97 id. 421.

(2) And the legal estate passes to those entitled to the possession and profits under secs. 72, 73 of Real Prop. L. (formerly 1 R. S. 72, secs. 47, 49) without the necessity of a conveyance.

Selden v. Vermilya, 3 N. Y. 525; Manice v. Manice, 43 id. 305; Nearpass v. Neuman, 106 id. 47; Watkins v. Reynolds, 123 id. 211.

A trust is not prolonged to its own construction by mere inference or implication.

Locke v. Farmer's Loan and Trust Co., 140 N. Y. 135.

Section 76, subdivision 3 of the Real Prop. L. allows trusts to be created "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."

Downing v. Marshall, 23 N. Y. 366.

(1) But the trust may be for the lives of any number of bene-

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ficiaries, provided it is to terminate in any event within two lives in being, so as to satisfy the statute against perpetuities.

Crooke v. County of Kings, 97 N. Y. 421; Schermerhorn v. Cotting, 131 id. 48.

(2) As to the duration of trust which suspends the power of alienation or the absolute ownership, see *ante*, p. 368.

(3) The trust instrument may indicate any "shorter term" as until judgment is recovered against the beneficiary.

Bramhall v. Ferris, 14 N. Y. 41.

Or until the beneficiary becomes solvent.

Hall v. Hall, 24 N. Y. 647.

Or, that the trust shall cease on the attempt of a beneficiary to interfere with its execution.

Van Cott v. Prentice, 104 N. Y. 45.

Section 76, subdivision 4 of the Real Prop. L. allows trusts "to receive the rents and profits of real property and accumulate the same for the purposes, and within the limits prescribed by law."

Duration of trusts for accumulation.

See, Accumulations, *ante*, p. 499.

Section 83 of the Real Prop. L. provides that "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."

A trust of real property may be terminated by exercise of a power of revocation, reserved in the deed creating the trust.

See Real Prop. L., secs. 125, 128, *post*, pp. 890, 891.

A trust of personal property may likewise be revoked where a power to do so has been reserved in creating the trust.

Von Hesse v. MacKaye, 136 N. Y. 114.

Power of the trustee, creator of the trust, or the court to destroy a valid express trust.

See, Indestructibility of the trust, p. 683.

Termination of trusts for married women.

See, Married women, *ante*, p. 63.

The statute of limitations does not apply to express trusts.

Hamer v. Sidway, 124 N. Y. 538.

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A trust to sell real estate for the payment of debts ceases when the debts are in any mode paid or discharged.

A debtor conveyed lands to trustees upon trust to sell the same for the benefit of certain specific creditors, and to re-convey to himself such parts of the property as should remain unsold after satisfying the trusts. Afterwards he conveyed his residuary interest in the property to the same trustees *for the benefit of the same creditors*, and in *satisfaction* of their demands, the creditors on their part accepting the trust fund *as a satisfaction* of their claims.

Construction:

The original trust was determined, and the whole legal and equitable title to the property became vested under the statute (1 R. S. 728, secs. 47, 49) in the creditors.

Same case:

The conveyance by the debtor of his residuary interest to the trustees, was preceded by and in pursuance of an agreement between the debtor and the creditor, in which he covenanted to execute such conveyance and they to discharge their claims; and in the same instrument the creditors agreed among themselves that arrangements should immediately be made for the disposition of the trust property, and that the same should be sold by the trustees, unless an amicable division without the sale should be sooner agreed upon. This agreement was referred to in the subsequent conveyance of the debtor.

Construction:

The agreement and conveyance did not have the effect either to continue the trust estate in the original trustees, or to continue or create in them a *power in trust* to sell the trust property.

The whole title of the debtor vested in the creditors, the original *cestuis que trust.* One of them might maintain against the others a bill for the partition of the property. *Selden* v. *Vermilya*, 3 N. Y. 525.

A provision in a will that the interest of a beneficiary for life in property shall cease on the recovery of a judgment by creditors to reach it, is valid. *Bramhall* v. *Ferris*, 14 N. Y. 41, digested p. 1028.

The will attempted to devise real estate used as a manufacturing establishment, to the executor in trust, to continue the factory in operation for two lives in being, and upon the death of the survivor of them, to sell the same; the income of the property, and the proceeds after its conversion, to be distributed to one unincorporated association and three corporations for religious and charitable purposes.

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Construction:

The provision failed as a trust to receive and apply the rents and profits, of real estate, because the lives on which the trust depended, were those of persons having no interest in its performance, while the statute (1 R. S. 728, sec. 55, sub. 3) requires it to be dependent upon the life of the beneficiary. *Downing* v. *Marshall*, 23 N. Y. 366.

A trust to pay to the beneficiary an annuity and the principal when he reaches thirty, or as soon thereafter as he becomes solvent, is valid. *Hull* v. *Hull*, 24 N. Y. 647, digested p. 719.

If the trustee in insolvency do not take possession of the property assigned, and the same continues in the possession of the insolvent, or his lessee, for thirty years thereafter, the presumption of law is that the purposes of the trust have been satisfied, and is against an outstanding title in the trustee. *Hoag* v. *Hoag*, 35 N. Y. 469.

A trust to receive rents ceases with the trust to apply them for the life of a person upon the death of the beneficiary and the devises in trust to convey to remainderman immediately to take effect in actual enjoyment. *Manice* v. *Manice*, 43 N. Y. 305, digested p. 423.

See, also, Matter of McCaffrey, 50 Hun, 371.

So, also, see Estates to trustees *in solido* or in shares. *Bruner* v. *Meigs*, 64 N. Y. 506, digested p. 1013.

See, also, Roberts v. Cary, 84 Hun, 328.

Where the trust is "to apply" during the minority of the beneficiary the trust ceases upon the death of the beneficiary before majority. *Stevenson* v. *Lesley*, 70 N. Y. 512, digested p. 429.

Trust to pay income to widow until youngest child was of age terminated at death of widow, or before that by arrival of youngest son of age. *Provoost* v. *Provoost*, 70 N. Y. 141.

The statute of uses and trusts (1 R. S. 728, sec. 55) does not require a trust to be limited, as to its duration, upon the lives of beneficiaries alone; it permits rents and profits to be received and held for the benefit of any number of persons during their lives, or for a "shorter time," and under the statute against perpetuities (1 R. S. 723, sec. 15), it is immaterial whether the two designated lives, beyond which the power of alienation may not be suspended, are strangers or beneficiaries.

A devise, therefore, in trust to receive and apply rents and profits during the lives of more than two beneficiaries, but terminable in any event upon the expiration of the lives of not more than two persons who are strangers to the trust, meets the requirements of both statutes.

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Moreover, such a trust may be sooner terminated by the death of all the beneficiaries before that of the persons on whose lives the trust is limited. Thus, a devise to a trustee during his life for support of nine beneficiaries, is valid. *Crooke* v. *County of Kings*, 97 N. Y. 421, digested p. 444.

NOTE.—The following decisions relate to trusts which had no measure of duration, except the natural terms alone, which consequently became the sole guide to the intended length of the trust and stood unaffected by the corrective element of an expressed and stipulated term, bringing the duration within a lawful limit. (Hawley v. James, 16 Wend. 61; Jennings v. Jennings, 7 N. Y. 547; Amory v. Lord, 9 id. 404; Savage v. Burnham, 17 id. 561; Downing v. Marshall, 23 id. 366; Knox v. Jones, 47 id. 396.) (See opinion on p. 441).

From opinion.—(After discussing the claim that the statute required that the lives on which the duration of the trust depended must be those of the beneficiaries, the opinion proceeds): "It is claimed to be found in the statute which authorizes the creation of the trust (1 R. S. 728, sec. 55), and which, while aiming only to prescribe the character of the trust property and dictate the trust objects, does not thereby also affect the trust term. It permits rents and profits to be received and held for the benefit of any number of persons during their lives or a shorter term. Unlike the other statute it fixes no arbitrary limit of two designated lives, but leaves it to run through any number, so far as its own conditions are concerned. But it is argued that it is the inherent and necessary character of such a trust that it can not exceed in duration the lives of the beneficiaries, and if its term is measured by some other life, that life, and so the trust term, may continue after the beneficiaries are dead, and no such trust is authorized to be created, but only for the lives of not more than two beneficiaries. But the inherent character of the trust, its own essential limitations, may very well form an element in the construction to be given to the language creating it. That character and those limitations are such that the trust can not exceed in duration the lives of the beneficiaries, because upon their death its purpose is accomplished, and a trust supposes a beneficiary, and so its very creation implies necessarily, without express words, a termination at such period. If then, in creating the trust, one or two lives of persons not beneficiaries are designated as its measure of duration, it follows that such designation can never be intended to lengthen the trust beyond its possibility of existence, and that the language which confines its benefits to persons who are or may be living, sufficiently indicates an intention to end it at their deaths unless it is earlier terminated by the close of the selected life, or lives. And when in the present case the vesting of the fee was fixed at the death of the trustee, the close of the selected life, that must be read and construed in connection with the other necessary limit indicated by the language declaring the purpose of the trust, and held to mean that the vesting is to take place at the end of the designated life, or of the period less than that marked by the earlier death of all the beneficiaries." (Citing, Provost v. Provost, 70 N. Y. 141; Woodgate v. Fleet, 64 id. 569; Harrison v. Harrison, 36 id. 546; Manice v. Manice, 43 id. 386; Haxtun v. Corse, 2 Barb. Ch. 507; Gilman v. Reddington, 24 N. Y. 9.)

In 1835 K., plaintiff's testator, sold certain lots in New York city to D., taking a mortgage thereon to secure part of the purchase money. In

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1840 D. executed an assignment of his property, including the lots, for the benefit of creditors, which provided that when the trust was fully executed the surplus, if any, should be returned to the assignor; the assignment was recorded. Soon thereafter K. commenced an action to foreclose the mortgage, making D. a party defendant, but not his assignee. K. bid off the property and received a master's deed, which was recorded in 1841. The lots were vacant and so remained until 1867, when plaintiffs, as executors of and having authority under the will of K., leased the lots, the lessee paying as rent the taxes thereon; he took possession and inclosed the lots, and he and his successors in business have occupied them since. In 1875 defendant contracted to purchase the lots, but refused to complete the purchase, claiming there was a defect of title by reason of the omission to make the assignee of D. a party to the foreclosure suit.

It appeared that the assignee lived twenty-five years after the assignment, and the assignor thirty years; that no successor of the assignee in the trust was ever appointed, and it did not appear that he ever claimed title to the lots, or that any creditor of the assignor or other person ever made claim under the assignment, or attempted to enforce the trust.

Construction:

The circumstances created a legal presumption that the purposes for which the trust was created, and consequently the estate of the trustee, had ceased and the title had reverted to K. or those claiming under him; and therefore, independently of the act of 1875 (Laws of 1875, ch. 545), the assignment was no substantial objection to the title.

It seems in that said act of 1875, which declares that 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, it shall be deemed discharged in twenty-five years after its creation, and so much of the estate not conveyed by the trustees shall revert to the grantor, etc., is applicable to the case; that it applies as well to assignments made before as to those made after its passage.

McCahill v. Hamilton, 20 Hun, 388, distinguished and questioned. *Kip* v. *Hirsh*, 103 N. Y. 565.[1]

The creator of a trust may provide that if any attempt should be made to interfere with the execution of the trust or to claim the securities contrary to the conditions of the instrument, that the trust should at

[1]Trusts for the benefit of the grantor and others are invalid as against the creditors of the grantor to the extent of his interest only. *Sloan* v. *Birdsall*, 58 Hun, 317.

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once cease and determine.[1] *Van Cott* v. *Prentice*, 104 N. Y. 45.

In an action of partition it appeared that the plaintiff derived title to an undivided portion of the land under a deed from his father, with full covenants, but which contained trusts empowering and directing the grantee to absolutely sell, lease or mortgage so much of the premises described, or any part thereof, as may be necessary to defray all expenses arising out of said estate, and for the support and maintenance of the grantor. The grantee was required to apply the proceeds of the sale, lease or mortgage to the payment of all expenses incurred and to invest the balance and pay all of the income to the grantor during his life, and after his death to pay over and duly transfer both principal and interest and the whole of the residue of the property conveyed to the children of the grantor, share and share alike. The grantor was made a party to the partition suit, but died before judgment was entered, leaving several children besides the plaintiff who were not made parties defendant. The action proceeded to judgment and a sale, at which P. became the purchaser. He refused to complete his purchase, claiming that the children of the grantor had an interest in fee in the grantor's share of the premises, and upon his death they should have been made parties defendant. A motion to compel the purchaser to take the title was granted.

Construction:

Error. Upon the death of the grantor the trust terminated and the real estate vested as such in his children; their title could not be divested by a sale in an action for partition to which they were not parties; upon the grantor's death plaintiff ceased to have any interest in the land under the deed, and the action should have therefore proceeded in the name of some one interested.

Questions of estoppel, as regards the purchaser and the children of the grantor, considered. *Miller* v. *Wright*, 109 N. Y. 194.

Distinguishing Morse v. Morse, 85 N. Y. 53; Delafield v. Barlow, 107 id. 535.

Where there were several takers of distinct shares, with provision for taking by survivorship, each share upon the death of a beneficiary, was released from the trust, and vested absolutely in the survivors. *Vanderpoel* v. *Loew*, 112 N. Y. 167, digested p. 454.

The title of the trustees, in legal effect, was limited in duration to the

[1] Where there is a condition that the trust may be terminated on the consent of specified persons, court can not substitute others, for those named. *Matter of Vanderbilt*, 20 Hun, 520.

trust term. (Stevenson v. Lesley, 70 N. Y. 512; Crooke v. County of Kings, 97 id. 451.) *Genet* v. *Hunt*, 113 id. 158, digested p. **456.**

This case treats of an agreement between husband F. and wife, and J., trustee, conveying to the trustee lands to sell and invest the proceeds and pay income to wife for life; a subsequent agreement between the same parties, whereby husband agreed to and did quit claim to J. the lands and to pay him a certain sum each year for the support of F.'s children, the deed to be placed in *escrow* and deliverable on the performance of certain covenants by the wife; and a third agreement conveying the trust property, or the proceeds thereof, to another trustee for the purposes provided in the first deed. *Held*, the last agreement prevailed, and upon the death of wife, the property reverted to F. Invalid portions of instrument are usable to discover intent. *Nearpass* v. *Newman*, 106 N. Y. 47.

The will of M. devised an undivided one-third of his real estate to a trustee, in trust, to pay the income to his daughter E. during her life, and upon the further trust, that upon the death of E. the trustee "shall and will convey and deliver the said estate * * * to the right heirs then living" of said E.

Construction:

Upon the death of E. the trust created by the will terminated (1 R. S. 730, sec. 67), and title to the real estate held in trust vested in her heirs; a formal conveyance to them from the trustee was unnecessary. (In re Livingston, 34 N. Y. 557, 567.) *Watkins* v. *Reynolds*, 123 N. Y. 211, rev'g 51 Hun, 175.

The statute of limitations does not apply to express trusts. *Hamer* v. *Sidway*, 124 N. Y. 538.

A trust is valid if by no possibility and in no contingency it can continue longer than during the existence of two lives in being when it was created. *Schermerhorn* v. *Cotting*, 131 N. Y. 48, digested p. **469.**

The rule that the gift of the income of property is a gift of the property itself, only applies where there is no limitation of time attached to the gift.

A gift of income followed by a gift over of the *corpus* on the happening of a contingency, or the death of the beneficiary, is a gift of the income for the intermediate period only.

A clause in the will of H. directed that one-third of his residuary estate should be held in trust by his executors, who were directed out of the income to pay to the testator's son R. $100 per month "for his support and maintenance, and for the support and maintenance of his

daughter" E. during her minority; the clause to be operative only in case she should, after she attained the age of eight years, reside with the testator's wife or her relatives. In the event of E.'s surviving her father, the will gave to her one-half of said one-third, the other half to the testator's heirs at law. In the event of the decease of R. leaving no issue surviving, the will provided that the said one-third "given and devised in trust for him" should revert to the testator's heirs at law. It was expressly declared that R. in no event should "be vested with, receive or control, any part of the principal of the said one-third, but that the same shall be held as trust estate only and the income only paid to him." E. died when about fifteen years of age.

Construction:

The trust so created did not terminate on the death of E. but was created primarily for the benefit of R., and continued during his life. *Matter of Smith*, 131 N. Y. 239.

The reservation by the settlor of a trust of a right in himself to revoke the trust does not work its destruction, where the rights of the settlor's creditors are not involved.

In an action to determine the rights of adverse claimants to certain railroad bonds in the hands of plaintiff, as administrator of the estate of W., the following facts appeared: M. in his lifetime delivered the bonds in question to W., the latter giving a receipt therefor, which stated that he held them in trust for T., an adopted daughter of M., and for her sole benefit. "Said bonds for and during his life to be subject to the order" of M. M. frequently thereafter declared that he intended the transfer to be so complete that, in case "any more blackmail suits" were brought against him, W. could swear that he had no property of M. in his hands. M., subsequent to the delivery, directed W. to effect a loan for him, and use two of the bonds as security therefor, which was done.

Construction:

A valid trust was created, and the said bonds remaining in the hands of W., upon the death of M., belonged to T. *Von Hesse* v. *MacKaye*, 136 N. Y. 114, aff'g 62 Hun, 458.

Deed conveying personal property in trust—when revocable as a power of attorney. See *Heermans* v. *Ellsworth*, 3 Hun, 473, aff'd 64 N. Y. 159.

The provision of the statute of uses and trusts (1 R. S. 730, sec. 67), as amended by ch. 545, laws 1875, which declares that "where an estate has been conveyed to trustees for the benefit of creditors * *

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* such trust shall be deemed discharged at the end of twenty-five years from the creation of the same," and the estate conveyed, not granted or conveyed by the trustee, shall revert to the grantor or person claiming under him, etc., "to the same effect as though such trust had not been created," applies to personal as well as real estate.[1]

The amendment also applies to assignments previously executed, and is constitutional. *Mills* v. *Husson*, 140 N. Y. 99.

In this case the intended duration of the trust was only certain down to the death of the life tenants, and, after that, became at least doubtful and uncertain, in view of its natural and reasonable purposes, and the language used by the settlor in creating it. In such a case, the trust is not to be prolonged to its own destruction by mere inference or implication (Greene v. Greene, 125 N. Y. 506), but ends at the termination of each life estate. *Locke* v. *The Farmers' Loan and Trust Co.*, 140 N. Y. 135, 148, 149, rev'g 66 Hun, 428.

Trust ended with life estate, although there was a direction that upon her death "her share to revert to my trustees for the benefit of my then children, their heirs and assigns, under the supervision of my trustees" to each of the children one-third. *Hopkins* v. *Kent*, 145 N. Y. 363.

Citing, Locke v. Farmers' Loan and Trust Co., 140 N. Y. 135; Greene v. Greene, 125 id. 512; Cooke v. Platt, 98 id. 38.

VII. CERTAIN DEVISES TO BE DEEMED POWERS.

Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896), sec. 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."

1 R. S. 759, sec. 56, Banks's 9th ed. N. Y. R. S. p. 1797 (repealed by Real Prop. L. sec. 300), was substantially the same.

See when a valid express trust is created, *ante*, p. 617.

[1] See cases at p. 567.

VIII. SURPLUS INCOME OF TRUST PROPERTY, LIABLE TO CREDITORS.

Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896), sec. 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[1] 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 can not be reached by execution."[2]

1 R. S. 729, sec. 57, Banks's 9th ed. N. Y. R. S. p. 1757 (repealed by Real Prop. L., sec. 300), was substantially the same; "in equity" was inserted after "liable" and "at law" after "execution".

NOTE 1.—As to rights of creditors of the creator of the trust. See Chaplin's Express Trusts and Powers, 578, *et seq.*

NOTE 2.—As to creditors of the trustee, see pp. 773–79.

Where executors took by implication the legal estate during the lives of grandchildren such grandchildren had no present legal interest which could pass by a sale under judgment and execution against them. *Brewster* v. *Striker*, 2 N. Y. 19, digested p. 620.

An attorney who defends a suit affecting the validity of the trust, at the request of such *cestui qui trust*, without the concurrence of the trustee, can not reach the surplus income of the trust estate under section 57 of the statute relating to uses and trusts, to pay the costs of such defense, for the reason that he is not a creditor of the *cestui que trust*, within the meaning of that section. *Noyes* v. *Blakeman*, 6 N. Y. 567, digested p. 802.

Devise to B., son, of the income of property for life, and such interest to cease in case a judgment be recovered by creditors against him.

Construction:

(1) Upon recovery of judgment B.'s interest would cease.

(2) The testator gave a certain right in property, which was to continue for a limited time, until an uncertain event should occur.

(3) Had the bequest been to B. absolutely for life, with no provision for its earlier termination, and no limitation over in the event specified, any attempt of the testator to make the interest inalienable or to with-

[1]The *corpus* can not be reached. Kennedy v. Hoy, 105 N. Y. 134

[2]See action by judgment creditor for discovery, Code of Civ. Pro. sec. 1871.

draw it from the claims of creditors, would have been nugatory. *Bramhall* v. *Ferris*, 14 N. Y. 41.

Citing, The Blackstone Bank v. Davis, 21 Pick. 42; Hallett v. Thompson, 5 Paige, 583; Graves v. Dolphin, 1 Sim. 66; Brandon v. Robinson, 18 Vesey, 429; Shee v. Hale, 13 id. 404; Lewes v. Lewes, 6 Sim. 304.

In general, property held in trust for the debtor and for his benefit, may be reached through the agency of a court of equity and applied to the satisfaction of his debts; but not property held in trust for him upon a trust, or arising out of a fund proceeding from a third person, designed to secure to the debtor personally, a support.

But a trust arising out of a fund proceeding from a third party, is not absolutely exempt from equity jurisdiction, but is subject to the same conditions under which other property may be enjoyed by a debtor secure from attacks from his creditors.

It seems, that in such case, only so much of the trust would be subject to the demands of creditors, as would remain a surplus after providing for the proper support of the *cestui que trust*.

Therefore, in an action seeking to recover such fund by the creditors, etc., the complaint must show by proper averments, the existence of such surplus.[1] *Graff* v. *Bonnett*, 31 N. Y. 9.

It seems that the interest of a beneficiary in a trust fund, created by a person other than the debtor, can not be reached by creditor's bill.

The surplus of a trust fund, after defraying the necessary expenses of the beneficiary, are not discoverable in proceedings supplementary to execution.

A receiver in proceedings supplementary to execution can not maintain proceedings in the nature of a creditor's bill, to subject the surplus of a trust fund, etc., created by a person other than the debtor, to the payment of the judgment. *Campbell* v. *Foster*, 35 N. Y. 361.

Citing, Stewart v. McMartin, 5 Barb. 538; Bramhall v. Ferris, 14 N. Y. 41; Graff v. Bonnett, 31 id. 9.

Bequest of personal to four trustees and survivor in trust to keep same invested for use of one of the trustees, is valid. The income is controlled and directed not by the beneficiary, but by a majority of the trustees, and can not be reached by a judgment creditor of the *cestui que trust* for the payment of debts, at least until he shall become the survivor of the trustees. *Wetmore* v. *Truslow*, 51 N. Y. 338.

Distinguishing Coster v. Lorillard, 14 Wend. 265; Craig v. Horn, 2 Edw. 554.

Income of real and personal property held in trust for a debtor and for his benefit, arising out of a fund proceeding from a third person, designed to secure to the debtor personal support, can not be reached or

[1] Howard v. Leonard, 3 App. Div. 277.

taken by a judgment creditor, by means of supplementary proceedings. *Locke* v. *Mabbett*, 3 Abb. Ct. App. Dec. 68.

When a judgment debtor is the beneficiary of a trust of real or personal property by which trustees are required to receive and pay to him the income of a trust estate, the surplus may be reached by the judgment creditor, beyond what is necessary for the suitable support and maintenance of the *cestui que trust* and those dependent on him. This applies to any surplus accumulated or that shall accumulate beyond a sum for support to be fixed in the judgment. This provision of the statute (2 R. S. 173, secs. 38, 39), exempting from the operation of creditors' bills trust funds, when the trust has been created, or the trust fund has proceeded from some other person than the defendant, is not inconsistent with the provision of the statute of uses and trusts. (1 R. S. 729, sec. 57.) The surplus in case of a trust estate shall be liable in equity to the claim of the creditors of the *cestui que trust*, and the former provision does not exempt the whole income; it exempts the principal fund, and the beneficial interest of the *cestui que trust* in the income to the extent of a fair support. Cases are reviewed. *Williams* v. *Thorn*, 70 N. Y. 270.

Distinguishing and limiting Campbell v. Foster, 35 N. Y. 361; Clute v. Bool, 8 Paige, 83.

And distinguishing Graff v. Bonnett, 31 N. Y. 9; Scott v. Nevins, 6 Duer, 672; Locke v. Mabbett, 2 Keyes, 457; s. c., 3 Abb. Ct. App. 68.

Overruling Hann v. Van Voorhis, 15 Abb. Pr. (N. S.) 79.

Citing Hallett v. Thompson, 5 Paige, 586; Rider v. Mason, 4 Sandf. Ch. 351; Sillick v. Mason, 2 Barb. Ch. 79; Bramhall v. Ferris, 14 N. Y. 41.

A judgment creditor of the *cestui que trust* having obtained judgment against the trustee, fixing the amount of the surplus income of said trust estate, and directed that plaintiff's debt and costs be paid out of the surplus, and demand of such payment not having been complied with, an order was properly granted directing execution against the property of T., one of the trustees, who by disobeying the command of the judgment became personally liable. *Williams* v. *Thorn*, 81 N. Y. 381.

Where a trust provides for the payment of the income of the trust fund to the beneficiary, a judgment creditor of such beneficiary may maintain an action in equity to reach and appropriate to the payment of his judgment the surplus income beyond what is necessary for the suitable support and maintenance of the *cestui que trust* and those dependent upon him.[1]

This rule applies as well where the trust fund from which the income is derived is personal property as where it is real estate.

[1] Andrews v. Whitney, 82 Hun, 117; Bunnell v. Gardner, 4 App. Div. 321; Wetmore v. Wetmore, 79 Hun, 268.

The disposition of the income may not be anticipated by the *cestui que trust*, or incumbered by any contract entered into by him, providing for its pledge, transfer, or alienation previous to its accumulation.

The creditor by the commencement of the action acquires a lien upon the accrued and unexpended surplus, or that subsequently arising from the fund superior to the claims of general creditors, or assignees of the *cestui que trust*. *Tolles* v. *Wood*, 99 N. Y. 616.

NOTE.—(1) "When a trust has been created by one person for the benefit of another, which provides for the payment of the income trust fund to the beneficiary, a judgment creditor of such beneficiary is entitled to maintain an action in equity to reach and recover the surplus income beyond what is necessary for the suitable support and maintenance of the *cestui que trust*, and those dependent upon him. (Code of Civ. Pro., secs. 1871, 1879; Williams v. Thorn, 70 N. Y. 270; Graff v. Bonnett, 31 id. 9; Craig v. Hone, 2 Edw. Ch. 570.)

(2) "This rule applies as well when the income is derivable from a trust of personal property as that from real estate. (Hallett v. Thompson, 5 Paige, 583; Williams v. Thorn, *supra;* sec. 57, art. 2, title 2, ch. 1, part 2, R. S., 2182.)

(3) "The disposition of such an income can not be anticipated by the *cestui que trust* or incumbered by any contract entered into by him providing for its pledge, transfer or alienation previous to its accumulation. (Sec. 63, R. S., p. 2182; Graff v. Bonnett, *supra;* Williams v. Thorn, *supra;* Scott v. Nevius, 6 Duer, 672)."

(4) "The creditor of such a beneficiary acquires a lien upon the accrued and unexpended surplus income, or that subsequently arising from such fund, superior to the claims of general creditors or assignees of the *cestui que trust*, by the commencement of an action in equity to reach and appropriate it to the satisfaction of his judgment. Williams v. Thorne (*supra*)."

(5) In addition to foregoing cases on this subject, see Craig v. Hone, 2 Edw. Ch. 554; McEvoy v. Appleby, 27 Hun, 44; McEwan v. Brewster, 17 id. 223; Thompson v. Thompson, 52 id. 456 (alimony to wife and rights of wife and child in income of trust fund); Levey v. Bull, 47 id. 350 (receiver in proceedings supplementary to execution); Bunnell v. Gardner, 4 App. Div. 321; Kilroy v. Wood, 42 Hun, 636 (burden is on debtor, to show surplus); Bulkley v. Staats, 31 id. 137 (claim for board and schooling of beneficiary); Cutting v. Cutting, 20 id. 360 (appointee of a power holding as trustee for creditors of the donee); Andrews v. Whitney, 82 id. 117; Continental Trust Co. v. Wetmore, 67 id. 9 (divorce—sequestration of husband's property—trust fund for benefit of husband—receiver does not represent a wife entitled to alimony); Kilroy v. Wood, 42 Hun, 636) habits and ability of *cestui que trust* are to be considered in determining the amount that should be allowed for his support); Hann v. Van Voorhis, 5 id. 425 (when surplus income can not be reached); Wetmore v. Wetmore, 149 N. Y. 520, digested p. 709. (right of divorced wife to reach trust income of husband—not limited to income already accrued); Card v. Card, 72 Hun, 299 (evidence as to sufficiency of income); Wetmore v. Wetmore, 149 N. Y. 520 (what is to be considered in determining what is needed for support of *cestui que trust*).

An equitable title to real estate is not a subject of levy and sale on execution. (1 R. S. 744, sec. 4.) *Bates* v. *The Ledgerwood Mfg. Co.*, 130 N. Y. 200.

Plaintiff's complaint alleged in substance these facts: B. died leaving a will by which she directed her executors to sell her real estate when

it seemed to them best, and hold the proceeds in trust to pay over the income to her daughters M. and F. during their lives, and upon the death of either, the principal of her share to go to her children. M. died leaving three children. At that time the power of sale had not been executed. Her children executed a conveyance to G., their father, for life, of "so much of the interest and income mentioned and provided for" in said will "as would come and accrue to said children under and by virtue of the provisions contained in said will. The interest of G. in said land was subsequently sold on execution against him. Thereafter the remaining executor, one of them having been removed, sold and conveyed the land and received the proceeds. The purchaser at the execution sale conveyed to plaintiff all his interest in the real estate, the income and the proceeds of the sale thereof. The plaintiff asked equitable relief.

Construction:

The complaint failed to state a cause of action; said conveyance to G. did not purport to convey any interest in the land but at most only an interest in the trust fund after the land had been converted into money, and if G. took an interest under it it was simply a possible equity in the trust fund, and so he had no legal title to which the lien of judgment against him could attach, and the execution sale passed nothing to the purchaser; the complaint was insufficient to reach any such equitable interest, as equitable assets can only be reached after the remedy by law is exhausted, the evidence of which is the return of an execution unsatisfied, and the complaint contained no such allegation; also, plaintiff could not assert an interest in G. as tenant by the curtesy in his wife's land; if, as to the land in question, she was seized at all, she took only a nominal fee which was subject to be and was defeated by the execution of the power of sale; also, the right of a tenant by the curtesy is a legal right to be enforced against the claimant in possession, and so could not be enforced in this action as the purchaser under the sale by the executors was not a party. *Harvey* v. *Brisbin*, 143 N. Y. 151, aff'g 50 Hun, 376.

Application of funds by trustee, for benefit of trust estate instead of to payment of debts — remedy of creditor — charging debt on trust property benefited. *Ferris* v. *Van Vechten*, 9 Hun, 12, rev'd 73 N. Y. 113.

As to when creditors may enforce the sale under power in trust, see Powers, execution, *post*, p. 966.

As to when creditors may reach the trust property, see Personal liability of trustee, *post*, pp. 773–79.

1. Husband and wife—divorce—subjection of income of trust for husband's benefit to payment of alimony. The effect of a judgment in

an action for divorce, awarding alimony to the wife, directed to be paid by the husband, is to make her a creditor[1] of the husband within the intention of the statute of uses and trusts (1 R. S. 729, sec. 57), and, after having exhausted the remedy given her by the Code to obtain payment of alimony, she is entitled, through an action in equity, to subject the surplus income, over what is required for the husband's support, of a testamentary trust created for the husband's benefit without any valid direction for the accumulation of income, to payment of her alimony both past due and to accrue.

2. Testamentary trust not annulled by judgment applying income to payment of alimony. When a will bequeaths property in trusts and directs that the income be applied by the trustee, from time to time as it shall accrue, to the use of the testator's son for life, without any direction for accumulation, and that the son shall have no power to anticipate or dispose of any of the income until fully accrued, and declares that the will is made with reference to the laws of the state of New York relating to trusts, the will is not subverted nor the trust annulled by a judgment compelling the trustee to apply the surplus income of the trust which should thereafter accrue, as well as that then accumulated, over what is required for the son's support, to payment of alimony awarded to the son's wife by a judgment of divorce.

3. Marital unity—right of support. When a will creating a trust for the benefit of a married man makes no mention of his wife,[2] a just rule and a safe basis for adjustment, where the question of support arises between him and his wife, are furnished by treating them as one, and both entitled to support out of the income of the estate, so far as creditors are concerned.[3]

4. Provisions for husband's support. While it is the duty of the court, in an action in equity subjecting the income of a trust created for the benefit of the husband to payment of alimony to his wife, to protect the husband's right to support, the judgment in such action need make no provision for his present support, where it appears that he has an income sufficient therefor derived from property possessed by him in his own right; but the judgment should permit him to apply at any time, in case of a change in his circumstances, for leave to

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[1]See Miller v. Miller, 1 Abb. N. C. 30; Andrews v. Whitney, 82 Hun, 117; Romaine v. Chauncey, 129 N. Y., 566

[2]Williams v. Thorn, 70 N. Y. 270; Tolles v. Wood, 99 id. 616. See matter of Appleby, 33 N. Y. Supp. 724; Macomber v. Bank of Batavia, 12 Hun, 294.

[3]Williams v. Thorn, 70 N. Y. 270; Tolles v. Wood, 99 id. 616; McEvoy v. Appleby, 27 Hun, 44. As to relative rights of husband and children, see Ireland v. Ireland, 84 N. Y. 321.

share in the income of the trust. *Wetmore* v. *Wetmore*, 149 N. Y. 520, modifying, 79 Hun, 268.

From opinion—"The will creating the trust for the benefit of William makes no mention of his wife. And yet, owing to their unity of person and his duty to support her, equity will not permit the interposition of creditors until there is a surplus over and above that which is necessary for the support of himself, his wife and infant children. (Williams v. Thorn, 70 N. Y. 270; Tolles v. Wood, 99 id. 616; Sillick v. Mason, 2 Barb. Ch. 79.)

"Equity will not feed the husband and starve the wife. Neither will it favor the wife to the detriment of the husband. Treating them as one, and both entitled to support out of the income of the estate, so far as creditors are concerned, furnishes a just rule and a safe basis for adjustment where the question of support arises between themselves. In Thompson v. Thompson (52 Hun, 456) a trust had been created by will in favor of the defendant similar to the one in question. The plaintiff was the wife of the defendant, and had obtained a divorce with an allowance of eight hundred dollars per year for her support. That action, like this, was brought to compel the trustee to pay her alimony out of the income of the trust estate payable to her husband. Judgment was awarded in her favor, and the same was affirmed in the general term.

"In Clinton v. Clinton (L. R. [1 Pro. and Div.] 215) the court made an order on the respondent for payment of permanent alimony at the rate of one hundred and ten pounds per annum so long as he was in receipt of a rent charge of four hundred pounds per annum, his only source of income. The respondent had become a bankrupt, and had failed to comply with the order of the court. It was held that sequestration in general terms should issue against his property.

"In Watkyns v. Watkyns (2 Atkyns, 96) a bill was brought against the husband for maintenance. It appeared that the defendant had possessed himself of the fortune of his wife and then departed the kingdom, without leaving any provision for her maintenance. The decree adjudged that the interest arising from the trust money should be paid to her until the husband returned and maintained her. (See, also, Head v. Head, 3 Atkyns, 295; Colemore v. Colemore, referred to therein, and Miller v. Miller, 1 Abb. N. C. 30.)"

IX. WHEN AN AUTHORIZED TRUST IS VALID AS A POWER.

Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896), sec. 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."

1 R. S. 729, secs. 58, 59, Banks's 9th ed. N.Y. R. S. p. 1798 (repealed by Real Prop. L., sec. 300), was substantially the same.

See Powers—When a power in trust and not a trust is created, p. 878.

X. TRUSTEE.

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IX. RESIGNATION AND REMOVAL. (See Real Prop. L., sec. 92, *post*, p. 843.)

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1. TRUSTEE OF AN EXPRESS TRUST TO HAVE THE WHOLE ESTATE.

Real Prop. L., sec. 80 (L. 1896, ch. 547, took effect Oct. 1, 1896). "Trustee of an express trust to have the whole estate. Except as other-

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1. TRUSTEE OF AN EXPRESS TRUST TO HAVE THE WHOLE ESTATE.

wise 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."

1 R. S. 729, sec. 60, Banks's 9th ed. N. Y. R. S., p. 1798 (repealed by Real Prop. L., sec. 300), was the same, except that the expression "shall vest the whole estate in the trustees, in law and in equity" was used instead of "shall vest in the trustee the legal estate" as above.

2. QUALIFICATION OF LAST SECTION.

Real Prop. L., sec. 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."

1 R. S. 729, sec. 61, Banks's 9th ed. N. Y. R. S., p. 1798 (repealed by Real Prop. L., sec. 300), was the same.

3. INTEREST REMAINING IN GRANTOR OF EXPRESS TRUSTS.

Real Prop. L., sec. 82. "Interest remaining in grantor of express trusts. 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."

1 R. S. 729, sec. 62, Banks's 9th ed. N. Y. R. S., p. 1798 (repealed by Real Prop. L., sec. 300), was the same, except that the word "legal" was omitted before "estate and interest" and the words "as a legal estate" were added at the end of the section.

Section 71 of the Real Property Law provides that every estate or interest in land shall be deemed a legal right.

See Real Property Law, secs. 71, *ante*, p. 571.

By section 73 of the Real Property Law, a trustee of a mere passive trust takes no estate or interest, legal or equitable.

See Express Trusts, *ante*, p. 617.

By sections 77, 79 of the Real Property Law, where an attempted trust is void as a trust, though valid as a power in trust, no estate vests in the trustees but the real property to which the trust relates remains in or descends to the persons otherwise entitled, subject to the execution of the trust as a power.

See Powers, *post*, p. 878.

I. TRUSTEE'S TITLE.

3. INTEREST REMAINING IN GRANTOR OF EXPRESS TRUSTS.

Where a trust is directed for an authorized purpose, the trustee will take a legal title sufficient to carry out the trust even though no estate is in terms devised.

See, when a valid express trust is created, *ante*, p. 616.

One who has voluntarily assumed the character of trustee will not be permitted to deny it or disavow his acts in that capacity, either as against his cotrustees or the *cestui que trust*. *Easterly* v. *Barber*, 65 N. Y. 252.

Citing Perry on Trusts, secs. 245, 265, 288; Lewin on Trusts, 244; Hill on Trustees, 173; Wyllie v. Ellice, 6 Hare, 506; Drury v. Connor, 1 Harris & Gill. 220; Blomfield v. Eyre, 8 Beav. 250; Rackham v. Siddall, 16 Simons, 297; s. c., 1 M. & G. 607; Life Association v. Siddall, 3 DeG., F. & J. 58; Pearce v. Pearce, 22 Beav. 248; see, also, Reid v. Sprague, 72 N. Y. 457.

An express trustee's title is not inheritable. See, Appointment, *post*, p. 837.

As to when the trustee's title terminates. See, Duration and termination of express trusts, *ante*, p. 692.

The provision of the statute of uses and trusts (1 R. S. 729, sec. 60), declaring that every valid express trust shall vest the whole estate in the trustees, and that the beneficiaries shall take no estate or interest in the lands, refers only to the trust estate, not to an interest in the lands not embraced in the trust; it does not prevent a valid limitation of a remainder to the beneficiary of the trust to take effect in possession upon its termination, and to vest in interest at the death of the testator. *Stevenson* v. *Lesley*, 70 N. Y. 512.

Citing Embury v. Sheldon, 68 N. Y. 227. See, also, Gilman v. Reddington, 24 id. 10; Manice v. Manice, 43 id. 303; Rathbone v. Hooney, 58 id. 463; Bennett v. Garlock, 79 id. 302; Goebel v. Wolf, 113 id. 405; Matter of Crossman, id. 503; Townshend v. Frommer, 125 id. 446; Matter of Tienken, 131 id. 391; Knowlton v. Atkins, 134 id. 313; Matter of Young, 145 id. 535; Losey v. Stanley, 147 id. 560; Chism v. Keith, 1 Hun, 589; Matteson v. Armstrong, 11 id. 245; Magill v. McMillan, 23 id. 193; Moore v. Appleby, 36 id. 368; Coit v. Rolston, 44 id. 548; DaCosta v. Bass, 48 id. 31; Levey v. Levey, 79 id. 290; Nichol v. Walworth, 4 Denio, 385.

By a trust created in 1808, land was given to trustees and their heirs, in trust to sell sufficient to pay subsisting debts and to lease the residue and pay over the proceeds to the grantors and to the survivor of them, after whose death the trustee, the survivor of them and the heirs and assigns of such survivor, to hold all the residue not sold to pay debts "for the sole use, benefit and behoof of such persons as shall be the right heirs" of the grantor at the time of the death of the survivor.

Construction:

By the deed, the whole estate in law and in equity was vested in the

trustees, subject only to the execution of the trust; the persons for whose benefit the trust was created took no estate in the lands, but simply an equitable interest, a right to enforce the performance of the trust in equity; upon the death of her mother, plaintiff became entitled to the rents and profits and to the actual possession of the lands remaining in the hands of the trustees; but the remainder in the plaintiff was limited upon the trust estate, and if by the acts or negligence of the trustees their estate had been defeated, or their right of action for its possession barred, the remainder was defeated. *Bennett* v. *Garlock*, 79 N. Y. 302, rev'g 10 Hun, 328

A testamentary trustee takes simply a legal estate commensurate with the equitable estate bestowed, and outside thereof there may be remainders and future estates, or powers of sale adequate to terminate the trust.

T., by his will, gave to his executors his residuary real estate in trust during the life of his wife, directing them to pay to her $2,000 each year and after paying out of the income remaining all taxes, necessary repairs, etc., to "apply the balance or remainder once a year between my children, share and share alike, for their use, benefit and maintenance."

Construction:

The provision did not vest the entire estate in the trustees, but their estate was limited to the life of the widow; and so, outside of the trust there was a remainder in fee which in the absence of any disposition thereof in the will went, upon his death, to the heirs of the testator. *Matter of Tienken*, 131 N. Y. 391, aff'g 60 Hun, 417.

Remainders—trusts—estate of trustee. Future legal estates in lands not covered by a trust, but created to take effect in possession on the termination of a prior trust estate for life, are not within the provisions of the statute of uses and trusts (1 R. S. 729, § 60) declaring that every valid express trust shall vest the whole estate in the trustee.

Mortgage by trustee—infants' estate outside of trust—power of court. The vested interests in remainder of infants which are not included in a trust estate for life can not be included in a mortgage by the trustee under direction of the court by virtue of the proviso added by the Laws of 1886 (ch. 257), as an amendment to the 65th section of the statute of uses and trusts (1 R. S. 730), whereby a trustee under direction of

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3. INTEREST REMAINING IN GRANTOR OF EXPRESS TRUSTS.

the court or judge may, in a proper case, be allowed to mortgage or sell the real estate held in trust. *Losey* v. *Stanley*, 147 N. Y. 560.

See, also, matter of Murphy, 144 N. Y. 557.

Heirs not entitled to maintain an action for damages to realty the title of which is in trustees. *Lindheim* v. *Manhattan Ry. Co.*, 68 Hun, 122.

II. WHO MAY BE A TRUSTEE.

1. DISABILITY WITH REGARD TO TAKING TITLE.

The trustee must have the legal title. As to who may take title, reference may be made to the chapter on "Who may take and create estates," *ante*, p. 1.

Although alienism (except through descent and as otherwise provided by statute), infancy and imbecility do not prevent the taking of title, they may be a cause for removal from trusteeship. See Removal, *post*, p. 843.

A corporation, when it receives property "in trust" for any of its corporate purposes, is not, properly speaking, thereby invested with a trust, and does not become a trustee.[1] Wetmore v. Parker, 52 N. Y. 450; Fosdick v. Town of Hemstead, 125 id. 581, 595; Bird v. Merklee, 144 id. 544; Matter of First Presb. Soc. of Buffalo, 106 id. 251. It is said, however, in Matter of Howe, 1 Paige, 214, where a legacy was given, in trust, to invest and pay the income to H. for life, and thereafter to use the income for church purposes, that "wherever property is devised or granted to a corporation, partly for its own use and partly for the use of others, the power of the corporation to take and hold the property for its own use carried with it, as an incident, the power to execute that part of the trust which relates to others."

L. 1840, ch. 318, entitled, "An act authorizing certain trusts;" and L. 1841, ch. 261; L. 1846, ch. 74, Banks's 9th ed. N. Y. R. S., p. 2060, empowers literary institutions to receive property, in trust, for certain purposes.

A corporation, when it receives property subject to the payment of legacies, annuities, etc., does not thereby become a trustee. Booth v. Baptist Church, 126 N. Y. 215; Currin v. Fanning, 13 Hun, 458.

Corporations may be, however, and frequently are, authorized to act as trustees of express trusts; as for example, trust companies. See The Banking Law, L. 1892, ch. 689, art. 4, Banks's 9th ed. N. Y. R. S., p. 1099; but, otherwise, corporations, as such, are authorized to acquire only "such property as the purposes of the corporation shall require."

[1] As to power of a state or of the United States to act as a trustee, see p. 75.

II. WHO MAY BE A TRUSTEE.

1. DISABILITY WITH REGARD TO TAKING TITLE.

(Gen'l Corp. Law, L. 1892, ch. 687, sec. 11, Banks's 9th ed. N. Y. R. S., p. 978, *ante*, p. 34.

2. DISABILITY WITH REGARD TO INTEREST, RELATIONSHIP, ETC.

The testator, by the terms of the will, gave to his wife and to his niece, all his real and personal estate, property, assets and effects, subject to his debts; and directed his executors to convert the same into cash, etc., and invest for each of the legatees, one-half of the proceeds; and gave to each, the use and enjoyment of so much of the interest arising therefrom as should be necessary and proper for their respective maintenance and support; and directed, that, if the interest of their respective parts of the proceeds should not be sufficient for their respective support, a portion of the principal should be applied for that purpose, and that, in case either the wife or niece should die without heirs, the share of the one so dying, should go to the heirs at law of the testator's mother.

Construction:

1. It was the duty of the executors to sell the real and personal estate of the testator, and invest the proceeds thereof, one-half for the benefit of the widow, and the other half for the benefit of the niece; and the executors should invest as trustees for the benefit of their *cestuis que trust*, and they, as trustees, should receive the interest and pay the same over to the party entitled.

2. The widow and legatee, being appointed executrix, with other executors, of the will, can not act both as trustee and *cestui que trust;* and, therefore, in respect to her estate, the other executors must take exclusive control and management of the half of the proceeds of the estate bequeathed.

3. In respect to the half bequeathed to the niece, the widow must join with the other executors in the management and control of that half.

4. The executors must retain the control of the estate then to be invested, under the will, and manage the same. *Bundy* v. *Bundy*, 38 N. Y. 410.

See, also, Moke v. Norrie, 14 Hun, 128; Jones v. Newell, 78 id. 290; Postley v. Cheyne, 4 Dem. 492; Cocks v. Barlow, 5 Redf. 406; Solomons v. Kursheedt, 3 Dem. 307.

A bequest of personal property to four trustees and the survivor of them, in trust, to keep the same invested and apply the interest or in-

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2. DISABILITY WITH REGARD TO INTEREST.

come to the use of one of the trustees, creates a valid trust. The income in such case and the manner of its application is controlled and directed not by the beneficiary, but by the majority of the trustees; and such income, therefore, can not be reached by a judgment creditor of the *cestui que trust* and appropriated to the payment of his debt, at least until by the death of his cotrustees it shall come under his control. *Wetmore* v. *Truslow*, 51 N. Y. 338.

The fact that one of several testamentary trustees is one of the beneficiaries under the trust does not incapacitate him from acting as trustee. He can act freely as to the other beneficiaries and, as to himself, his cotrustees can exercise the control and judgment improper for him.

In case the other trustees decline to act, the court may either supply their place or take upon itself the execution of the trust so far as it ought not to be executed by said trustee and beneficiary. *Rogers* v. *Rogers*, 111 N. Y. 228, aff'g 18 Hun, 409.

Because a trustee is a beneficiary in a part of the income, his trust in the *corpus* of the property is not thereby destroyed. *Woodward* v. *James*, 115 N. Y. 346, digested p. 640.

See, also, Rose v. Hateh, 125 N. Y. 427.

A merger of the interests of trustee and beneficiary in one individual effects a legal estate in him of the same duration as the beneficial interest. *Greene* v. *Greene*, 125 N. Y. 506, digested p. 462.

An appointment of the beneficiary as trustee, made by the court on the death or resignation of the testamentary trustee, does not extinguish the trust, whether the trust would be void or not in its inception if the sole beneficiary had been appointed trustee by the instrument creating the trust. *Losey* v. *Stanley*, 147 N. Y. 560.

Citing, Rogers v. Rogers, 111 N. Y. 228; Woodward v. James, 115 id. 346; see, also, Mulry v. Mulry, 89 Hun, 531; Collins v. Donahue, 70 id. 317.

A devise to one in trust is valid notwithstanding he was a necessary wituess to prove the will. *Barnard* v. *Crossman*, 54 Hun, 53.

Where a trust is attempted to be created, and the beneficiary, who is entitled to a beneficial interest in the trust, is created a trustee, no trust is in effect created; the person named as trustee and as beneficiary takes the entire estate. Where, however, there are others interested as beneficiaries in the trust besides the trustee a valid trust is created. *Mulry* v. *Mulry*, 89 Hun, 531.

Citing, Woodward v. James, 115 N. Y. 357; Greene v. Greene, 125 id. 512.

A vice-chancellor may appoint his son a committee of a lunatic, and may hear and decide upon an application of such committee in behalf of the lunatic or his estate; the committee being only an officer of the court, and having no personal interest in the questions to be decided by the vice-chancellor. *Matter of Hopper*, 5 Paige, 489.

See, also, Underhill v. Dennis, 9 Paige, 202; Matter of Van Wagonen, 69 Hun, 365.

III. DUTIES OF A TRUSTEE.

1. WHETHER THE TRUST DUTY IS ANNEXED TO THE PERSON OR THE OFFICE

When trust attaches to the office.—A deed in trust to three persons, provided that in the event of the death of either of them the survivors might, with the consent of the *cestui que trust* appoint a trustee in place of the deceased, and that thereupon the survivors and the substituted trustee should hold the trust estate with the same powers conferred on the original trustees.

Construction:

On the death of one of the trustees, the survivors, without appointing a successor, could execute the powers expressed in the trust deed. *Belmont* v. *O'Brien*, 12 N. Y. 394, digested p. 903.

By will made in 1833 the testator devised two-fifths of his real estate to three executors as trustees for his two daughters respectively, who were to have the income for life, and their shares, at their respective deaths, to go to their issue. He gave to his executors discretionary power to sell and to invest the proceeds upon mortgage, or in the purchase of real estate. Two of the executors renounced; the third took out letters and acted alone. He sold the real estate, taking a mortgage thereon for the purchase money; foreclosed and bought in the premises. He then brought an action in the supreme court against the testator's daughters and all their children, then *in esse*, for the purpose of having another person substituted as trustee, and such person being substituted by the judgment of the court with all the powers, trusts and interests held by him under the will, he conveyed the property to such substituted trustee.

Construction:

1. The sole executor who qualified took all the powers conferred upon the three nominated in the will, in the capacity of trustees as well as executors.

2. His conveyance and repurchase upon the mortgage sale was valid as an execution of his power to sell, and to invest the proceeds in the purchase of real estate.

3. The supreme court could confer all the powers of the original upon a substituted trustee, and could exercise such jurisdiction as well in an action instituted for that purpose as upon petition.

4. The substituted trustee having sold and conveyed the premises, his deed conveyed a perfect title, as well against the testator's daughters and their children *in esse* as against their children who might be subse-

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quently born and acquire interests under the will. *Leggett* v. *Hunter*, 19 N. Y. 445.

Bequest of personal property to executors in trust to pay an annuity of five hundred dollars, to be increased in their discretion to one thousand dollars, to the testator's son till he attained the age of thirty, and to pay all that should remain of principal and accumulated income to the son upon the condition that he should then, in the opinion of the executors, be solvent. The executors renounced.

Construction:

The provision for the increase of the son's annuity became ineffectual, the discretion being absolute and personal.

The determination as to solvency of the son at the age of thirty is not a matter of personal discretion; but, as it rests upon a fact judicially ascertainable, effect is to be given to the provision, notwithstanding the renunciation of the trustees.

The provision for the accumulation of income during the interval between the son's majority and the age of thirty is void, and the income for that period goes as in case of intestacy. *Hull* v. *Hull*, 24 N. Y. 647.

An administrator with the will annexed takes the power of the executor named, where the power or trust appears to be annexed to the office, unless a personal confidence in the discretion of the *person* named is plainly expressed or implied.

The authorities as to power of administrator, with will annexed, collated. *Bain* v. *Matteson*, 54 N. Y. 663.

In case of devise to executor in trust, the trust duty is not annexed to the office of executor, but to the person; and an administrator with the will annexed does not succeed to any rights concerning the trust estate, unless it be ordered sold for the payment of debts. *Dunning* v. *Ocean Nat. Bank*, 61 N. Y. 497.

See, also, Judson v. Gibbons; 5 Wend. 224; Green v. Green, 4 Redf. 357.

The testator did not contemplate a trust that would attach to the persons of executors rather than to the office, nor intend the execution of the trust in the character of trustees, rather than executors. *Hall* v. *Hall*, 78 N. Y. 535, 539.

If the power was a power in trust and not a naked power it survived the death of the executors and was imperative and could be adminis-

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tered by the court, and it was so held to be. *Delaney* v. *McCormack*, 88 N. Y. 174.

See Dominick v. Sayre, 3 Sandf. 555; 1 R. S., part 2, ch. 1, title 2, art. 3, secs. 73, 74–77, 78.

J., by will, after various legacies, gave his residuary estate to three children named; the executors to invest and keep the same invested, to apply the interest to the support and education of said children until they respectively arrived of age; after that to pay to each the interest upon one-third, and after the death of two of the children to divide the principal between the survivor and the heirs of the two deceased.

The executors were empowered to sell and convey the real estate and to invest the proceeds for the purposes of the will. One executor died, and the other, having settled the estate, except as to the sale and distribution of the proceeds of the real estate, resigned; two trustees were appointed by the court; at the time three children were living, all of age.

Construction:

Even if the executors were merely the donees of a power of sale, it was a general power and imperative, and so subject to the same statutory provisions as to the substitution of new trustees as are applicable to express trusts; the new trustees were lawfully substituted and had power to convey; the principal purposes of the will yet remained to be carried out. Trustees conveyed to E., one of the children interested in the residue, who mortgaged same and afterward conveyed it to F., as trustee (F. was one of the new trustees, the other one having resigned). F. contracted to sell it to defendant, subject to the mortgage, agreeing to have H. (the trustee who had resigned) join in the deed and also procure deed from E. This would convey good title. *Farrar* v. *McCue*, 89 N. Y. 139.

From opinion—"It is unnecessary to determine whether the executors under the will of Jackson took a legal estate in the rest and residue devised, or were merely donees of a power of sale given them to aid in the ultimate distribution. In the one event they took the fee as trustees, and no estate in the land went to the heirs at law by descent or devise; and in the other the fee passed to the devisees under the provisions of the will, but in either case the executors were at liberty to convey, and could transfer a valid and perfect title to a purchaser. * * * We have recently held that such a trust power as here existed, if no trust estate was created, is a general power in trust and imperative, and subject to the same provisions as to the substitution of new trustees as are applicable to express trusts. (Delaney v. McCormick, 88 N. Y. 174.) Farrar and Hawley, therefore, were at the date of their appointment lawfully substituted as trustees and had power to convey. (Crittenden v. Fairchild, 41 N. Y. 289; Leggett v. Hunter, 19 id. 459.)"

III. DUTIES OF TRUSTEE.

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When a power of sale is given to executors for the purpose of paying debts or legacies, and especially when there is an equitable conversion of land into money for the purpose of such payment and for distribution, and the power is imperative and does not grow out of a personal discretion confided to an individual, such power belongs to the office of the executor and under the statute passes to and may be exercised by an administrator with the will annexed.[1] *Mott* v. *Ackerman*, 92 N. Y. 539.

From opinion.—"But we are of opinion that the administrator with the will annexed has authority to make the necessary deed. The question has been left by the disagreement of the courts in some uncertainty which should be dispelled so far as it is possible to do so. The statute provides that administrators with the will annexed 'shall have the same rights and powers and be subject to the same duties as if they had been named executors in such will.' (2 R. S. 72, sec. 22.) In construing this statute great differences of opinion have arisen. (De Peyster v. Clendining, 8 Paige, 296; Conklin v. Egerton, 21 Wend. 430; 25 id. 224; Roome v. Philips, 27 N. Y. 357; Bain v. Matteson, 54 id. 663; Bingham v. Jones, 25 Hun, 6.) The debate has turned mainly upon the inquiry what were the distinctive duties of an executor as such, and when they were to be regarded as not appertaining to his office, but as personal to the trustee. Where the will gives a power to the donee in a capacity distinctively different from his duties as executor, so that as to such duties he is to be regarded wholly as trustee and not at all as executor; and where the power granted or the duty involved imply a personal confidence reposed in the individual over and above and beyond that which is ordinarily implied by the selection of an executor, there is no room for doubt or dispute. In such a case the power and duty are not those of executors, *virtute officii*, and do not pass to the administrator with the will annexed. But outside of such cases the instances are numerous in which by the operation of a power in trust authority over the real estate is given to the executor as such and the better to enable him to perform the requirements of the will. It will not do to say, in the present state of the law, that whenever a trust or trust power is conferred upon executors, relating to real estate, some personal confidence distinct from that reposed in executors is implied. An executor is always a trustee of the personal estate for those interested under the will. We have recently so decided where the trust char-

[1]Right of administrator with the will annexed to exercise a power of sale. Bingham v. Jones, 25 Hun, 6. See also, Matter of Baker, 26 id. 626; Fish v. Coster, 28 id. 64; Paret v. Keneally, 30 id. 15; Matter of Christie, 59 id. 153; Matter of Hood, 33 N. Y. 338.

Where a discretionary power of sale is conferred upon an executor the court can not appoint, to exercise it, a successor to the one named by the testator. Matter of Bierbaum, 40 Hun, 504.

Power of sale given to executors, who are also clothed with a trust, passes to a trustee, subsequently appointed by the court. Kortright v. Storminger, 49 Hun, 249.

When the two functions of executor and trustee are severed, accounting by the executor. Matter of Emerson, 59 Hun, 244.

When executors are also testamentary trustees. Cline v. Sherman, 78 Hun, 298, aff'd 144 N. Y. 601.

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acter could only be derived from the office and its relation to rights claimed through it. (Wager v. Wager, 89 N. Y. 161.) And we have held, also, that, where a will devised and bequeathed to the executors the residue of real and personal estate, in trust, to sell and convert the same, to divide the balance into shares, to invest it in bond and mortgage, and to pay over the income for a time and finally the principal, the proceeds of the land sold became legal assets in the hands of the executor, for which he was liable officially, and for which his sureties were responsible; and that an objection that he held the proceeds as trustee, and not as executor, and could only be made accountable in equity, was not well taken. (Hood v. Hood, 85 N. Y. 571.) We have no doubt, therefore, that where a power of sale is given to executors for the purpose of paying debts and legacies, or either, and especially where there is an equitable conversion of land into money for the purpose of such payment and for distribution, and the power of sale is imperative and does not grow out of a personal discretion confided to the individual, such power belongs to the office of executor, and under the statute, passes to and may be exercised by the administrator with the will annexed."

Where, by a will, certain trusts are vested in the executors, as such, an executor, by accepting the office and qualifying, accepts the trust so conferred. *Earle* v. *Earle*, 93 N. Y. 104, digested p. 759.

See, also, Bingham v. Jones, 25 Hun, 6; Matter of Stevenson, 3 Paige, 420; Matter of Clark, 5 Redf. 466.

Discretionary power of sale in executors can not be executed by administrator with will annexed. Trustee could execute power after removal of executors. *Cooke* v. *Platt*, 98 N. Y. 35, digested p. 883.

To constitute a testamentary trustee, it is necessary that some express trust be created by the will. Merely calling an executor or guardian a trustee does not make him one. Every executor and every guardian is, in a general sense, a trustee, for he deals with the property of others confided to his care. But he is not a trustee in the sense in which that term is used in courts of equity, and in the statute. *Matter of Hawley*, 104 N. Y. 250.

Citing, Wood v. Brown, 34 N. Y. 337; Cleveland v. Whiton, 31 Barb. 544.

When executors will be deemed trustees. *Ward* v. *Ward*, 105 N. Y. 68, digested p. 634.

In an action to recover a portion of the purchase price of certain real estate sold by plaintiff to defendant W., it appeared that one B. died leaving a brother and two sisters, S. and A., her only heirs at law; and that by her will she gave the entire estate, real and personal, to her executors, in trust, with power and directions to sell and distribute the proceeds to her brother and sister S., each one-third, the income of the other third to be paid to A. during the joint lives of herself and her husband. If she survived him she was to take the *corpus* of the fund;

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if she died before him, leaving lawful issue, the income to be paid for their benefit until the youngest should reach the age of twenty-one years; and then the principal to be paid to them; in case of the death of A. without leaving issue, or if all of said issue should die before reaching the age of twenty-one, the fund to go to the brother and S. At B.'s death A. had no children living. One of the executors died, and the survivor, the brother of the testatrix, and S., conveyed all their interest in said premises to A. Shortly after, upon petition of the three, the supreme court made an order accepting the resignation of the surviving executor, as trustee under the will, discharging him as such and appointing A. as trustee. She, as trustee, conveyed said premises to J., to reconvey to her, and she then, individually, conveyed to plaintiff. W. objected that plaintiff's deed did not convey a good title to one-third of the premises.

Construction:

Untenable; by the will there was an equitable conversion of the real estate into personalty.;[1] the provision therein as to the children of A. was void, being in contravention of the statute forbidding the suspension of the absolute ownership of personal property for more than two lives in being (1 R. S. 773, sec. 1);[2] and the testatrix died intestate as to that part of her estate; by the conveyance to A. from her brother and sister, she acquired the entire beneficial interest therein; as the beneficiaries could effectually elect to have a reconversion into realty, and take it as land rather than the proceeds of it.[3]

And as all the parties having any beneficial interest in the land or its proceeds had joined in a conveyance of it so that no occasion remained for an exercise of the power of sale, the exercise of that power might be deemed dispensed with and defeated; and, therefore, her deed conveyed to plaintiff a good title.

The execution of the power of sale devolved upon the executors as such, not as trustees; and the acceptance of the resignation as trustee of the person named as executor, and the appointment of A. did not

[1] Kane v. Gott, 24 Wend. 640; Stagg v. Jackson, 1 N. Y. 206; Everitt v. Everitt, 29 id. 39.

[2] Batsford v. Kebbell, 3 Ves. 363; Patterson v. Ellis, 11 Wend. 259; Warner v. Durant, 76 N. Y. 133; Delaney v. McCormack, 88 id. 174, 183.

[3] Story's Eq. Juris. sec. 893; Hetzel v. Barber, 69 N. Y. 1; Prentice v. Janssen, 79 id. 478; Armstrong v. McKelvey, 104 id. 179.

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relieve the executor of the duty or vest in A. the power to make the sale as trustee.'

While the relation as trustee, distinguished from that of executor, may be treated as terminated by force of the order of the court, that of executor remained and the court could not appoint a trustee to succeed him in the exercise of his functions as executor. *Greenland* v. *Waddell*, 116 N. Y. 234.

NOTE.—Those who were heirs, or next of kin, at the death of testatrix, and not those who would be such at the time of the contingency producing the intestacy, would take the one-third illegally disposed of by the will. (1 R. S. 751; 2 id. 96; Hoes v. Van Hoesen, 1 Barb. Ch. 379; In re Kane, 2 id. 375.)

From opinion.—"And one question presented is whether the power of sale came within the duty of a trustee, as distinguished from that of an executor. The question as to where is located the line between the duties which fall upon an executor, and may be discharged by an administrator with the will annexed, and the powers which must be executed by a trustee, has been involved in some uncertainty in view of the apparent want of harmony in judicial opinion upon the subject. The theory upon which the distinction seems to have been founded is, that the duties of an executor pertain to the office, and those of a trustee to the person; that the character given to a trustee has relation to a personal trust, while that of an executor is official solely Hence it has, in the more recent case of Mott v. Ackerman (92 N. Y. 553), been said by Judge Finch, in speaking for the court, that 'where the power granted or duty involved imply a personal confidence reposed in the individual over, above and beyond that which is ordinarily implied in the selection of an executor—the power and duty are not those of executors *virtute officii* and do not pass to the administrator with the will annexed.' And when a discretionary power of sale is given to the executors, or when, in the sense as applied to trusts the duties imposed are active, the executors will be deemed trustees, and such powers can not be executed by an administrator with the will annexed. (Cooke v. Platt, 98 N. Y. 35; Ward v. Ward, 105 id. 68.)

In the present case the real estate, of which the testatrix died seized, became, by virtue of the direction in her will to sell for the purposes there mentioned, personalty as of the time of her death, upon the principle applicable to such case, that what is directed to be done by the will may be regarded as done at the time directed. The doctrine of equitable conversion rests upon that principle. (Pomeroy's Eq. Jur. sec. 161.) The power to receive the rents and profits of the land, intermediate the death of the testatrix and the sale, did not qualify the character, as personalty, of the land in the hands of the executors. That is incidental to the direction to sell, and the rents and profits so received also have the character of personalty, and are assets in the hands of the executor. (Stagg v. Jackson, 1 N. Y. 206; Lent v. Howard, 89 id. 169.) The title to the personalty vested in the executors by operation of law; and to accomplish the purpose of the imperative direction in the will in that respect, it was within their power, and imposed upon them as a duty, by virtue of their office, to execute the power of sale. (Lockman v. Reilly, 95 N. Y. 64; Meakings v. Cromwell, 5 id. 136; Bogert v. Hertell, 4 Hill, 492.) As the consequence of this, the proceeds of the

[1] 1 Perry on Trusts, sec. 281; In re Van Wyck, 1 Barb. Ch. 565; Quackenboss v. Southwick, 41 N. Y. 117.

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sale, when received by the executors, would be legal assets in their hands, for which they would be required to account. (Hood v. Hood, 85 N. Y. 561.) And if any duties were to follow, in respect to one-third of the fund, which would require the function of a trustee to execute, the executors, as such, would remain responsible for it until the severance, in some manner, by them of the trust fund. (In re Hood, 98 N. Y. 363.)

"We have proceeded far enough to show the relation of the executors, as such, to the powers given by the will, sufficiently for the purpose of the question here. And it is unnecessary to consider the nature of the duties which would be assumed after the sale, in the management of the fund, the income of which they were directed to pay Mrs. Bush.

"The power of sale was vested in the executors; and, in view of the later authority giving construction to the statute in that respect (2 R. S. 72, sec. 22), that power of sale would be taken by an administrator with the will annexed. (Mott v. Ackerman, 92 N. Y. 539.) It is, however, contended by the plaintiff's counsel, that, notwithstanding the correctness of the proposition just stated, the power given to sell, created a trust for that purpose, and as such came within the jurisdiction of the supreme court; and, therefore the acceptance of the resignation of Boerum as trustee, and the appointment of Mrs. Bush as such by the court pursuant to the statute, was effectual to vest in the latter the power to make the sale. (1 R. S. 730, secs. 69, 70, 71.) There is no doubt about the power of the court to provide the means for the execution of a trust when there ceases to be a trustee to complete it. The statute provides that in case of death of a trustee of an unexecuted express trust, the trust shall vest in the court of chancery (now in the supreme court), with all the powers and duties of the original trustee, and shall be executed by some person appointed for the purpose under the direction of the court. (Id. sec. 68.) And that provision is applicable to powers in trust. (Id. 734, sec. 102.) It is said by text and judicial writers, to the effect, that the court of equity will not permit a trust to fail for want of a trustee to execute it. This means that the power of appointment of a trustee will be exercised by the court when occasion properly arises requiring it. Such were the cases of Leggett v. Hunter (19 N. Y. 445), Delaney v. McCormack (88 id. 174), Farrar v. McCue (89 id. 139), Cooke v. Platt (98 id. 35), Rogers v. Rogers (111 id. 228). And they are cited by counsel to support the contention that the trustee appointed by the court in the present case was vested with the power to make the sale and conveyance in question. It may be observed that those cases presented express trusts and powers in trust within the Revised Statutes, and, therefore, came within the statute before referred to, providing for the appointment of trustees to execute such trusts, and the appointments were essential for the execution of the trusts. The power of sale given by the will in question is not within the statutory term of express trusts, and no title passed to the executor of the land as such, and '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 execution of the power.' (1 R. S. 734, sec. 94.)

"The statute upon the subject of trusts is not applicable to that created by this will, although analogous principles, to some extent at least, are applied to those of personal property. (Kane v. Gott, 24 Wend. 640; Cutting v. Cutting, 86 N. Y. 545.) It may be assumed that the power is inherent in the supreme court, without the aid of the statute, to administer trusts, in so far that it may, upon the death or disability of a trustee of an unexecuted trust, appoint another to execute it; and for

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adequate cause may remove a trustee and supply his place with another to complete the execution of a trust. This proposition is not applicable to an executor so far as relates to the duties of his office as such. As applied to him, the power is exclusively in the probate court."

The provision of the Code of Civil Procedure (sec. 2818) which provides that when a sole testamentary trustee dies, or is removed or resigns, and the trust has not been fully executed, the surrogate's court may appoint a successor, is not limited to a case where there is but one such trustee; where there are more than one and all die or resign, the surrogate has power to appoint a successor.

The supreme court also has authority to make such appointment.

The will of L. devised and bequeathed to his executors all his real and personal estate, upon certain trusts mentioned, and authorized them or "whoever shall execute" the will, to sell and convey any of the real estate and give a good title thereto. The will contained no express provision as to what was to be done with the proceeds of sale. Before the estate was settled all of the executors and trustees named in the will resigned. Plaintiffs were thereafter appointed trustees by orders properly made, both by the surrogate's court and the supreme court.

Construction:

As the trust survived the resignation of said trustees, the surrogate had power to appoint new trustees, as had also the supreme court; as the power of sale was conferred not only upon the executors named, but upon whoever should execute the will, it was not a personal trust or confidence, but could be executed by any person lawfully appointed to execute the will; while it was not expressly provided what should be done with the proceeds of sale, it was to be implied that they were to be held and disposed of for the purpose of the trust, and so, plaintiffs had power to sell and to convey a good title, and were entitled to maintain the action. *Royce* v. *Adams*, 123 N. Y. 402, aff'g 57 Hun, 415.

The sureties of an executor, to whom property was given, in trust, to convert, invest and pay over the proceeds to the widow, were held liable for his failure to obey the surrogate's decree, rendered on his final accounting, charging him "to invest and keep invested * * * according to the trust contained in the will," a balance in his hands. *Cluff* v. *Day*, 124 N. Y. 195, rev'g 23 J. & S. 460.

See, also, Matter of Hood, 98 N. Y. 363; 104 id. 103, digested *post*, p. 793.

Where the letters of one of two coexecutors are revoked and no successor is required to carry out the express provisions of the will, and

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none is appointed, as the statute contemplates in such case that the survivor will perform all the duties of the trust (sec. 2692), he is the successor of the removed executor within the meaning of the statute, and, as such, can bring an action upon the bond of the latter without the return of an execution unsatisfied. *Hood* v. *Hayward*, 124 N. Y. 1, modifying 48 Hun, 330.

When a power is conferred upon executors by virtue of the office, and not upon them as individuals, in the absence of evidence that it was intended to be beneficial to them, the presumption is that it was given for the purpose of being executed in the interest of the estate, and not for their own benefit. *Sweeney* v. *Warren*, 127 N. Y. 426, digested p. 941; see Powers.

Execution of will by surviving executor was valid, under a gift to "my said executor or executors who shall consent to act or may survive." *Viele* v. *Keeler*, 129 N. Y. 190, digested p. 1000.

Substituted trustee properly executed power of sale, as it was applicable to the subject of the trust. *Lahey* v. *Kortright*, 132 N. Y. 450,

When discretionary powers can not be exercised nor enforced by the court or by any other person than the trustee named. *Tilden* v. *Green*, 54 Hun, 231; Roosevelt v. Roosevelt, 6 id. 31.

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A trustee will not be permitted to make profit for himself out of the trust property, and it is his duty to protect it to the best of his ability from sacrifice on sales which would overreach and destroy his title; and purchases by a trustee in such cases accrue to the benefit of the trust fund.

This principle is applied without reference to the question of the fairness or unfairness of the transaction.[1]

[1] Jewett v. Miller, 10 N. Y. 402; Van Epps v. Van Epps, 9 Paige, 237; Slade v. Van Vechten, 11 id. 21; Campbell v. Johnston, 1 Sandf. Ch. 148; Dickinson v. Codwise, id. 214; Cram v. Mitchell, id. 251; Dobson v. Racey, 3 id. 60; Iddings v. Bruen, 4 id. 223, 263; Moore v. Moore, id. 37; Bank of Orleans v. Torrey, 7 Hill, 260; Hawley v. Cramer, 4 Cow. 717; Torrey v. Bank of Orleans, 9 Paige, 649; Conger v. Ring, 11 Barb. 356; 4 Kent's Com. 438; Story's Eq. Jur. secs. 321, 322, 465; Will. Eq. Jur. 186, 187; Gardner v. Ogden, 22 N. Y. 327 and cases both in England and in this country there collected; Munro v. Allaire, 2 Cai. Cas. 183; Davoue v. Fanning, 2 Johns. Ch. 252; McMahon v. Allen, 35 N. Y. 403; Fox v. Mackreth, 2 Bro. Ch. 400; Aberdeen Railway Co. v. Blaikie, 1 Macq. 461.

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The rule that a trustee can not purchase the trust property, is to be applied not only in case of valid trusts, but as well on settlements and accountings with trustees or assignees in cases of fraudulent assignments, when adjudged void.[1]

If such trustees hold under the assignment, they are trustees of an express trust to be executed according to the directions of the instrument; but if the assignment be avoided by creditors, the assignees are the trustees for the creditors under an equitable or constructive trust.

The assigned property purchased in by the assignees still belongs to the trust fund, subject only to the assignees' right of indemnity for their advance on the purchase. *Colburn* v. *Morton*, 1 Abb. Ct. App. Dec. 378.

A testamentary guardian of an infant devisee has no right to purchase real property of the testator at a sale under a surrogate's order. The sale, however, is not absolutely void, but its validity is at the election of the ward.

And where a sale was made beneficial to the ward at which he was present, and who, instead of repudiating it, suffered eighteen years to lapse after he became of age without impeaching the conveyance, during which time the title had passed into the hands of innocent parties, the ward must be deemed to have waived the objection and to have affirmed the sale. *Bostwick* v. *Atkins*, 3 N. Y. 53.

See Diefendorf v. Spraker, 10 N. Y. 246.

One standing as trustee in respect to property in his possession is not, it seems, permitted to purchase and hold it for his own benefit, although the sale is a judicial one under a title superior to that of the trustee or the *cestuis que trust*.

The receiver of an insolvent bank holding in that character the equity of redemption in other mortgaged premises and purchasing them at a sale under the foreclosure of the mortgage, holds them for the benefit of the *cestuis que trust* who may elect to adopt the purchase or demand a resale.

The rule is entirely independent of the question whether in fact any fraud has intervened. Its policy is to avoid the necessity of such an inquiry in which justice might be baffled.

A receiver held a mortgage as part of the trust estate and became the purchaser of the mortgaged premises under the foreclosure of a prior

[1] Wakeman v. Grover, 4 Paige, 23; Ames v. Blunt, 5 id. 13; Averil v. Loucks, 6 Barb. 470; Collumb v. Read, 24 N. Y. 505.

mortgage for his own account and benefit, but afterwards advertised the junior mortgage for sale as a part of the assets of the trust, and upon the sale informed the purchaser of all the facts.

Construction:

Such purchaser could not avail himself of the equitable estoppel, which, as against a person who had actually been misled, would have prevented the receiver from setting up that he held the title under the foreclosure of the elder mortgage otherwise than as security for advances made by him to obtain it. *Jewett* v. *Miller*, 10 N. Y. 402.

The clerk of a broker employed to make a sale of land, who has access to the correspondence between his principal and the vendor, stands in such a relation of confidence to the latter that, if he becomes the purchaser, he is chargeable as trustee for the vendor, and must reconvey or account for the value of the land.

The vendor can not, it seems, unite in the same action against the broker for damages for having fraudulently sold the land, with a claim against the purchaser for a reconveyance or accounting. *Gardner* v. *Ogden*, 22 N. Y. 327.

The purchase at a sale of real estate for the payment of an intestate's debts by one acting as the agent, or for the benefit of the administrator, is void, and the title of the heirs is not affected thereby (2 R. S. 104, sec. 27). *Forbes* v. *Halsey*, 26 N. Y. 53.

Where persons standing in confidential relations make bargains with, or receive benefits from, the persons for whom they are counsel, etc., the transaction is to be scrutinized with the extremest vigilance, and regarded with the utmost jealousy.

The presumption is against such a transaction; and the *onus* is upon the party seeking to establish the gift, etc. *Nesbit* v. *Lockman*, 34 N. Y. 167.

NOTE.—Agreement between an executor and a legatee is regarded with suspicion. Haviland v. Willets, 67 Hun, 89.

Trustee can not profit from his trust. Cole v. Millerton Iron Co., 59 Hun, 217.

It is not competent for the directors of an accessory transit company to create a trust in the property of the company committed to their management, and constitute a part of their number trustees of the new trust, to consider and determine its management and sale, and thereby to create a claim to compensation in their own favor for the performance of such duties. *Ogden* v. *Murray*, 39 N. Y. 202.

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It is a settled principle of equity that no person who is placed in a situation of trust or confidence in reference to the subject of sale, can be a purchaser of the property on his own account, but it is at the option of the *cestui que trust* to repudiate or affirm the transaction, irrespective of any proof of actual fraud.

Where the complaint averred that the defendant was an attorney and counselor of the supreme court, and the counsel and adviser of the plaintiffs in relation to the manner of obtaining an outstanding mortgage which was a lien upon their lands, and using the same for the purpose of enabling them to obtain and give a clear title to such lands; and after a foreclosure suit was commenced by the mortgagee, the defendant proposed to pay the mortgage and take an assignment thereof and hold it for their benefit, they paying him annual interest on the same; and the said defendant having purchased said mortgage by paying what was due thereon, with costs of foreclosure: Held, that he could not afterward dissolve his relations with the plaintiffs, and purchase the lands, under a decree of foreclosure, on his own account. Held further, that in equity the relation between the plaintiffs and defendant was that of mortgagors and mortgagee, and their equity of redemption continued to attach itself to the legal estate, which could not be cut off without a strict foreclosure, after calling upon the plaintiffs to redeem. *Case* v. *Carroll*, 35 N. Y. 385.

Citing, Torrey v. Bank of Orleans, 9 Paige, 650; N. Y. Ins. Co. v. National Protection Ins. Co., 14 N. Y. 91.

Where a trustee to sell, or one having a power of sale in trust, bids in the property at the sale for himself, the transaction is not void but voidable at the election of the beneficiary (when *sui juris*), and the latter may, if he choose, hold the trustee to the consequences of his act.

And where there is no legal incapacity in the *cestui que trust*, and he has full knowledge of all the facts, and is free from undue influence arising out of the relation of the parties, a clear and unequivocal affirmance of the sale may conclude him.

Ordinarily, the acceptance of the proceeds of such sale by the beneficiary with full knowledge would be such an affirmance. But, as between the immediate parties, the act is open to explanation, and where such proceeds are received under protest and with an express reservation of the right to controvert the validity of the sale, it does not estop or preclude a subsequent proceeding by the beneficiary to disaffirm and obtain a resale. *Boerum* v. *Schenck*, 41 N. Y. 182.

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In a proceeding under the statute for the sale of real estate to pay debts of a testator, B., an auctioneer employed by the executor, bid in the premises himself, and, before confirmation of the sale, made an arrangement with the executor, by which they were to be jointly interested in the purchase. The sale was subsequently confirmed by the surrogate, *ex parte*, and, a few days afterward, the executor executed a deed of the premises to B., and, on the same day, received from B. a deed to himself of one-half thereof.

Construction:

The sale was void, both because B., who purchased, was an agent of the executor in making the sale, and because the executor became interested before the sale was consummated. *Terwilliger* v. *Brown*, 44 N. Y. 237.

Citing, Forbes v. Halsey, 26 N. Y. 65; DeCaters v. LeRay De Chaumont, 3 Paige Ch. 179; Davoue v. Fanning, 2 Johns. Ch. 257; Hawley v. Cramer, 4 Cow. 735; Cruger v. Ring, 11 Barb. 364; Moore v. Moore, 5 N. Y. 262; Story's Eq. Jur. 322.

The trustee of the equity of redemption in mortgaged premises can not become the purchaser upon foreclosure, so as to remove them from the operation of the trust. He is liable to be called upon by the *cestui que trust* to account therefor, and for the rents and profits thereof. *Hubbell* v. *Medbury*, 53 N. Y. 98.

Where the property rights of infants are concerned, court will exercise the most vigilant care in protecting their interests and will hold guardians and all who are engaged in managing or disposing of their property to a rigid adherence to principles of good faith not only, but to a strict performance of every duty. *Howell* v. *Mills*, 53 N. Y. 322.

Citing, Sherman v. Wright, 49 N. Y. 227; 2 Story Eq. Jur. sec. 1334.

An administrator, as such, has no authority or control over the real estate of his intestate, and assumes no obligations in reference to it, and owes no duty to the heirs. He is not, therefore, precluded from purchasing such real estate upon a foreclosure sale, and from holding the same in his own right.[1] *Hollingsworth* v. *Spaulding*, 54 N. Y. 636.

Directors of defendant took a lease of premises on which defendant built its road, and were precluded from asserting any rights hostile to the defendant, on account of the trust relations existing between such

[1]On the same point and to the same effect see, Matter of Monroe, 142 N. Y. 484.

Incapacity of an executor to purchase property of the estate—the rule does not apply to one named as an executor who has not taken out letters. *Valentine* v. *Duryea*, 37 Hun, 427.

trustees and the defendant. *Blake* v. *Buffalo Creek R. Co.*, 56 N. Y. 480.

Trustee can not acquire an interest inconsistent with his duty.[1] *Genet* v. *Davenport*, 56 N. Y. 676.

Citing, Torrey v. Bank of Orleans, 9 Paige, 650; Colburn v. Morton, 3 Keyes, 296. See, Steinway v. Steinway, 4 App. Div. 301.

The relationship of father and son will not of itself invalidate a lease by the former, as agent or trustee, to the latter, or authorize the disaffirmance of the transaction by the principal or *cestui que trust*. *Lingke* v. *Wilkinson*, 57 N. Y. 445.

B., as executor, allowed lands to be sold on execution and bid on them. He held them in trust for devisees. *Lytle* v. *Beveridge*, 58 N. Y. 592, digested p. 320.

Torrey v. Bank of Orleans, 9 Paige, 649; s. c., 7 Hill, 260; Bridenbecker v. Lowell, 32 Barb. 9; Dobson v. Racey, 3 Sandf. Ch. 60; Moore v. Moore, 1 Seld. 256.

Person at once a beneficiary and trustee joined in sale of trust property to himself. Other *cestuis que trust* could repudiate the sale, and

[1] Purchase of outstanding title by trustee. *Knolls* v. *Barnhart*, 9 Hun, 443, aff'd 71 N. Y. 474.

Trustee of a power of sale can not himself purchase any of the trust estate. *People* v. *Stock Brokers' Building Co.*, 28 Hun, 274.

Trustee of a company—right of, to purchase judgments against it—they may be enforced for their full amount although purchased at a discount. *Inglehart* v. *Thousand Island Hotel Co.*, 32 Hun, 377.

Executor securing payment of his individual debt by a mortgage upon chattels held by him as executor, is suspicious on its face. *Clark* v. *Coe*, 52 Hun, 379.

Transfer of corporate property to a trustee by his own vote is invalid against the corporation even though it was to pay a debt due him from such corporation. *Gildersleeve* v. *Lester*, 68 Hun, 532, aff'd 139 N. Y. 608.

Sale by executors to themselves—presumption of invalidity overcome by acquiescence and laches. *Geyer* v. *Snyder*, 69 Hun, 115, aff'd 140 N. Y. 394.

Assignment of a mortgage by an administrator to himself voidable, but not void. *Read* v. *Knell*, 69 Hun, 541, aff'd 143 N. Y. 484.

When trustee is chargeable with the profits resulting from his purchase of the trust estate. *Reynolds* v. *Sisson*, 78 Hun, 595.

Trust—purchase by an administrator of an interest therein—when it inures to the benefit of the estate. *Matter of Randall*, 80 Hun, 229.

Contract between trustees and *cestui que trust*. *Stevens* v. *Melcher*, 80 Hun, 514.

Purchase by a trustee of property belonging to the trust estate is voidable, not void; when beneficiaries will not be permitted to disturb the title. *Kahn* v. *Chapin*, 84 Hun, 541.

Contract between a trustee and his *cestui que trust*. *Wildey* v. *Robinson*, 85 Hun, 362.

A grant of land by a man individually to himself in his capacity as trustee, is not, in the absence of fraud, void, but is in the nature of a declaration of trust in favor of the estate. *Howe* v. *Striker*, 5 Misc. 309.

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having received none of the considerations, the return thereof or offer to return need not be shown. *Tiffany* v. *Clark*, 58 N. Y. 632.

Rule prohibiting trustee from purchasing or dealing with the trust estate for his own benefit does not make every purchase by him of such estate illegal.[1] He can not purchase of himself, but may, under special circumstances, buy from the *cestui que trust*, if the latter is *sui juris*.

The burden is upon the trustee to establish that there was such a *bona fide* contract as will support the purchase on a careful and zealous examination and rigid inquiry by a court of equity. *Graves* v. *Waterman*, 63 N. Y. 657.

Executrix with power of sale violated her duty as trustee by selling land subject to mortgage to the mortgagee for a nominal sum and permitting a foreclosure stipulating for a lease to herself for life. Upon complaint of remaindermen, infants at time of such sale, the transaction was avoided. *McMurray* v. *McMurray*, 66 N. Y. 175.

Trustee can not purchase for his own benefit property which although not a part of the trust, is so connected with it that a sale of the property for less than its value will diminish the trust fund; and a purchase of such property for less than its value inures, even in the absence of actual fraud, to the benefit of the *cestui que trust*. The judgment of sale permitting any of the parties to purchase and confirmation of sale to trustees was no protection. Gallatin v. Cunningham, 8 Cow. 377, 381; Torrey v. Bank of Orleans, 9 Paige, 661; Conger v. Ring, 11 Barb. 356.

Trustees of a fund to pay debts and legacies purchased at less than its value land not a part of the fund, on foreclosure, leaving a deficiency, which became a claim against and diminished the fund. *Fulton* v. *Whitney*, 66 N. Y. 548.

NOTE.—The object of the rule precluding trustees from dealing for their own benefit, in matters to which their trust relates, is to prevent secret frauds by removing all inducement to attempt it. (555.) Keech v. Sandford, 3 Eq. Cas. Abr. 741; Whelpdale v. Cookson, 1 Ves. Sr. 8; Davoue v. Fanning, 2 J. Ch. 252; Case v. Carroll, 35 N. Y. 385.

When a person received profits from the use of property transferred

[1]There is no rule of law or equity that incapacitates a trustee from purchasing the obligations of his *cestui que trust* which have become legally vested in a third person. If they are valid obligations they *may* be sold and transferred to any one, and such transfer will pass a good title to them.

Quære, whether in such case the trustee will be permitted to enforce them for any greater sum than he paid for them. *Clark* v. *Flint & Pere Marquette R. Co.*, 5 Hun, 556.

to him as collateral security, he was bound to account to the owner of the property therefor, within the principle prohibiting a trustee from using trust property to his private benefit. *Chapman* v. *Porter*, 69 N. Y. 276.

A trustee is liable for conversion of property obtained by the trustee as such, and which upon demand he refuses to deliver to the *cestui que trust* entitled thereto. *Smith* v. *Frost*, 70 N. Y. 65, aff'g 7 J. & S. 389.

Premises devised to C., with contingent estate to J. & W., having been sold during C.'s life for nonpayment of an assessment, P., who bid them off, assigned the certificate of sale to M., as trustee, M. being the devisee and executor in C.'s will. Any title so acquired by M. inured to the devisees under the first will. *Buel* v. *Southwick*, 70 N. Y. 581, digested p. 320

An assignee, who was the counsel and active agent of the wife of the assignor in procuring a judgment and execution before, and a sale thereon after assignment, was incompetent, as his duty to the wife as counsel was inconsistent with his duty as assignee; the creditors were entitled to an assignee who could impartially, and without the violation of a duty which he owed to others, assail the judgment and the sale made under it. *Matter of Cohn*, 78 N. Y. 248.

When one, the president and director of a corporation, entered into a contract with it to build and equip a portion of its road and take its stock and funds in payment, and assigned the contract to another, and the contract and assignment were in good faith and with the knowledge and consent of all the directors and stockholders of said company, A. was not liable to a receiver of the company in an action to recover a proportionate share of the difference between the par value of the stock and the cost of performance, as the stock was to be regarded as paid up.

As to whether any profit would inure to the company, *quære*. *Van Cott* v. *Van Brunt*, 82 N. Y. 535.

Directors of a corporation when precluded from dealing in their own behalf in respect to matters involving the trust. *Duncomb* v. *N. Y. C. & H. R. R. Co.*, 84 N. Y. 190.

Under will of D. his widow took a fee in certain real estate, deter minable on her marriage, and plaintiff, an infant, a contingent fee, limited on such marriage. Under the statute, the infant's interest was sold, T., executor of D.'s will, being appointed special guardian for plaintiff. T., as special guardian, and the widow, executed a convey-

ance to the purchaser, who executed to T., as such guardian, a mortgage on the lands for part of the purchase money, upon the foreclosure of which T. bid in land and received a conveyance in his own name, paying no portion of the purchase price; and executed a mortgage on the lands to defendant S. to secure judgment recovered against him as executor. The widow subsequently remarried.

Construction:

The plaintiff was entitled to a cancellation of the mortgage and the transfer of the title to or in trust for the plaintiff, as, conceding that the court had no power to order a sale of the land, the defendant would not be allowed to defeat the action brought for a violation by the suggestion that the apparent title so acquired may not, if allowed to stand, be effectual to divest plaintiff of her title.

Same will:

S. claimed to be entitled to a judgment, declaring that plaintiff, as devisee, was liable for his debt against the testator to the extent of the estate devised, and charging the same upon the lands.

Construction:

As the plaintiff was not the sole devisee, as under the statute making devisees liable for the testator's debts (2 R. S. 452, secs. 32, 33, 56), in case of several devisees they are to be prosecuted jointly and the debt apportioned among them, and as all the devisees were not parties, such relief could not be granted in this action,[1] and this was so although the other devisee had aliened his land and was insolvent. *Dodge* v. *Stevens*, 94 N. Y. 209.

It seems the rule that a trustee may not purchase or deal in this trust property in his own behalf does not render such purchase void *ab origine*, but voidable only, and at the instance of the *cestui que trust* or of a party who has acquired the rights which belong to one in that relation. The title, even while in the hands of the trustee, may be confirmed as well by acquiescence and lapse of time as by the express act of the *cestui que trust.*

The title of a subsequent *bona fide* purchaser for value and without notice, when there is nothing on the record to show that his grantors

[1] Wambaugh v. Gates, 11 Paige, 513; s. c., How. Ct. App. Cas. 247; Parsons v. Bowne, 7 Paige, 354.

had not a perfect right to convey, can not be impeached, even in equity; he takes the land free from the trust. *Harrington* v. *The Erie County Savings Bank*, 101 N. Y. 257.

Where a trustee who has an interest to protect, by bidding at a sale of the trust property, makes special application to the court for permission to bid, which, upon a hearing of all parties interested, is granted, he can make a purchase which is valid and binding upon all the parties, and under which he can obtain a perfect title. *Scholle* v. *Scholle*, 101 N. Y. 167.

From opinion.—"The general rule is not disputed that the purchase by a trustee directly or indirectly of any part of a trust estate which he is empowered to sell, as trustee, whether at public auction or private sale, is voidable at the election of the beneficiaries of the trust; and this rule will be enforced without regard to the question of good faith or adequacy of price, and whether the trustee has or has not a personal interest in the same property. Nor is it sufficient to enable a trustee to make such a purchase that the formal leave to buy, which is usually granted to the parties in a foreclosure or partition sale, has been inserted in the judgment. Such a provision is inserted merely to obviate the technical rule that parties to the action can not buy, and is not intended to determine equities between the parties to the action, or between such parties and others. (Fulton v. Whitney, 66 N. Y. 548; Torrey v. Bank of Orleans, 9 Paige, 649; Conger v. Ring, 11 Barb. 356.) But where the trustee has an interest to protect by bidding at the sale of the trust property, and he makes special application to the court for permission to bid, which, upon the hearing of all the parties interested, is granted by the court, then he can make a purchase which is valid and binding upon all the parties interested, and under which he can obtain a perfect title. (De Caters v. Chaumont, 3 Paige, 178; Gallatian v. Cunningham, 8 Cow. 361; Davoue v. Fanning, 2 Johns. Ch. 251; Bergen v. Bennett, 1 Caine's Cas. 1, 20; Chapin v. Weed, 1 Clarke's Ch. 464, 469; Colgate's Exrs. v. Colgate, 23 N. J. Eq. 372; Froneberger v. Lewis, 79 N. C. 426; Faucett v. Faucett, 1 Bush. 511; Michoud v. Girod, 4 How. U. S. 503; Campbell v. Walker, 5 Ves. Jr. 678; Farmer v. Dean, 32 Beav. 327; Potter's Willard's Eq. Jur. 607; Lewin on Trusts, 7th ed., 443; Godefroy on Trusts, 184.)"

A trustee may not, as such, purchase property in which he has an individual interest. The law, in such case, does not stop to inquire whether the transaction was fair or unfair, but, when the relation is disclosed, sets aside the transaction, or refuses to enforce it at the instance of the *cestui que trust*.

A corporation, in order to defeat a contract entered into by its directors on its behalf, in which one or more of them had a private interest, is not bound to show that the influence of the director or directors having the private interest determined the action of the board. *Munson* v. *Syracuse, Geneva & Corning R. Co.*, 103 N. Y. 58.

Where the mortgage of a third person has been assigned by the mort-

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gagee as collateral for his own debt, the foreclosure of the mortgage and purchase at the foreclosure sale by the assignee, as against the assignor, where the latter is not made a party to the foreclosure and his equitable right foreclosed, simply substitutes the land for the mortgage and the assignee holds it as a security merely, subject to the right of the assignor to redeem by payment of the debt, and upon such payment he is entitled to the land.

The doctrine of merger does not apply in such case, as in equity merger will never be allowed against the interest of the parties or their obvious intention, or where the two estates are held in different rights. *Matter of Gilbert*, 104 N. Y. 200.

Distinguishing and limiting Bloomer v. Sturges, 58 N. Y. 168.

A director of a manufacturing corporation owes to it the duty of acting in its interest and for its benefit, and may not buy up its outstanding debts for his own benefit, knowing it to be insolvent and intending thereby to get an advantage over other creditors by holding the debts purchased for their full amount. *Bulkley* v. *Whitcomb*, 121 N. Y. 107.

While the rule which forbids persons who fill fiduciary positions from using them for their own benefit, is strict in its requirements and extends to all transactions where the individual's personal interest may be brought into conflict with his acts in a fiduciary capacity, and works independently of the question whether there was fraud or good intention, it does not operate to avoid *ab initio* all transactions of a trustee where he is interested, but it is generally limited in its operation to rendering them voidable at the election of the party whose interests are concerned; and so, if nothing is done in avoidance the transaction remains undisturbed. *Barr* v. *N. Y., L. E. & W. R. R. Co.*, 125 N. Y. 263, rev'g 52 Hun, 555.

Duties and obligations of persons bidding in a railroad in the interest of the bondholders. *White* v. *Wood*, 129 N. Y. 527.

Where one or more tenants in common are in the actual possession and control of the common property, they may not buy in an outstanding title to defeat the rights of their cotenants, and are bound to do nothing with a view to prejudice their interests.[1] *Carpenter* v. *Carpenter*, 131 N. Y. 101.

Release by plaintiff, next of kin, of a lapsed legacy found to have been obtained by the executor by inequitable concealment of the plaintiff's right thereto, was canceled by the court; but plaintiff was not al-

[1]See cases collected p. 536.

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lowed to recover sums paid to others after his discovery of his rights and during three years while he remained acquiescent in regard to such release and payment. *Haviland* v. *Willets*, 141 N. Y. 35, rev'g 67 Hun, 89.

An assignment of a mortgage by an administrator of a deceased mortgagee to a third person, and by the latter to the administrator individually, is not void, but voidable at the election of the next of kin of the intestate; and so, in an action by the administrator, in his own name as owner, to foreclose the mortgage, the mortgagor and his successors in interest may not controvert plaintiff's title.[1] *Read* v. *Knell*, 143 N. Y. 484, aff'g 69 Hun, 541.

Unless some special fund has been provided for the payment of the obligations of a corporation not yet due, or unless some special liquidation thereof has been ordered by it, a director owes it no duty to buy in the obligations, and in the absence of any fact or circumstance charging him with a present duty to act for it, which duty is, or may be, inconsistent with a personal purchase, he may purchase for himself, and though he purchases the obligations at less than their face, he may enforce them for the full amount against the corporation.

Even if such a purchase be voidable at the election of the corporation, that election must be made promptly upon sufficient knowledge of the facts. *Seymour* v. *Spring Forest Cemetery Co.*, 144 N. Y. 333.

3. LIMITATION OF AUTHORITY.

By sec. 85, of the Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1, 1896). "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 rest of the section deals with his power to sell under authority of the court. See Real Prop. L., secs. 85, 86, 87, *post*, p. 829). But if the trust is not declared in the conveyance to the trustee, innocent purchasers are protected by section 84 of the Real Prop. L. (see Real Prop. L., sec. 84, *post*, p. 828).

See Indestructibility of an express trust, *ante*, p. 683.

The purchaser upon credit of property assigned in trust for creditors can not resist an action for the price on the ground that the trustees were only authorized to sell for cash;

Nor on the ground that the plaintiff took a transfer of the claim for

[1] Hawley v. Cramer, 4 Cow. 719; Forbes v. Halsey, 26 N. Y. 65; Harrington v. Brown, 5 Pick. 519.

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the purchase money, agreeing to apply it in payment of the *cestuis que trust*, according to the directions of the assignment. A sale by the assignee upon such terms is not void as a delegation of the trust powers in violation of law. *Small* v. *Ludlow*, 20 N. Y. 155.

An administrator or executor who makes, indorses or accepts negotiable paper is personally liable thereon, although he adds to the signature the name of his office; he can not bind the assets of the deceased by his contracts. *Schmittler* v. *Simon*, 101 N. Y. 554.

From opinion.—"Neither executors nor administrators have power to bind the estate represented by them through an executory contract, having for its object the creation of a new liability, not founded upon the contract or obligation of the testator or intestate. They take the personal property as owners and have no principal behind them for whom they can contract. The title vests in them for the purposes of administration and they must account as owners to the persons ultimately entitled to distribution. In actions upon contracts made by them, however they may describe themselves therein, they are personally liable, and in actions thereon the judgment must be *de bonis propriis*. Not so, however, upon contracts made by their testator or intestate; in such case the judgment is always *de bonis testatoris*. (Gillet v. Hutchinson's Admr., 24 Wend. 184; Ferrin v. Myrick, 41 N. Y. 315; Austin v. Monro, 47 id. 360, 366.)"

See. also, Pumpelly v. Phelps, 40 N. Y. 59; Barry v. Lambert, 98 id. 300; Pinney v. Administrators of Johnson, 8 Wend. 500; Gould v. Ray, 13 id. 633; Hills v. Banister, 8 Cow. 31; Taft v. Brewster, 9 Johns. 334; Delaware, Lack. & W. R. R. v. Gilbert, 44 Hun, 201, aff'd 112 N. Y. 673; Bailey v. Spofford, 14 id. 86.

See, further, Personal liability of trustee, *post*, p. 773.

For necessary expenses however the trustee has a right to be reimbursed out of the estate and for that purpose has an equitable lien thereon.

See, Expenses, *post*, p. 800.

A trustee has no general power of disposition of a trust estate, but must derive such power from the instrument creating the trust, or, under special circumstances, such power may be implied; but where there is in the instrument creating the trust a designation of the method in which the trust estate is to be sold, if at all, the trustee can not convey any title except in the manner thus specified in the trust deed. The existence of provisions of the trust deed, designating a certain method, for the sale of the trust property, necessarily excludes all other powers in respect to the alienation of the trust estate by the trustees. *O'Connor* v. *Waldo*, 83 Hun, 489.

See, also, Suarez v. Montigny, 1 App. Div. 494.

When executors and administrators may sue as such for goods sold after the death of the testator: an objection of want of legal capacity to sue must be taken by demurrer or by answer. *Varnum* v. *Taylor*, 59 Hun, 554.

4. MANNER OF EXECUTING THE AUTHORITY.[1]

A purchaser can not safely dispense with the concurrence in a sale of the trust estate of all the assignees, under L. 1860, ch. 348, regulating voluntary assignments for the benefit of creditors, notwithstanding one

[1]See Powers, section 146; *post*, p. 967.

may have attempted to disclaim after acceptance, and although he may have released his estate to his cotrustees; all must unite in a transfer, and a deed by one or more, while another who does not join is living, is invalid. *Brennan* v. *Willson*, 71 N. Y. 502.

See, also, Fleming v. Sternberger, 100 N. Y. 1, rev'g 36 Hun, 456.

From opinion:—"A trustee having once accepted the trust in any manner, a purchaser can not safely dispense with his concurrence in a sale of the trust estate, notwithstanding he may have attempted to disclaim, and although he may have released his estate to his cotrustees. (Crewe v. Dicken, 4 Ves. 97.) All the trustees must unite in a disposal of the trust property and a deed by two, while a third is living, is not valid. The trustees take as joint tenants, and must all unite in the execution of the trust, and especially in a deed of lands. (Story Eq. Jur. sec. 1280; Brinckerhoff v. Wemple, 1 Wend. 470; Thatcher v. Candee, 4 Abb. Ct. App. Dec. 387.)"

When one of several trustees may bring an action to enforce a lien, when associates will not join. *Bockes* v. *Hathorn*, 78 N. Y. 222, 228.

One of several executors has no authority to borrow money without the assent of the others, and such assent is not to be assumed from the fact that the loan was for the benefit of the estate. *Bryan* v. *Stewart*, 83 N. Y. 270.

One executor, without the assent of the other, can not enter into a valid contract to convey land, where the title is by will vested in the two executors, in trust, with power to sell (Brennan v. Willson, 71 N. Y. 502; Berger v. Duff, 4 Johns. Ch. 368), although the rule would be otherwise as to personalty.

This is the case, although by the will there is an equitable conversion for certain purposes of the real estate into personalty; until actual conversion it may only be conveyed as realty, according to the rules governing such conveyances. *Wilder* v. *Ranney*, 95 N. Y. 7.

Executors constitute an entity, and are regarded in law as an individual person (see opinion). *Barry* v. *Lambert*, 98 N. Y. 300, digested pp. 657, 658.

Under the provision of the Revised Statutes (1 R. S. 600, sec. 1, sub. 5), authorizing corporations "to appoint such subordinate officers and agents as the business of the corporation shall require," the board of trustees of a manufacturing corporation may appoint an executive committee of its members, and invest it with power to transact the business of the company during the interval between the meetings of its board of trustees. (Olcott v. Tioga Railroad Company, 27 N. Y. 546–557.)

Such committee may delegate to one of its number power to do merely ministerial acts, such as the indorsing of checks payable to the

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corporation and receiving the money thereon. *The Sheridan Electric Light Company* v. *The Chatham National Bank*, 127 N. Y. 517, aff'g 52 Hun, 575.

The trustees of a religious corporation, organized under the general act providing for such organizations (Laws of 1813, ch. 60, as amended by Laws of 1863, ch. 45), can only when acting as a board make or authorize acts binding on the corporation; they have no separate or individual authority to bind it, and this, it seems, although a majority, acting singly, assent to the particular transaction.

In an action against such a corporation to recover an alleged overdraft upon a deposit account kept with it by defendant's treasurer, the complaint also set forth a promissory note made by a third party, indorsed in defendant's name by its treasurer and received, as alleged, as security for the account. The referee found, upon sufficient evidence, that the account was not opened or the note indorsed with the consent or authority of defendant or its board of trustees, and that none of the transactions between plaintiff and said treasurer had been authorized or ratified by defendant.

Construction:

The action was not maintainable. *Columbia Bank* v. *The Gospel Tabernacle Church*, 127 N. Y. 361, aff'g 25 J. & S. 149.

Conveyance by two of three trustees of a town, is void, under certain statutes. *Town of Westchester* v. *Davis*, 7 Hun, 647.

When will authorizes a majority of the trustees to act. Crane v. Decker, 22 Hun, 452.

Presumption that the executor, signing a deed, composed all the existing executors under a power of sale given to executors. Fleming v. Burnham, 36 Hun, 456, rev'd 100 N. Y. 1.

5. INVESTMENT.[1]

When trustees must invest funds, receive and pay over interest to beneficiaries.[2] *Bundy* v. *Bundy*, 38 N. Y. 410, digested p. 716.

The law in this state imposes upon trustees, holding trust funds for investment for the benefit of minor children, to be supported from the income accruing therefrom, the duty of placing them in a state of secur-

[1] As to the liability of a trustee for breach of duty to invest, see, also, Personal liability of trustee for negligent and wrongful act, *post*, p. 747.

[2] As to investment by a trust company, see Banking Law, L. 1892, ch. 689, secs. 158, 159, as amended by L. 1893, ch. 696 (Banks's R. S. 9th ed. p. 1105, 1106.

See, also, cases presented and analyzed in Chaplin's Express Trusts and Powers, pp. 144, *et seq.*

ity, of seeing that they are productive of interest, and of so keeping them that they may be subject to future recall, for the benefit of the *cestui que trust.*

The investment of such funds in canal, bank, insurance, railroad or other stocks of private corporations, is a violation of his duty and the obligation of his trust.

As to moneys held upon trust of this kind, it is not according to the nature of the trust nor within any just idea of prudence to place the principal of the fund in a condition, in which it is necessarily exposed to the hazards of loss or gain, according to the success or failure of the enterprise in which it is embarked, and in which by the very terms of the instrument, the principal is not to be returned at all.

Investment of funds of infants by trustees in canal, bank, insurance, railroad and other stocks of private corporations violates the trust.

In this state a trustee holding funds for investment for the benefit of minor children, must invest in government or real estate securities, any other investment would be a breach of duty and the trustee personally liable. *King* v. *Talbot*, 40 N. Y. 76, digested p. 779.

From opinion (per Woodruff, J.).—"My own judgment, after an examination of the subject, and bearing in mind the nature of the office, its importance, and the considerations which alone induce men of suitable experience, capacity and responsibility to accept its usually thankless burden, is that the just rule is that the trustee is bound to employ such diligence and such prudence in the care and management as in general prudent men of discretion and intelligence in such matters employ in their own like affairs.

"It, therefore, does not follow, that, because prudent men may, and often do conduct their own affairs with the hope of growing rich, and therein take the hazard of adventures which they deem hopeful, trustees may do the same; the preservation of the fund, and the procurement of a just income therefrom, are primary objects of the creation of the fund itself, and are to be primarily regarded. * * *

"It is not denied that the employment of the fund as capital in trust, would be a clear departure from the duty of trustees. If it can not be so employed under the management of a copartnership, I see no reason for saying that the incorporation of the partners tends, in any degree, to justify it.

"The moment the fund is invested in bank, insurance, or railroad stock, it has left the control of the trustees; its safety and the hazard or risk of loss is no longer dependent upon their skill, care or discretion, in its custody or management, and the terms of the investment do not contemplate that it ever will be returned to the trustees."

See, also, Smith v. Smith, 1 Johns. Ch. 281; Mills v. Hoffman, 26 Hun, 594; Matter of Hathaway, 80 id. 126.

Testator gave legacies payable from his interest in the assets of a firm in which he was partner, and directed that balance might remain

in hands of surviving partners for five years on interest, and then devised it to be invested in good securities for the benefit of his children and distributed among them as follows: $10,000 unto each child, to be paid upon his arriving at the age of twenty-four. No other disposition was made of such balance. The entire interest in the estate, less the legacies, was given to the children, of which the payment of $10,000 to each was postponed until the taker was twenty-four years of age.

Construction:

The trustees could retain the whole fund for five years and thereafter sufficient thereof to enable them to perform the continuing trusts. The provision for leaving fund with partners for five years was merely an authority for investment, and executors could withdraw it. *Vernon* v. *Vernon*, 53 N. Y. 351.

A trustee can not mingle the trust funds with his own and invest them in common and require the *cestui que trust* to accept an undivided interest in the investment. *Doud* v. *Holmes*, 63 N. Y. 635.

Investment in bond and mortgage of a corporation by executors, who were empowered to invest as they should deem safe and for the greatest benefit of the *cestuis que trust*, was considered imprudent under the circumstances, and the executors were held liable. *Adair* v. *Brimmer*, 74 N. Y. 539, digested p. 754.

Person creating a trust may designate the manner of the investment and whether any, and if so what security shall be taken.

When testator directed his executors to lease for a time money representing his interest in a firm, of which he had been a special partner, no security was intended to be required of the surviving partner. *Denike* v. *Harris*, 84 N. Y. 89, rev'g 23 Hun, 213.

See, also, Matter of Cant, 5 Dem. 269; Valentine v. Valentine, 3 id. 597; Ferris v. Ferris, 2 id. 336.

It seems that, as a general rule, investments by executors or testamentary trustees of the funds in their hands, which take those funds beyond the jurisdiction of the court, will not be sustained, and the trustee who so invests does so at the peril of being held responsible for the safety of the investments.[1]

This rule, however, is not so rigid as to admit of no possible exceptions, although the case must be very rare and the circumstances very unusual and peculiar to make it an exception.

[1] Cocks v. Barlow, 5 Redf. 406; Matter of Denton v. Sanford, 103 N. Y. 612.

III. DUTIES OF A TRUSTEE.

5. INVESTMENT.

The rule relates only to voluntary investments by the trustee, and does not govern a case where by the acts of the testator, a foreign investment has been made, or where without the fault of the trustee the assets have been transmitted into a debt which can only be secured and saved by taking foreign securities. *Ormiston* v. *Olcott*, 84 N. Y. 339, digested p. 756.

It seems that it is the duty of trustees holding funds for investment to use due diligence to keep them invested; if they have retained them uninvested beyond a reasonable time, six months being usually allowed, they are *prima facie* liable for interest, and the burden is upon them, upon an accounting, to explain and justify the delay. *Lent* v. *Howard*, 89 N. Y. 169.

Where the guardian of an infant loans moneys belonging to his ward, receiving security for the amount loaned, with lawful interest, but as an inducement to make the loan receives a sum of money as a bonus for his own benefit from the borrower, who pays the same with knowledge as to the title to the moneys loaned, this does not make the transaction an usurious loan. The guardian is not a lender of the trust fund within the meaning attached to that term of our statutes, relating to usuries.

The circumstance that the guardian has given a bond for the faithful performance of his duties does not affect the character of the transaction of the securities so taken. *Fellows* v. *Longyor*, 91 N. Y. 324.

There is no rigid or arbitrary standard by which to measure the "reasonable time" within which an executor directed to convert an estate into money may exercise his discretion, and beyond which he may not delay in complying with the direction. What is a reasonable time must depend upon the circumstances of each particular case.[1]

The test must be the diligence and prudence of prudent and intelligent men in the management of their own affairs.[2]

It seems, that where no special modifying facts are shown to shorten or lengthen the reasonable time, the period allowed before the executor can be compelled to account, *i. e.*, eighteen months may serve as a just standard. *Matter of Weston*, 91 N. Y. 502.

The will provided that the executors should not be liable for any loss or damage except such as occurred "from their willful default, misconduct

[1]Gillespie v. Brooks, 2 Redf. 355; Lockhart v. Public Administrator, 4 Bradf. 21.

[2]King v. Talbot, 40 N. Y. 76; Thompson v. Brown, 4 Johns. Ch. 627; McRae v. McRae, 3 Bradf. 199.

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or neglect." The complaint alleged and the court found that defendants imprudently and carelessly invested a portion of the fund set apart for plaintiff in insufficient securities, but such imprudence was not alleged or found to have been "willful."

Construction:

A judgment requiring defendants to restore to the trust fund the amount so invested was not authorized.

A testator has the right to impose the terms and conditions under which his bounty shall be distributed, and the court has no authority to increase the responsibility of, or impose obligations upon, the trustees selected by him from the burden of which he in his will protected them.

It did not appear that any loss had actually occurred to the income because of such investments, and it seemed probable that no loss would even eventually occur to the fund itself, and the evidence disclosed no ground for imputing bad faith or want of prudence in making said investments. Held, that a judgment removing defendants was not justified; that if they acted in good faith, subsequent events which they could not foresee, over which they had no control, could not render them liable.[1]

While trustees will be held to great strictness in their dealings with trust property, the courts will regard them with leniency when it appears they have acted in good faith.

Defendants were required by the will to invest in bonds and mortgages "on unincumbered real estate." At the time of a loan upon bond and mortgage there was an unpaid tax upon the land. *Held*, that this was not a violation of the provision; that the tax was not an incumbrance within the meaning of the provision. *Crabb* v. *Young*, 92 N. Y. 56.

Citing Lansing v. Lansing, 1 Abb. Pr. (N. S.) 288; Chesterman v. Eyland, 81 N. Y. 398; Ormiston v. Olcott, 84 id. 339.

The rule that a New York trustee can not invest in mortgages on lands out of the state did not apply. *Matter of petition of Denton* v. *Sanford*, 103 N. Y. 607, digested p. 762.

The employment of a trust fund by an administrator or other trustee for his individual benefit, or as loans to persons engaged in and to be used in business, is illegal and constitutes a *devastavit*. *Leobold* v. *Opperman*, 111 N. Y. 531.

Citing, Wilmerding v. McKesson, 103 N. Y. 336; King v. Talbot, 40 id. 90;

[1] See, also, Matter of Butler, 1 Con. 58; Matter of Blauvelt, 2 id. 458.

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Fellows v. Longyor, 91 id. 324; Wetmore v. Porter, 92 id. 76. See, also, matter of Myres, 131 id. 409.

A trustee appointed to receive rents and profits of real estate may permit the beneficiary to occupy the premises. *Matter of Brewer*, 43 Hun, 597.

TRUSTEE—receiving fluctuating securities—effect of a power to sell on the death of the life tenant—not a limitation on the power to sell stocks before the death—liability of a transfer agent. *Toronto General Trust Co.* v. *C. B. & Q. R. R. Co.*, 64 Hun, 1, aff'd 138 N. Y. 657.

WILL.—Providing for the continuance of a loan. *Sheldon* v. *Sheldon*, 84 Hun, 422.

An executor has no right to invest moneys of the estate in personal securities; if he does, and a loss occurs, he must bear it, together with the costs of any litigation instituted by him, in order to realize. *Lefever* v. *Hasbrouck*, 2 Dem. 567.

An executor who, under a power contained in a will, makes a collusive sale of real estate, may properly be surcharged on his accounting, with the difference between the price which he received and the actual value of the premises sold.

Where an executor, to accommodate his relatives, loans them moneys of the estate upon their notes, he is chargeable with the amount of interest lost to the estate by his misconduct. Matter of Vandevort, 8 App. Div. 341.

An investment by trustee in second mortgage bonds of a railroad is unauthorized by law. *Matter of Havemeyer*, 3 App. Div. 519.

See, also, Lacey v. Davis, 4 Redf. 402.

Bonds of a horse railway company secured by a mortgage upon its tracks are not such real estate security as will authorize trustees to invest trust funds therein. *Judd* v. *Warner*, 2 Dem. 104.

See, also, matter of Macdonald, 4 Redf. 321.

A loan on a security of a future vested estate is a proper investment. *Delafield* v. *Schuchardt*, 2 Dem. 435.

Trustees, under a will, can only loan on real estate or on state or United States bonds as permanent investments even though the will, after giving them the power to sell, also gives them the right to invest the same in such manner and upon such securities as to them shall seem advisable. *Matter of Keteltas*, 1 Con. 468.

While the circumstance of an investment on second mortgage by an executor is one of importance upon the question of the exercise of proper care, yet it only calls for the exercise of greater caution in making the investment, for there is no rule of law prohibiting the investment of trust funds in any other than first mortgages.

Where a loan by an executor upon mortgage is a safe one when made, such executor will not be held liable for a loss arising from the sudden depreciation of the mortgaged property by reason of a general panic. *Matter of Blauvelt*, 2 Con. 458.

Trustees with discretion to invest without restriction as to the character or class of such investments, are not thereby authorized to lend to each other assets of the estate, or invest them on the hazardous security of a second mortgage. *Matter of Petrie*, 5 Dem. 352.

It is an improper use of a trust fund to build houses with it upon land held in trust. *Rose* v. *Rose*, 6 Dem. 26.

Even where executors loan on real estate they must use care as to title and ascertain that the value is such as will, in all probability, be adequate security for repayment whenever the money shall be called in.

The criterion of value for executors in loaning on real estate is the estimate of men of ordinary prudence who would deem it safe to make a like loan with their own money.

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Good faith and honest intentions will not protect men in the performance of a trust when they depart from prudential rules, which experience of others in similar transactions have approved as the only safe guides. *Bogert* v. *Van Velsor*, 4 Edw. Ch. 719.

Trustees can not without breach of duty change securities specified and set apart by the testator. *Bigelow* v. *Tilden*, 18 Misc. 689. Nor invest in bonds and mortgages, if the will direct investment in public stocks. *Meldon* v. *Devlin*, 20 Misc. 56.

See statute relating to investment of trust funds in addenda.

When the fund is directed to be invested in the purchase of land in a particular place, upon such a trust, the court of chancery may, with the assent of all parties, who have any interest in the trust fund, or in the lands to be purchased therewith, authorize it to be invested in the purchase of real estate in another place upon the same trusts, and the chancellor as general guardian of infants, who are interested in the trust fund, may assent to such change of investment in their behalf. *Wood* v. *Wood* 5 Paige, 596.

When, by the provisions of the will, the trustees are empowered to hold any or all the personal estate of the testator in the manner and form in which the same may be invested at the time of his death, the trustees can not be held liable for losses incurred by reason of stocks bought by the testator in his lifetime, selling for less than their inventoried value. *Matter of Wolf*, 1 Con. 102.

Where the testator directs investments to be made in England a court can not direct the same to be made here, except with the assent of the persons interested. *Burril* v. *Sheil*, 2 Barb. 457.

IV. PERSONAL LIABILITY OF THE TRUSTEE.

1. FOR NEGLIGENT OR WRONGFUL ACT.[1]

(1) Representatives of a deceased executor, liable for his waste, or wrongful act.

Statute, p. 751.

(2) Executors of trustee selling trust property.

Wall v. Kellogg's Executors, 16 N. Y. 385.

(3) Selling property for less than its value.

People v. Norton, 9 N. Y. 176; Parsons v. Rhodes, 22 Hun, 80; People v, Pleas, 2 Johns. Cas. 376.

(4) Regulation of the conduct of an offending trustee by the court.

Wood v. Brown, 34 N. Y. 337.

(5) Investment of funds by trustee.

See Investment: King v. Talbot, 40 N. Y. 76; Sherman v. Parish, 53 id. 483; Adair v. Brimmer, 74 id. 539; 95 id. 35; Cocks v. Haviland, 124 id. 426; Matter of Barnes, 140 id. 468; Matter of Foster, 15 Hun, 387; Baker v. Disbrow, 18 id. 29; Ackerman v. Emott, 4 Barb. 626; King v. King, 3 Johns. Ch. 552.

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[1]See rules and decisions in Thomas on Negligence, p. 25, *et seq.*

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1. FOR NEGLIGENT OR WRONGFUL ACT.

(6) Liability for the taking and detention of property.

Levin v. Russell, 42 N. Y. 251.

(7) Rents and profits of demised premises—misapplication of.

Miller v. Knox, 48 N. Y. 232.

(8) Estoppel of beneficiary.

Sherman v. Parish, 53 N. Y. 483; Matter of Denton v. Sanford, 103 id. 607; Mills v. Smith, 141 id. 256; Cline v. Sherman, 144 id. 601; see Beneficiary, p. 826.

(9) Executor commingling property of estate with his own.

Hannahs v. Hannahs, 68 N. Y. 610.

(10) Payment of interest by trustee for breach of duty.

Hannahs v. Hannahs; 6 8N.Y. 610; See Interest, p. 779; Adair v. Brimmer, 74 N.Y. 539; 95 id. 35; Cook v. Lowery, id. 103; Matter of Barnes, 140 id. 468.

(11) Investment in discretion of trustees.

Adair v. Brimmer, 74 N. Y. 539; 95 id. 35.

(12) Securities or property taken to protect *choses in action*, or other property of the estate.

Adair v. Brimmer, 74 N. Y. 539; 95 id. 35; Ormiston v. Olcott, 84 id. 339; Matter of Deuton v. Sanford, 103 id. 607.

(13) Waste, negligence, or breach of duty by a trustee—liability of cotrustee therefor.

Adair v. Brimmer, 74 N. Y. 539; 95 id. 35; Ormiston v. Olcott, 84 id. 339; Croft v. Williams, 88 id. 384; Glacius v. Fogel, 88 id. 434; Lent v. Howard, 89 id. 169; Earle v. Earle, 93 id. 104; Wilmerding v. McKesson, 103 id. 329; Matter of Niles, 113 id. 548; Bruen v. Gillet, 115 id. 10; Nanz v. Oakley, 120 id. 84; Cocks v. Haviland, 124 id. 426; Matter of Blauvelt, 131 id. 249; Cline v. Sherman, 144 id. 601; Weetzen v. Vibbard, 5 Hun, 265; Matter of Storm, 28 id. 499; Matter of Litzenberger, 85 id. 412; Monell v. Monell, 5 Johns. Ch. 283; Sutherland v. Brush, 7 id. 17; Clark v. Clark, 8 Paige, 153; Johnson v. Corbett, 11 id. 265.

(14) Settlement of accounts when one of several trustees has misapplied or wasted funds.

Adair v. Brimmer, 74 N. Y. 539; s. c., 95 id. 35; Moore v. American Loan & T. Co., 115 id. 65.

(15) Trustee of mortgage selling without authority.

James v. Cowing, 82 N. Y. 449.

(16) Trustees for protection of persons interested in corporate property, and for purposes of buying same, or reorganizing.

James v. Cowing, 82 N. Y. 449; Harrison v. Union Trust Co., 144 id. 326.

(17) Liability of trustee for property deposited with another for safe keeping.

McCabe v. Fowler, 84 N. Y. 315.

(18) Duty as to foreclosure of mortgage.

Ormiston v. Olcott, 84 N. Y. 339.

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(19) Duty as to collecting obligations due trust estate.

Harrington v. Keteltas, 92 N. Y. 40; O'Connor v. Gifford, 117 id. 275; Hollister v. Burritt, 14 Hun, 291; Trumpbour v. Trumpbour, 70 id. 571; Raynor v. Pearsall, 3 Johns. Ch. 578; Shultz v. Pulver, 3 Paige, 182; s. c., 11 Wend. 361.

(20) Loss from ignorance of one acting as attorney.

Wakeman v. Hazelton, 3 Barb. Ch. 148.

(21) expenses of unsuccessful attempt to collect debts.

Collins v. Hoxie, 9 Paige, 81.

(22) Selling on credit without proper security.

Orcutt v. Orms, 3 Paige, 459.

(23) Degree of care required of a trustee.

Ormiston v. Olcott, 84 N. Y. 339; Crabb v. Young, 92 id. 56; Earle v. Earle, 93 id. 104; Matter of Cornell, 110 id. 351; Purdy v. Lynch, 145 id. 462; Thompson v. Brown, 4 Johns. Ch. 619; Sheerin v. Pub. Adm., 2 Redf. 421.

(24) Liability for proceeds of land sold, and for rents and profits.

Hood v. Hood, 85 N. Y. 561; Glacius v. Fogel, 88 id. 434; Lent v. Howard, 89 id. 169; Harlow v. Mills, 58 Hun, 391; aff'd 128 N. Y. 650.

(25) Liability of sureties—nature of remedy and condition precedent to action against.

Hood v. Hood, 85 N. Y. 561; Trust & Deposit Co. v. Pratt, 25 Hun, 23.

(26) Non resident trustees.

Hood v. Hood, 85 N. Y. 561.

(27) Loaning or delivering funds to cotrustee.

Croft v. Williams, 88 N. Y. 384.

(28) One of two trustees receiving money paid to estate.

Croft v. Williams, 88 N. Y. 384; Lent v. Howard, 89 id. 169; Bruen v. Gillet, 115 id. 10; Nanz v. Oakley, 120 id. 84.

(29) Trustee claiming never to have received any of the trust estate —evidence of his liability.

Glacius v. Fogel, 88 N. Y. 434; Earle v. Earle, 93 id. 109; Cocks v. Haviland, 124 id. 426.

(30) Trustee not deprived of remedy against a wrong doer because he participated in the wrong.

Wetmore v. Porter, 92 N. Y. 76.

(31) Trustee using trust property for his own benefit or for another; or consenting to such use by another.

Wetmore v. Porter, 92 N. Y. 76; Wilmerding v. McKesson, 103 id. 329; Deobold v. Oppermann, 111 id. 531; Moore v. Am. Loan & T. Co., 115 id. 65; Cocks v. Haviland, 124 id. 426; Thompson v. Brown, 4 Johns. Ch. 619; Colt v. Lasnier, 9 Cow. 320; Schott's Estate, 1 Tucker, 337.

(32) Devastavit by former trustee.

Cook v. Lowery, 95 N. Y. 103.

IV. PERSONAL LIABILITY OF THE TRUSTEE.

1. FOR NEGLIGENT OR WRONGFUL ACT.

(33) Errors in distribution.
Bowditch v. Ayrault, 63 Hun, 23.

(34) Presumption that income was misappropriated by trustees before the principal was misappropriated.
Cook v. Lowery, 95 N. Y. 103.

(35) Completing contracts of purchase made by testator.
Matter of Denton v. Sanford, 103 N. Y. 607.

(36) Power of surrogate to adjust equities on accounting.
Matter of Niles, 113 N. Y. 548.

(37) Separation of principal and income.
Wilcox v. Quinby, 73 Hun, 524.

(38) Erecting buildings and making repairs.
Stevens v. Melcher, 80 Hun, 514.

(39) Losses in making investments to escape taxation.
Wheelwright v. Rhoades, 28 Hun, 57.

(40) Duty to deposit money in bank.
Cornwall v. Deck, 8 Hun, 122.

(41) Deposit of funds in bank in trustee's own name.
Matter of Barnes, 140 N. Y. 468.

(42) Failure of bank in which deposit is made.
Harlow v. Mills, 58 Hun, 391, aff'd 128 N. Y. 650.

(43) Separation of estate into shares by order of court and assignment of shares to trustees severally.
Cline v. Sherman, 144 N. Y. 601.

(44) Separation of trust duties by the testator.
Sherman v. Paige, 21 Hun, 59.

(45) Acts authorized by power of sale do not constitute waste.
Keller v. Ogsbury, 121 N. Y. 362.

(46) Failure to pay over proceeds of sale to those entitled and consequent loss of same by failure of bank in which they are deposited.
Harlow v. Mills, 58 Hun, 391, aff'd 128 N. Y. 650.

(47) Evidence of *devastavit.*
Platt v. Robins, 1 Johns. Cas. 276; People v. Judge of Erie, 4 Cow. 445.

(48) Refusal to apply assets to payment of debts.
Hartness v. Purcell, 1 Wend. 303.

(49) Liability of public administrator.
Sheerin v. Pub. Adm., 2 Redf. 421; Levin v. Russell, 42 N. Y. 251.

(50) Trustee discharging mortgage for which he is liable.
Zapp v. Miller, 3 Dem. 266.

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(51) Order of marshaling assets for payment of debts and legacies.
Matter of Oosterhoudt, 15 Misc. 566.

(52) Proceedings by beneficiaries to protect their interests.
See Beneficiaries, pp. 811, 825; also see pp. 578–614.

(53) Action by attorney general against trustees for waste.
People v. Simonson, 126 N. Y. 299.

(54) Rights of creditors when executor has squandered the estate.
Matter of Bingham, 127 N. Y. 296; Kingsland v. Murray, 133 id. 170; Hosack v. Rogers, 11 Paige, 603.

(55) Removal of trustee for waste.
Matter of McGillivray, 138 N. Y. 308.

(56) Residuary legatees—refunding by—contribution on account of waste by trustee.
Mills v. Smith, 141 N. Y. 256.

(57) If estate claims profits of an investment it must allow incidental expenses of same.
Wheelwright v. Rhoades, 28 Hun, 57; see Town of Lyons v. Chamberlain, 89 N.Y. 578.

(58) Rights of next of kin for conversion of assets by administrator.
Matter of O'Brien, 45 Hun, 284; Clark v. Clark, 8 Paige, 153.

(59) Demand by unauthorized person does not render trustee liable for conversion.
Furman v. Coe, 1 Caines Cas. 96.

3 R. S. 114, sec. 6 (Banks's 7th ed. p. 2307). "The executors and administrators of every person, who, as executor, either of right or in his own wrong, or as administrator, shall have wasted or converted to his own use, any goods, chattels, or estate, of any deceased person, shall be chargeable in the same manner, as their testator or intestate would have been, if living."

A trust estate consisted of a house and lot, subject to the lien of a mortgage, and the trustee, for his own convenience and not for the advantage of the estate, sold the property subject to the mortgage for less than its value, and the property on a foreclosure sold for less than the sum due on the mortgage.

Construction:

The surety of the trustee, after the death of the latter, was liable on his bond for the surplus value of the property at the time of the trustee's sale, beyond the amount of the incumbrance, together with interest on such surplus. *People* v. *Norton*, 9 N. Y. 176.

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Executors who, under a power of sale, convey land of which their testator was in equity a mere trustee, are liable, as executors, to the person having the equitable title to such land, for the damages sustained by him to the extent of the purchase money received by them. *Wall* v. *Kellogg's Executors*, 16 N. Y. 385.

Where the trusts under a will vested in the executor are distinguishable from those attached to his office, the court may dismiss him as to the former, and not as to the latter. But if one of several executors is guilty of misconduct in his dealings with the estate, the court will interfere, in a proper case, to regulate his conduct and compel him to place the notes, bonds and other securities in his possession belonging to the estate, in such custody as to enable his co-executors to obtain access to the same; and may direct the mode in which he shall co-operate with his co-executors in discharging his duties as executor under the will.

It seems the surrogate is authorized, under the statutes of this state, upon an accounting by the executor to administer the same remedy. *Wood* v. *Brown*, 34 N. Y. 337.

Misapplication of funds by executor—liability therefor. *King* v. *Talbot*, 40 N. Y. 76, 90, digested p. 779.

The public administrator of the city of New York is liable personally for the taking or detention of personal property from the possession of a mortgagee thereof, where such mortgagee had obtained possession of the property, on default in payment of his mortgage, during the lifetime of the mortgagor, although such public administrator acted in his official capacity and in good faith, and on the belief that the property belonged to the intestate mortgagor at the time of his death.

He has the same right as a private administrator of a mortgagor to avoid the mortgage by showing it fraudulent, as against creditors. *Levin* v. *Russell*, 42 N. Y. 251.

It is the duty of executors and administrators to receive the rents and profits of premises leased to their testator or intestate, accruing after his death, and to the extent of the rent reserved in the lease, to apply them in payment thereof, instead of placing them among the general assets; and they are personally liable for the rent, to the extent of the rents and profits received by them. *Prima facie*, these are sufficient to pay the whole rent; if not, it is matter of defense. *Miller* v. *Knox*, 48 N. Y. 232.

A married woman may acquiesce in an unauthorized investment of

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trust property given to her sole and separate use, so as to bar her right of action against her trustee therefor. She is not estopped, however, by such acquiescence from seeking a withdrawal of the fund from the unauthorized investment; and the placing of it as required by the trust. *Sherman* v. *Parish*, 53 N. Y., 483.

Citing, Walker v. Shore, 19 Ves. Jr. 387; Jacques v. Meth. Epis. Ch., 17 J. R. 548.

See also, Boerum v. Schenck, 41 N. Y. 182, digested p. 826; see trustees' duty to be disinterested; Arthur v. Nelson, 1 Dem. 337; Cocks v. Barlow, 5 Redf. 406.

Executor mixing property of estate with his own—when executor is chargeable with compound interest—when claim of executor to charge for use of his property is disallowed. *Hannahs* v. *Hannahs*, 68 N. Y. 610.

The will of W. devised to his executors certain real estate, in trust, with power to sell and to invest the proceeds in other lands, in bonds and mortgages, or in such securities as they should deem safe and for the greatest benefit of the *cestuis que trust*. The executors transferred the lands, which were undeveloped coal lands, for the purpose of organizing a mining corporation to develop and work them, taking pay in the stock of the corporation. After the funds of the company were exhausted, its bonds, secured by mortgage on its lands, were issued to raise funds to build a railroad to the lands, which bonds the stockholders were requested to take *pro rata*, and a portion of which the executors took, crediting themselves as executors the amount paid therefor, as an investment for the estate. The amount of the bonds issued was more than the value of the company's land. No dividend had been paid, and it did not appear that the property was yielding any profits or income out of which interest could be paid. *Held*, that the executors were not entitled to the credit; that the bonds were not such a security as a prudent executor or trustee would voluntarily have accepted as an investment for trust funds, or as the rules of courts of equity would have sanctioned; and that it was questionable whether, even if the investment had been made in the exercise of the power, it could be sustained; but that it was not so made, as the purchase of the bonds was a *quasi* compulsory advance, to protect the stock received in payment for the lands; and as the transaction by which the lands were sold and the stock acquired, was unauthorized, and thereby the executors became personally accountable to the estate for the value of the lands, the stock was their individual property, the investment in the bonds was for their individual account, and not chargeable to the estate.

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Where executors have made such a transfer, they are personally liable for the market value of the lands at the time they conveyed, with interest from that time.

The maxim "*ignorantia legis excusat neminem*" can not be invoked by the trustee in such a case.

Where excessive payments have been made by one of several executors, without the authority or consent of the others, out of moneys which have come to his hands severally, and which have never come under the control of the other executors, that one will be held solely responsible for so much of the fund as has thus come to his hands, and be credited only with such amounts as have been legally paid, or which, if himself a legatee, he was legally entitled to retain. But the excess in his hands can not be subtracted from the general account of all the executors, as a payment to a legatee; it must remain in the account as so much assets of the estate, and when the whole balance of the estate, not legally disposed of, is thus ascertained, the question in what proportion the several executors are liable for such balance must be determined.

Where excessive payments are made, or moneys drawn, by one executor, with the consent or acquiescence of the others, out of a fund which has been collected, and has come into the possession of such other executors, or the joint possession or control of all, they all become liable, not only to make good to the other distributees, on the final distribution, any excess of advances so made, but at all intermediate stages to make good all payments which become due or payable, under the provisions of the will, to such distributees.

So, also, where an executor, by his negligence, suffers his coexecutor to receive and waste the estate, when he has the means of preventing it by proper care, he is liable to the beneficiaries for the waste.

As to whether where an agent appointed by all the executors jointly, to manage the final affairs of the estate, makes over payments out of the funds held by him as such agent, all the executors are jointly liable, *quære.*

Where securities of the estate was intrusted to one of the executors for sale, on his promise to pay the proceeds into the general fund, which promise he failed to perform, permission to him so to act was not such negligence on the part of the other executors as would render them liable for such default. *Adair* v. *Brimmer*, 74 N. Y. 539; see, 95 id. 35, digested p. 986.

Citing, Clark v. Clark, 8 Paige, 153; King v. Talbot, 40 N. Y. 90.

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A trustee of a mortgage, with authority, in case of default, to foreclose, buy in the property, organize a new company for the benefit of bond holders and convey the property to it, sold the property without authority and was held liable for the loss occasioned thereby. *James* v. *Cowing*, 82 N. Y. 449, rev'g 17 Hun, 256.

An executor is not a guarantor of the safety of securities in his charge belonging to the estate; he is bound simply to exercise such prudence and diligence in the care and management of the estate as men of discretion and intelligence in general employ in their own like affairs.

N., in his lifetime, left certain United States bonds in the hands of O. for safe keeping, who was at the time responsible, of good character and considered entirely trustworthy. N. died in 1865, leaving a will, by which his widow was appointed executrix, and W., defendant's testator, executor. The latter qualified, the former did not until after the death of W. The bonds were converted into other bonds, which remained in the custody of O. until W. died in 1871. W. also left securities of his own in the hands of O. After the death of W., the widow of N. qualified as executrix, but no letters testamentary were issued to her. Her attorney took charge of the estate; no call was made upon O. to deliver up the bonds; after his death, which occurred in 1875, it appeared that in 1874 he hypothecated the bonds as collateral for a loan made to a firm of which he was a member; said firm, including O., were insolvent. In an action to charge the estate of W. with the amount of the bonds so lost to the estate of N., *held*, that there was no negligence or want of care and vigilance on the part of W., such as would authorize a recovery. *McCabe* v. *Fowler*, 84 N. Y. 315.

Citing, Walton v. Walton, 1 Keyes, 18; 2 Abb. Pr. (N. S.) 428; King v. Talbot, 40 N. Y. 76; Shook v. Shook, 19 Barb. 653.

Where the assets of an estate had all passed into the possession of one of two executors and trustees, and, upon his death, the surviving executor found that the deceased had mingled the assets with his own, and had partly converted them to his own use and partly lost them by unsafe investments, and, as the best possible arrangement to secure the fund, the survivor took from the estate of the deceased a bond secured by mortgage on real estate in Ohio, which was guarantied by the widow, who was sole legatee and at that time solvent, and also took further collaterals for greater safety, the securities being at the time perfectly good, *held*, that it was the right and the duty of the survivor to accept the securities; and that he could not be made personally liable for so doing.

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The rule that each of several coexecutors is only liable for his own acts, and can not be made responsible for the negligence or waste of another, unless he in some manner aided or concurred therein, applies as well where the executors are also trustees.

While it was the duty of the surviving executor to foreclose the mortgage in case of nonpayment, he was entitled to exercise the reasonable discretion of an ordinarily prudent man as to the time and occasion. *Ormiston* v. *Olcott*, 84 N. Y. 339, rev'g s. c., 22 Hun, 270.

Citing King v. Talbot, 40 N. Y. 76; Ackerman v. Emott, 4 Barb. 626; Sutherland v. Brush, 7 Johns. Ch. 22; Monell v. Monell, 5 id. 283; Manahan v. Gibbons, 19 Johns. 427; Bates v. Underwood, 3 Redf. 365; distinguishing Banks v. Wilkes, 3 Sandf. Ch. 99; DeForrest v. Fulton Fire Ins. Co., 1 Hall, 130; Kip v. Denniston, 4 Johns. 23; Kirby v. Turner, Hopk. Ch. 330.

When executor is liable to account for proceeds of sale of land, which he is empowered by testator to sell, also for rents and profits—sureties are responsible when executor is a nonresident for result of accounting—how default of executor is established—condition precedent to action at law—when equitable action is not maintainable against nonresident executor and his sureties. *Hood* v. *Hood*, 85 N. Y. 561.

Where an executor receives funds of the estate and delivers them to a coexecutor, or does any act by which the funds come to the hands of the latter, and but for which he would not have received them, and he diverts or wastes them, said executor is liable for the loss.[1]

But where an executor is merely passive, not obstructing the collection or receipt of assets by his associate, he is not liable for the latter's waste, unless he assented to it, or having knowledge of a misapplication intended, or in progress, and having the means of preventing it by proper care, neglected to do so.[2]

Where an executor loaned to his coexecutor money, taking his individual note therefor, upon the faith of representations of the coexecutor that he desired to use the money to pay debts of the estate, and where it appeared that it was not so used, *held*, that the money loaned was not a proper charge against the estate.

So, also, where an executor received funds of the estate which he delivered to his coexecutor, who misappropriated them, *held*, that said executor was liable therefor.

[1] Langford v. Gascoyne, 11 Ves. 335; Ames v. Armstrong, 106 Mass. 18; Candler v. Tillett, 22 Beav. 257; Clark v. Clark, 8 Paige, 152; Monell v. Monell, 5 Johns. Ch. 296; Williams on Ex'rs, 1927.

[2] Sutherland v. Brush, 7 Johns. Ch. 17; Adair v. Brimmer, 74 N. Y. 566; Williams v. Nixon, 2 Beav. 472.

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Where, however, two executors under a power of sale in the will entered into a joint contract for a sale of real estate, and the purchaser made a payment in the presence of both, which one of them took without objection from the other, and subsequently misappropriated, in the absence of evidence charging him with negligence, the latter was not liable; that the fact that the coexecutor was insolvent was not alone sufficient to so charge him; and that the fact that he joined in the sale did not make him liable.[1]

That he was not made liable by acts of negligence on his part which in no way were connected with or contributed to the loss. *Croft* v. *Williams*, 88 N. Y. 384.

See, also, Matter of Hathaway, 80 Hun, 186.

In proceedings to compel executors to account and to pay a deficiency judgment on foreclosure, P., one of the executors, claimed and testified that he never had any part of the assets of the estate in his possession. It appeared, however, that he qualified as executor and acted as such, he rendered a joint account with his coexecutor without making any such claim therein, and in it and the schedules attached the receipts and disbursements of money were stated as if made by the executors jointly. This was an admission of joint action and joint liability; and the surrogate was justified in holding P. liable for the moneys received.

The entire real estate was devised to the executors in trust with power to sell; they sold the same, save that covered by the mortgage, and also received large amount for rent, etc. *Held*, that the amounts thus received were assets for the payment of debts and they were liable to account therefor to the petitioner. *Glacius* v. *Fogel*, 88 N. Y. 434.

B., one of the executors, received a sum of money on the exchange of a house and lot for a farm.

Construction:

In the absence of evidence that the exchange was made with the knowledge of his coexecutor, H., or that the money ever came to the hands or under the control of the latter, he was not chargeable with the sum so received. *Lent* v. *Howard*, 89 N. Y. 169.

An executor, having notice that there is a debt due the estate, is bound to active diligence for its collection; he may not wait for a request from the distributees.

[1] Williams on Ex'rs, 1937, note u; Perry on Trusts, secs. 420, 423; Kip v. Denniston, 4 Johns. 25; Monell v. Monell, 5 Johns. Ch. 296.

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In case the debt is lost through his negligence he becomes liable as for a *devastavit.*

It seems, that if the case is one of such doubt, that an indemnity is proper, he must at least ask for it; and at any rate he takes the risk of showing that the debt was not lost through his negligence. *Harrington* v. *Keteltas*, 92 N. Y. 40.

Citing, Shultz v. Pulver, 3 Paige, 184, 11 Wend. 366.

While trustees will be held to great strictness in their dealings with trust property, the courts will regard them with leniency when it appears they have acted in good faith.

When the will provides that executors should not be liable for any loss or damage except such as occurred "from their willful default, misconduct or neglect," they will not be liable for imprudence in investments which were not "willful." *Crabb* v. *Young*, 92 N. Y. 56, digested, *ante*, p. 745.

It is no defense to an action brought by the executor as such, to recover assets of the estate in the hands of defendant, or for the conversion thereof, that plaintiff in his individual capacity acted in collusion with the defendant in despoiling the estate.

The complaint in an action brought by an executor to recover the value or possession of certain railroad bonds, after alleging the issuing of letters testamentary to plaintiff and his qualification, and that the bonds in question belonged to the estate, alleged in substance that plaintiff, at the request of defendant, who was his partner in business, and who knew that the bonds were trust funds, pledged the same as security for loans made to the firm; that the firm had funds sufficient to pay the debt, and defendant was largely indebted to plaintiff, yet that defendant, without the knowledge or consent of plaintiff, procured the pledgee to sell the bonds, and the proceeds were applied to the payment of the firm debt; that the bonds came into the custody and control of defendant, who refused to return them or pay their value. Upon demurrer to the complaint, held, that it set forth a good cause of action; and that it was not necessary that plaintiff should have been made individually a party defendant. *Wetmore* v. *Porter*, 92 N. Y. 76.

Citing, Western R. R. Co. v. Nolan, 48 N. Y. 517; Austin v. Monro, 47 id. 360; Ferrin v. Myrick, 41 id. 315; Reynolds v. Reynolds, 3 Wend. 244; Demott v. Field, 7 Cow. 58; Wolcot v. Knight, 6 Mass. 418; Williams v. Jackson, 5 Johns. 493; Merritt v. Seaman, 6 N. Y. 168. Dillaye v. Greenough (45 id. 438), distinguished.

Where by a will certain trusts are vested in the executors as such, an

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executor by accepting the office and qualifying, accepts the trusts so conferred.

Where executors or trustees permit a third party to manage and control the estate, they adopt him as their agent, are responsible for his conduct, and liable for losses occasioned by his improper or negligent management.

It seems, that while an executor or trustee is not liable for acts of a coexecutor or cotrustee, which he has not the means of preventing or guarding against, or from which he has no reason to apprehend danger to the estate, he is bound to exercise due caution and vigilance in respect to the approval of, or acquiescence in, the acts of his associates; and if he delivers over to them the whole management of the estate, he is responsible for losses which might have been prevented by reasonable diligence upon his part. *Earle* v. *Earle*, 93 N. Y. 104, modifying 16 J. & S. 18.

Upon settlement of the accounts of the executors of the will of W. it appeared that C., one of the executors, who was entitled to one-sixth of the estate, had received and appropriated moneys in excess of his share. The accounts were brought down and settled to December 31, 1871. It was determined that B., a coexecutor, was liable individually for so much of the moneys so appropriated by C. prior to August, 1867, as was in excess of the amount found payable to him on account of his share at the time of the accounting, but was not so liable for monies which went into the hands of C. after August, 1867.

Construction:

B. was entitled to have applied in reduction of his liability the share of the estate to which C. was found entitled and which was payable December 31, 1871; and that a direction that the same should be applied in reduction of the indebtedness of C., incurred after August, 1867, was error.

B. was not entitled to have payments made by C. after August, 1867, credited in deduction of his liability; they were properly applied against the indebtedness of C. incurred after that date.

The executors were charged with the value of certain real estate which it was determined they had unlawfully disposed of. *Held*, that in ascertaining C.'s interest in the estate he was entitled to a credit for his share of the sum so charged. *Adair* v. *Brimmer*, 95 N. Y. 35; see 74 N. Y. 539.

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Testator died in 1852, the executors accounted in 1865, and defendant was appointed trustee in 1866. Through a *devastavit* by one of the executors, the fund paid over to defendant was less than the original principal.

Construction:

It could not be presumed that the *devastavit* was of the principal only, but in the absence of evidence the presumption was that the income was first misappropriated. *Cook* v. *Lowry*, 95 N. Y. 103, modifying 20 Hun, 20.

NOTE 1. "Under these circumstances, we think it was not error in law to charge the trustee with the legal interest, as the equivalent of undisclosed profits and by way of indemnity for his unfaithfulness in his trust. It is not usual to charge a trustee with the highest rate of interest where he has acted in good faith, without gross negligence, but such case must depend to a considerable degree on its own circumstances. (Raphael v. Boehm, 11 Ves. Ch. 92; Barney v. Saunders, 16 How. U. S. 535; 2 Kent Com. 230, note and cases cited.)"

NOTE 2. "Commissions are allowed to trustees as a compensation for services in the execution of the trust, and in a case of gross neglect or of unfaithfulness, we think the court may properly disallow them. (3 Redf. on Wills, 554, and cases cited.)"

NOTE 3. "At no time when trustees make payments for maintenances with income in hand, not bearing interest, should they be allowed interest on such payments. (King v. Talbot, 40 N. Y. 76.)" (115.)

Failure of executor to collect note specifically devised to an infant. *Davis* v. *Crandall*, 101 N. Y. 311, digested p. 1497.

An executor is not exonerated from the duty of vigilance in protecting funds belonging to the estate simply by the fact that they were paid to or came into the hands of a coexecutor in due course of administration.

While, if he is merely passive, and does not obstruct the collection or receipt of assets by his associates, he is not liable for the latter's waste; where he knows and assents to a misapplication, or negligently suffers his coexecutor to receive and waste the estate, when he has the means of preventing it, he becomes liable for a resulting loss.

The will of W. created certain trusts; among others, one for the benefit of plaintiff. The portion of the trust fund, held for plaintiff's benefit, was directed to be separately invested, and the net income applied to her use during life. At the time of his death, W. was a member of the firm of W. & M. The surviving members of the firm, one of whom was the defendant, G., an executor and trustee under the will, continued

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the business. He retained in his possession the books of account, papers and securities belonging to the estate. Moneys realized from the estate in the course of administration were, under the authority of G., paid to the new firm, and were, with the knowledge of defendant McK., a coexecutor and trustee, used in its business, the firm paying interest, which was credited in the account books of the estate. No portion of the estate was set apart as plaintiff's share. The firm failed, and the funds of the estate in its hands were lost. In an action to charge said trustees with the loss, held, that McK. was liable for allowing the fund to accumulate in the hands of the firm without requiring the same to be invested as directed by the will: also, that if he had not actual knowledge of the fact that the firm was using the funds, as he could have ascertained the fact by making inquiries as to what use was being made thereof, he was chargeable with negligence in failing so to do; that he should at least have sought to have them properly invested.

G., without the knowledge of McK., hypothecated securities belonging to the estate to secure loans for his own benefit or for that of the firm. McK. was not liable for the loss; a failure to make a separation of the securities, as contemplated by the will, did not render him liable, as this did not induce or cause the spoliation, nor would such a separation have prevented it. *Wilmerding* v. *McKesson*, 103 N.Y. 329.

Citing, McCabe v. Fowler, 84 N. Y. 314; Croft v. Williams, 88 id. 384; Sutherland v. Brush, 7 Johns. Ch. 19; Sherman v. Parish, 53 N. Y. 483; Adair v. Brimmer, 74 id. 539; Peter v. Beverly, 10 Pet. 532; Ormiston v. Olcott, 84 N. Y. 339; McKim v. Aulbach, 130 Mass. 481.

By the will of D. certain trusts were created to the amount of $4,500, of which the executors of the will were the trustees. D. held a mortgage upon real estate in New Jersey, which, previous to his death, was foreclosed, and on foreclosure sale he bid off the premises for $11,000, the amount of prior incumbrances and the cost; but before the sale was consummated D. died. The executors were called upon to complete the sale and pay the purchase price, which they did. After holding the real estate for about three years, making diligent effort to sell, they effected a sale for $6,000, receiving two mortgages for the purchase money, one of $4,500, on the premises sold, which was assigned to defendants as trustees, and held by them as an investment of the trust fund. Subsequently this mortgage was foreclosed, and on sale about $2,300 was realized to apply on the mortgage, which sum the trustees accounted for.

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Proceedings before the surrogate, to charge the trustees individually with the deficiency in the trust fund.

Construction:

In the absence of any evidence impeaching their good faith, they were not liable; as executors they were bound to perform their testator's contract of purchase, and were not required to wait until it was enforced against them by legal proceedings.

It was immaterial that the executors paid the money to complete the purchase out of the funds of the estate before they had qualified; thereafter they could ratify what they had previously done.

While, as a general rule, trustees residing in, and deriving authority from, a will executed and admitted to probate in this state may not invest trust funds in mortgages upon real estate out of the state, the rule does not apply in a case like this.[1]

Same will:

After the sale of the land defendants rendered a final account as executors. The petitioners were made parties to the proceedings. The mortgage was credited to the executors, and the surrogate's decree, settling the accounts, recited in substance, that they held the mortgage for the purposes of the trust, directed payment to the *cestui que trust* of certain sums as interest, and adjudged that, upon complying with the decree, the executors should be discharged.

Construction:

The petitioners were estopped by the decree, which furnished absolute protection to the executors.[2] *Matter of petition of Denton* v. *Sanford*, 103 N. Y. 607, affg 39 Hun, 487.

See also, Bushnell v. Drinker, 5 Redf. 581.

An assignee for the benefit of creditors is bound to exercise in the discharge of his trust that degree of diligence which persons of ordinary prudence are accustomed to use in their own affairs. This duty extends to all the interests committed to his charge, and his whole conduct and management of the trust, when called in question is to be considered in view of the powers which he may exercise in the collection, recovery,

[1] Ormiston v. Olcott, 84 N. Y. 339.

[2] Code, sec. 2742; In re Tilden, 98 N. Y. 434; In re Hawley, 100 id. 206.

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and application of the assets, and the general management of the trust. *Matter of Cornell*, 110 N. Y. 351.

Citing, Litchfield v. White, 7 N. Y. 438; Matter of Dean, 86 id. 399; 2 Pom. Eq. Jur. sec. 1066.

See also, Butler v. Johnson, 111 N. Y. 204; Cuthbert v. Chauvet, 136 id. 336; Spicer v. Raplee, 4 App. Div. 471; Matter of Hutchinson, 84 Hun, 563; Wheelwright v. Rhoades, 28 id. 57; Valentine v. Valentine, 3 Dem. 597.

The employment of the trust fund by an administrator or other trustee for his individual benefit, or as loans to persons engaged in and to be used in business, is illegal and constitutes a *devastavit*. *Deobold* v. *Oppermann*, 111 N. Y. 531.

Citing, Wilmerding v. McKesson, 103 N. Y. 336, King v. Talbot, 40 id. 90; Fellows v. Longyor, 91 id. 324; Wetmore v. Porter, 92 id. 76.

The administration of assets of the estate of a decedent is peculiarly within the cognizance of equity, and a surrogate's court, in adjusting the accounts of executors or administrators, is governed by principles of equity as well as of law; it is not prevented by any rule of law from doing exact justice to the parties, according to the equities, within the confines only of statutory provisions.

He who holds a position of trust jointly with others can not remain passive, when he knows of irregular acts of his associates, without incurring responsibility for such acts. *Matter of Niles*, 113 N. Y. 548.

While, where one of two or more trustees simply remains passive and does not obstruct the collection by a cotrustee of moneys belonging to the trust fund, he is not liable for the latter's waste, if he himself receives the funds and either delivers them over to his associate or does any act by which they come into the sole possession of the latter or under his control, and but for which he would not have received them, such trustee is liable for any loss resulting from the waste.

Defendants were joint assignees for the benefit of creditors. Defendant H. collected certain moneys from the assets which he deposited to the joint credit of himself and G., his co-assignee. These deposits were withdrawn upon the joint checks of the assignees and the funds deposited with H., who was carrying on business as an individual banker. H. also collected other moneys which never came into the possession or under the control of G. H. subsequently became insolvent. In an action for an accounting, G. was jointly liable with H. for the funds so drawn out upon the joint checks and deposited with the latter; but, held, as it appeared that H. paid out in the proper administration of the trust more than that amount, G. was only liable for such portion of said

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fund as he failed to show was properly applied; that the burden of showing such application was upon him.

Interest at the rate of five per cent. upon the amount not so shown to have been properly applied would be a proper allowance. *Bruen* v. *Gillet*, 115 N. Y. 10.

Citing, Croft v. William, 88 N. Y. 384; Adair v. Brimmer, 74 id. 539, 564; Monell v. Monell, 5 Johns. Ch. 283; Langford v. Gascoyne, 11 Ves. Ch. 333; Underwood v. Stevens, 1 Mer. 712; Williams v. Nixon, 2 Beav. 472.

People ex. rel. v. Faulkner, 107 N. Y. 477; Chambers v. Minchin, 7 Ves. 198; Atty.-Gen. v. Randall, 21 Viners' Abridgment, 534; note a, 9, distinguished; Churchill v. Hobson, 1 P. Williams 241, distinguished and questioned.

The authorities upon the subject of the liability of one trustee for the acts of another, collated and discussed.

See, also, Kittle v. Huntley, 67 Hun, 617; Purdy v. Lynch, 72 id. 272; Cline v. Sherman, 78 id. 298; matter of Litzenberger, 85 id. 512.

W., one of several coexecutors, describing himself as executor, applied to defendant for a loan, offering as security certain stock belonging to the estate; this was refused unless the coexecutors joined in the transaction. The suggestion was then made by or in the presence of one of defendant's officers that if the stock was transferred to one of the legatees the loan could be made; it was transferred to S., a legatee, who paid no consideration therefor, and, with knowledge of defendant's president of the object of such transfer, it discounted a joint and several note, executed by the legatee and W., as "managing executor," the stock being pledged as collateral, it being described in the note as the property of S., and defendant agreed to account to her for any surplus arising on the sale. Defendant gave its check for the sum loaned payable to the order of S.; she gave her individual receipt therefor, and the transaction was entered on defendant's book as a loan to S. Before the transaction W. had executed an assignment in blank of the stock certificate; at the time thereof he filled in the blank with the name of the defendant's president as "trustee." W., after the transaction, absconded. In an action to recover for the estate the stock so pledged, a finding that the loan was made to W., as executor, or that the money advanced ever became assets in his hands was not justified by the evidence; that it clearly showed a contrivance participated in by W., S. and defendant to waste the assets of the estate, in pursuance of which the loan was made to S., secured by pledge of the stock, which, although described as the property of S., were, to the knowledge of defendant, the property of the estate, and was pledged to secure credit for S.; that the fact defendant was told that "the money was going to the benefit of the estate"

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was not material; that the transfer was an abuse of trust on the part of the executor, and that plaintiff was entitled to an unconditional return of the security, or to a return upon paying such portion of the loan as it shall appear was received by W. and applied by him upon the debt of the estate, and that the burden of showing this was upon the defendant. *Moore* v. *American Loan & Trust Co.*, 115 N. Y. 65.

Proceedings by beneficiaries to protect their interests. *United States Trust Co.* v. *Roche*, 116 N. Y. 120, digested p. 341.

Failure of executor to collect a debt, where by competent advice it is doubtful that he has a cause of action, will not charge him with a *devastavit*. *O'Connor* v. *Gifford*, 117 N. Y. 275, digested p. 863.

One of two or more joint administrators is not liable for assets which came into the hands of the other, or for the laches, waste, *devastavit*, or mismanagement of the other, unless he consents to or joins therein.

It seems their liability in that respect is not affected by the fact that they joined in executing the statutory bond. *Nanz* v. *Oakley*, 120 N. Y. 84.

Citing Bruen v. Gillet, 115 N. Y. 10; Croft v. Williams, 88 id. 384; Ormiston v. Olcott 84 id. 339; Adair v. Brimmer, 74 id. 539; 2 Woerner's Law of Administration, sec. 348; Brandt on Suretyship, etc., sec. 490.

Acts were authorized by a power of sale and consequently were not waste. *Keller* v. *Ogsbury*, 121 N. Y. 362, digested p. 999.

The mere fact that one of two or more executors or trustees is passive, and does not participate in the administration or interfere with the acts of his coexecutors in taking possession of the property and collecting moneys of the estate, will not charge him with liability for waste by them; it must appear that he had some reason to apprehend that such might be the consequence of their acts.

Defendant was one of six executors of a will; letters testamentary were issued to all; two of them, C. and B., took charge and possession of the estate and assumed to administer it. No portion of the assets came into defendant's hands, except what she received as the share of the residuary estate given her by the will and she took no active part in the management. The will directed that the share of D., one of the beneficiaries and also one of the executors, should be invested by the executors upon bond and mortgage, the income applied during his life to the support of his family, and on his decease the share to go to plaintiffs, his children. C. and B. divided the estate into shares as directed, and paid over to the beneficiaries, except D., their shares. At the time all the beneficiaries were present. The property apportioned

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and set apart, as the share of D., was examined by him and handed over to B., to care for. It was not invested as directed by the will, but was misappropriated by C. and B. who were copartners. About eight years after the issuing of letters testamentary they failed. It did not appear that up to the time of the failure there was anything to excite suspicion that they were not prudent and reliable business men. In an action brought by plaintiffs to recover said share, it was held that the fact did not justify a finding of such negligence, on the part of the defendant, as to render her liable.

The will directed an investment for the testator's widow. The investment was not made by C. and B., as directed, but in another security. Defendant remonstrated against this at the time, but took no action to compel a proper investment; no loss resulted therefrom. Four years before the failure of C. and B. defendant knew that they had not made any other investment of the fund, and she then joined in an undertaking to the widow that her annuity should be paid. These facts were not sufficient to charge defendant with the want of due care and caution. *Cocks* v. *Haviland*, 124 N. Y. 426.

Citing Bruen v. Gillet, 115 N. Y. 10; Croft v. Williams, 88 id. 384; Ormiston v. Olcott, 84 id. 339; Wilmerding v. McKesson, 103 id. 329.

It seems, an action is not maintainable by the attorney general in the name of the people against executors or trustees for waste, misapplication of the estate or any malversation in office. *People* v. *Simonson*, 126 N. Y. 299, digested p. 465.

The rights of creditors to the payment of their debts out of the proceeds of the real estate of a testator, in the absence of proof of *laches* on their part, may not be denied because of the fact that the executor has squandered the personal property which came to his hands. *Matter of Bingham*, 127 N. Y. 296, digested p. 941.

Liability of an executor for acts of his coexecutor. *Matter of Blauvelt*, 131 N. Y. 249, digested p. 910.

If the administrators waste or squander the personal property so that it becomes insufficient to pay the debts, the only resort of the creditors is to them, to enforce their personal responsibility. *Kingsland* v. *Murray*, 133 N. Y. 170, aff'g 60 Hun, 116.

Sufficient ground for the removal of a trustee for waste stated. *Matter of McGillivray*, 138 N. Y. 308.

Except where there is a loss of interest by a failure of a trustee to make an authorized investment, he may not be made liable for interest not earned, and which could not have been earned by the exercise of

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vigilance, unless there has been a misappropriation by him of the trust fund or some misfeasance equivalent to it.

While it is the duty of a trustee, if he deposits the trust fund in bank, to make the deposit in his name, as trustee, the mere depositing of it in his individual name without adding his title, as trustee, is not *per se* such a misappropriation as will subject him to a charge for the full legal rate of interest.

During an action to set aside an assignment the assignee kept the funds in deposit in a bank and was charged with interest from failure to invest or place them where they would draw interest; error. *Matter of Barnes*, 140 N. Y. 468.

Where the loss of a testamentary trust fund is caused by the waste or misconduct of the executor and trustee, no claim for contribution arises against the residuary legatees.

It seems, such legatees are liable to refund in case they have been paid from the estate without a decree authorizing the payment, and in consequence there is a deficiency of assets to discharge prior claims or to pay other legatees, but in the absence of collusion or fraud on their part, they take the payment without other risk.

By the will of M. a sum was given to his executors to be held in trust for the benefit of T. during life, the trust fund to be invested in bonds and mortgages, and upon his death to be distributed among his children. In an action by the sole surviving child of T., brought after his death, to compel the residuary legatees to account, and to pay the amount of the trust fund, it appeared that there had been a final accounting by the executors, and at that time the amount of the trust fund was in their hands in bonds and mortgages, which were held by them as the trust fund, and no part thereof was ever paid to the residuary legatees. Neither T. nor plaintiff were cited to appear upon the accounting. By the surrogate's decree thereon, the executors were credited with the amount of the trust fund.

Construction:

In the absence of proof of any fraudulent conversion or combination on the part of the residuary legatees whereby the trust fund was affected or divested, no claim was established against them; the trust fund having been invested and set apart as prescribed by the will, and the trust being in that condition at the time of the decree, the irregularity in not citing plaintiff and T. did not render the distribution of the residuary estate invalid; plaintiff's interest was simply in the trust fund, and he had no concern

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in the distribution of the residue; for any breach of duty upon the part of the executors and trustees his remedy was against them, not against the distributees. *Mills* v. *Smith*, 141 N. Y. 256.

Action by bondholders on account of failure of trustees to collect checks given on sale of trust property and for breach of trust—when not maintainable as bondholders had in a former action elected to disaffirm the sale. *Harrison* v. *Union Trust Co.*, 144 N. Y. 326, aff'g 80 Hun, 463.

The will of S. gave to each of four grandchildren $10,000, to be set apart and invested by the executors, and paid, with the accumulated interest, to the beneficiary on arrival of age. The executors were two sons of the testator, each having two children, who were the beneficiaries named. Upon the final accounting of the executors all parties interested were duly cited and appeared. In the accounts rendered was a statement to the effect that from the assets $40,000 had been set apart and invested in U. S. bonds, of which $20,000 was registered in the name of D., one of the executors, as trustees for his two children, and $20,000 in the name of S., the other executor, as trustee for his children. The decree of the surrogate approved of the action of the executors, and by its terms discharged them "from all and every liability as well to each other as to others as executors." Action brought by one of the children of S. against him and D., to compel an accounting as to the trust fund to which she was entitled.

Construction:

The surrogate had jurisdiction to determine as to the distribution of the estate and the disposition of the trust fund, and he having approved of, and substantially directed the separation of the trust funds, the executors were discharged, and each became separately and only liable as trustee for trust funds in his hands; and so, D. was not liable for the waste by S. of the fund in his hands to which plaintiff was entitled. *Cline* v. *Sherman*, 144 N. Y. 601, aff'g 78 Hun, 298.

While a trustee is to be held to strict accountability for the performance of all his duties as such, the true question in any case, where he is charged with negligence, is as to whether considering all the facts and circumstances, he employed in the matter complained of such prudence and diligence in the discharge of his duties as, in general, men of average prudence and discretion would employ in their own affairs, and in the determining this the facts as they existed at the time are to be considered,

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without regard to those which subsequently took place, by reason of which loss occurred. *Purdy* v. *Lynch*, 145 N. Y. 462.

Duty of trustee to protect trust estate against malfeasance of cotrustees. *Weetjen* v. *Vibbard*, 5 Hun, 265.

An administratrix kept a large amount of money (the collections from the sales of goods in a store and of notes and accounts of the intestate) in a trunk in a bedroom occupied by her crippled son, being one of the rooms occupied by her family adjoining the store. Part of such collections had been kept there over a year. The nearest bank was twelve miles from where she lived. The money was stolen. Held, that had the money been only a portion of the estate lately collected, and had the rest been deposited in bank, she might have been held authorized to keep the same where she did, until a proper opportunity to deposit it in the bank occurred; but as the whole, or nearly all, the fund had been allowed to remain in such an insecure place for nearly a year, when it was finally stolen, it was such a violation of the ordinary laws of prudence as constituted negligence for which she was liable. *Cornwell* v. *Deck*, 8 Hun, 122, s. c., 2 Redf. 87; citing, Litchfield v. White, 3 Seld. 438; Furman v. Coe, 1 Caines Cas. 96.

Failure to collect judgment—when liable personally for the amount thereof. *Hollister* v. *Burritt*, 14 Hun, 291.

A trustee's liability for unauthorized investments is not determined by his discharge but continues until the funds are properly reinvested. *Matter of Foster*, 15 Hun, 387.

Where a trustee has made improper investments, *cestui que trust* has an election to take the original fund and legal interest therein, or to take the fund as invested at the time of the accounting, and all legal profits realized by the trustee thereon. In the latter case, however, in determining the profits realzed by the trustee, the whole period during which he has held the fund is to be considered. The *cestui que trust* can not take profits for one period and interest for another. *Baker* v. *Disbrow*, 18 Hun, 29, aff'd 79 N. Y. 631.

A testator may appoint one executor to take charge of property within, and another of property without the state. Such an executor is only bound to account for such property as is within the state in which he is appointed. *Sherman* v. *Page*, 21 Hun, 59, aff'd 85 N. Y. 123.

Duty of trustees as to selling at inventoried values. *Parsons* v. *Rhodes*, 22 Hun, 80.

When trustee is liable to one injured by his neglect of duty. *Merrill* v. *Farmers' Loan & Trust Co.*, 24 Hun, 297.

Executor who commits *devastavit* and dies before an accounting—remedy against his sureties. *Trust and Deposit Co.* v. *Pratt*, 25 Hun, 23.

Executor—liability of, for money paid to his coexecutor and misappropriated by him. *Matter of Storm*, 28 Hun, 499.

An estate can not claim the profits of such an investment without accepting the incidental expenses thereof. *Wheelwright* v. *Rhoades*, 28 Hun, 57.

Executors are liable for losses incurred in making investments to escape taxation. *Wheelwright* v. *Rhoades*, 28 Hun, 57.

Right of the next of kin to compel an administrator to return assets of the intestate converted by him. Matter of O'Brien, 45 Hun, 284.

An administrator of an estate, who negotiates the sale of a farm which belonged to his intestate, and which is conveyed by a deed signed by the children of the intestate, the purchase price of which is received by the administrator, and is deposited by him

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in a bank which subsequently fails, is liable for the money lost through the failure of the bank.

It is the duty of the administrator, in such a case; to at once pay over the money to the parties entitled thereto, and in receiving and depositing such money he does not act within the rule that a trustee or public officer, who deposits money in a bank of good standing, without negligence on his part, will not be liable if the bank fails. *Harlow* v. *Mills*, 58 Hun 391, aff'd in 128 N. Y. 650; citing, King v. Talbot, 40 id. 76; Mills v. Mills, 115 id. 80; People ex rel. Nash v. Falkner, 107 id. 477.

Trustee is not liable personally for past errors in distribution—correction thereof. *Bowditch* v. *Ayrault*, 63 Hun, 23, mod. 138 N. Y. 222.

Trust company—depository of court moneys—liability for a failure to collect money. *Trumpbour* v. *Trumpbour*, 70 Hun, 571, aff'd 144 N. Y. 652.

Testamentary trustee of a life estate—separation of income and principal. *Wilcox* v. *Quinby*, 73 Hun, 524.

Liability of one of two trustees for a trust fund held by his cotrustee—Code of Civ. Pro., sec. 2802—ch. 728 of 1867; ch. 482 of 1871. *Cline* v. *Sherman*, 78 Hun, 298, aff'd 144 N. Y. 601.

When trustees may erect buildings and make repairs from the principal. *Stevens* v. *Melcher*, 80 Hun, 514.

Liability of executors and trustees for the acts of their coexecutors and trustees. *Matter of Litzenberger*, 85 Hun, 512.

In England, when a general power is conferred upon persons acting in a representative capacity, to make investments, they are confined in its exercise to *real and government securities*, and the same rule prevails in this state.

Where executors and trustees were authorized to invest legacies generally—no particular mode of investment being pointed out—and they invested the legacies in bank stock, which was retained by them long after the period when the solvency of the bank was more than doubtful, and the stock depreciated in their hands by which a large loss was sustained by the legatees; held, that the executors and trustees were personally liable to make good the loss.

Trustees can not deal in their own behalf with the funds intrusted to their charge for the benefit of another. Accordingly where trustees and executors invested a legacy in the bank stock which was in whole or in part the individual property of one of them, or the proceeds (in dividends) of such property, and a loss was sustained in consequence of the depreciation of the stock; *held*, that the executors were bound to make good the loss. *Ackerman* v. *Emott*, 4 Barb. 626.

Where administrators sold the leasehold estate of the intestate, and took the promissory note of the purchaser, on a credit, without any security for the payment of the purchase money, the administrators were held liable to the heirs for the amount, the purchaser having become insolvent. *King* v. *King*, 3 Johns. Ch. 552.

Where an executor puts bonds and notes, due to the testator, into the hands of an attorney to collect, and after the death of the executor, the attorney collected the money and applied it to his own use, and became insolvent: *held*, that the estate of the executor was not chargeable with the loss, especially after a lapse of more than six years.

Where the administrator of an executor, in his answer to a bill filed by the representatives and legatees of the testator, for an account, etc., sets forth an account, and avers that he had fully administered, etc., and had distributed the surplus, being a trifling sum, the court refused to order a reference to a master for a further account, especially after a lapse of twelve years. *Rayner* v. *Pearsall*, 3 Johns. Ch. 578.

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Where an administrator of a deceased partner, without applying to this court for its direction, *bona fide*, permitted the surviving partner to sell the joint stock, in the usual course of the trade, for the joint benefit of himself and the intestate's estate, he was held not to be responsible to the creditors for any loss; but he is *personally* liable for any debts contracted by such assumed partner.

So, if he puts into the hands of the surviving partner, *assets* which he had in his own hands, and under his own control, to trade with, he will be answerable for the loss.

Executors and administrators, or trustees, acting with good faith, and without any willful default or fraud, will not be responsible for the loss which may arise. *Thompson* v. *Brown*, 4 Johns. Ch. 619.

Where, by any act or agreement of one trustee, or executor, money gets into the hands of his cotrustee, or coexecutor, both are answerable for it. *Monell* v. *Monell*, 5 Johns. Ch. 283.

An executor is not responsible for the *devastavit* of his coexecutor except so far as he has concurred in such waste, or misapplication of the assets. *Sutherland* v. *Brush*, 7 Johns. Ch. 17.

Where the intestate resided in this state at the time of his death, and administration was granted upon his estate here, by virtue of which the administrator obtained notes due to the estate of the decedent, against a debtor who resided in Pennsylvania, and had sufficient property there to pay his debts, and who was afterwards in this state, with the knowledge of the administrator, and might have been arrested here; *held*, that the administrator was answerable for the amount of such notes, with interest. *Shultz* v. *Pulver*, 3 Paige, 182; s. c., 11 Wend. 361.

If an administrator sells leasehold property belonging to the estate of the testator upon credit, without taking proper security, he will be liable for a loss arising from the insolvency of the purchaser. *Orcutt* v. *Orms*, 3 Paige, 459.

Where an executor by his negligence suffers his coexecutor to receive and waste the estate, when he has the means of preventing it by proper care, he is liable to the heirs and next of kin for the estate thus wasted. *Clark* v. *Clark*, 8 Paige, 153.

If an executor in suing for debts supposed to be due to the estate; brings a suit in good faith, under the advice of counsel and in a manner which is apparently for the benefit of the estate, he will not be subjected to personal loss, although the result shows that a different mode of proceeding would have been more beneficial to the parties interested in the estate. *Collins* v. *Hoxie*, 9 Paige, 81.

An administrator, who suffers or permits his coadministrator to misapply the funds of the estate, where he has the power to prevent it, is liable in equity for such misapplication; if the amount misapplied can not be collected from his coadministrator. *Johnson* v. *Corbett*, 11 Paige, 265.

The remedy of the complaint, where there are no funds of the testator, in the hands of the executor, which can be reached, is by an execution against the individual property of the executor, if he has wasted the funds of the estate which came to his hands. *Hosack* v. *Rogers*, 11 Paige, 603.

Where executors employ a person not authorized to practice, to foreclose a mortgage due to the estate of their testator, and he forecloses the same in the name of another person, as solicitor, but from the ignorance of the person so employed by the executors, the mortgage is irregularly foreclosed, so that a part of the debt is lost, such executors are answerable to the legatees for the amount of such loss. *Wakeman* v. *Hazelton*, 3 Barb. Ch. 148.

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Where a will provides for the support of children, an unauthorized person can not make such a demand for the same as will make the executor liable for a conversion. *Furman* v. *Coe*, 1 Caines Cas. 96.

The fact of a previous judgment and a *fi. fa.* returned *nulla bona* are conclusive evidence of a *devastavit* by an executor. *Platt* v. *Robins*, 1 Johns. Cas. 276.

Where an administrator by mistake surrendered a lease below value, but had not executed a release, held no *devastavit;* but having later executed a release with knowledge of his former mistake was held chargeable with the difference in value. *People* v. *Pleas*, 2 Johns. Cas. 376.

If, on a *fi. fa. de bonis intestatoris*, issued upon a judgment by confession against an administrator, he do not produce assets, this justifies the sheriff in returning a *devastavit*. The *People* v. *Judges of Erie*, 4 Cow. 445.

Any person receiving from an executor the assets of his testator, knowing that such disposition of them is a violation of the executor's duty, is to be adjudged conniving with the executor to work a *devastavit*, and is accountable to the person injured by such disposition directly, on a bill filed by him.

Where the executor, being one of a trading firm, with the knowledge of the firm, mixed the funds of his testator's estate with those of the firm, and they were thus employed in trade; held, that the firm were liable for these funds to a legatee of the testator.

And this, even admitting that the funds had been carried to the account of the executor, and the account as to these closed on the partnership books.

The English and American cases upon this doctrine stated and commented upon, both as they respect the rights of legatees and creditors. Per Savage, Ch. J., delivering the opinion of the court. *Colt* v. *Lasnier*, 9 Cowen, 320.

A refusal to apply assets to the payment of debts does not amount to a *devastavit*. *Hartness* v. *Purcell*, 1 Wend. 303.

An administrator is bound to use care as a reasonably prudent man would with his own property. *Sheerin* v. *Pub. Adm.*, 2 Redf. 421.

Devastavit lies if administratrix intrusts assets with a third person. *Schott's Estate*, 1 Tuck. 337.

An executor is liable who wrongfully discharges a mortgage for which he is liable. *Zapp* v. *Miller*, 3 Dem. 266.

Marshaling assets for payment of debts. *Matter of Oosterhoudt*, 15 Misc. 566.

From opinion.—"The rule is well settled that the personal property is the primary fund for the payment of debts. The order of marshaling assets for the payment of debts is: first, the general personal estate; second, estates specifically devised for the payment of debts; third, estates descended, and, fourth, estates specifically devised though charged generally with the payment of debts. 1 Birdseye's Stat. 1131.

"The testator is presumed to act upon this legal rule in making a testamentary disposition of his estate until some distinct and unequivocal intention to the contrary is shown. Hoes v. Van Hoesen, 1 N. Y. 120; Matter of Smith, 19 N. Y. St. Rep. 898.

"It has been distinctly held that personal property, although specifically bequeathed, must be applied to the payment of debts before land specifically devised can be charged therewith, and in consequence where an executor first applied the rents of the real estate to the payment of debts, in such a case it was held to be a misappropriation of the funds for which the executor was held liable personally. Nagles

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v. McGinniss, 49 How. 193; Rogers v. Rogers, 3 Wend. 503; Matter of Smith, *supra;* Hoes v. Van Hoesen, 1 Barb. Ch. 379; 1 N. Y. 120; Dodge v. Manning, 11 Paige Ch. 334.

"This question has frequently claimed the consideration of other courts, where it has been distinctly held that even a charge of the testator's debts upon his lands generally, however formally framed, will not exonerate the personalty. White v. White, 2 Vern. 43; Bridgman v. Dove, 3 Atk. 20; Hancox v. Abbey, 11 Ves. 186; Ancastar v. Mayer, 1 Brown's Ch. 454.

"The executors having made an unauthorized and improper application of this portion of the assets, they are personally liable therefor as for a *devastavit.* Conduct on the part of representatives amounting to *devastavit* is defined to be 'such a mismanagement of the estate and effects of deceased in squandering and misapplying the assets contrary to the duty imposed on them for which executors and administrators shall answer out of their own pockets so far as they have had or might have had assets of deceased.' Wms. Ex'rs (Eng. ed.), 1796; 7 Am. & Eng. Ency. of Law, 346, n. 1.

"Paying debts or legacies out of order, making mispayments, paying legacies before debts, applying the assets in undue funeral expenses, delivering property to next of kin leaving debts unpaid, are all adjudged instances of such maladministration as constitute *devastavit.* 7 Am. & Eng. Ency. of Law, 346, n. 2; Cobb v. Muzzey, 13 Gray (Mass.), 58; Place v. Oldham, 10 B. Mon. (Ky.) 400; McNair v. Ragnal, 1 Dev. (N. C.) 516.

"The responsibility for this misappropriation rests upon both of the accounting executors; each participated in the transaction for the disposition of the bank stock; one of the executors and a minor son of each were the beneficiaries of the transaction; moreover, the executors each join in the account, and that is an admission of joint action and joint liability. Matter of Glacius v. Fogel, 88 N. Y. 434-443."

An executor or administrator is not liable, as for a devastavit, for failure to take legal steps to recover assets claimed to belong to the estate, where there are reasonable grounds for considering that such steps would have been entirely ineffectual, and that he acted in good faith. *Matter of Hall,* 16 Misc. 174.

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In all cases of action arising upon contracts made by executors or administrators, the claim is against the executor or administrator personally and not against the estate,[1] and the judgment must be *de bonis propriis. Ferrin* v. *Myrick,* 41 N. Y. 315.

Citing, Myer v. Cole, 12 Johns. 349; Dewitt v. Field's Adm'r, 7 Cowen, 58; Gillet v. Hutchinson's Adm'r, 24 Wend. 184; Reynolds v. Reynolds, 3 Wend. 244.

See, also, Noyes v. Blakeman, 6 N. Y. 580; Merritt v. Seaman, id. 168; Mygatt v. Wilcox, 45 id. 306; New v. Nicoll, 73 id. 127, digested p. 778; Austin v. Monro, 47 id. 360; Willis v. Sharp, 113 id. 586, digested p. 778; Patton v. Royal Baking Powder Co., 114 id. 1; Hall v. Richardson, 22 Hun, 444; Laird v. Arnold, 25 id. 4; Kidean v. Hoyt, 33 id. 145; Higgins v. Hallock, 60 id. 125; Bostwick v. Beach, 31 id. 343;

[1] A judgment recovered against executors is not a lien upon land conveyed to them as such. Cook v. Ryan, 29 Hun, 249.

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modified in 103 N. Y. 414; Stanton v. King, 8 Hun, 4; Ryan v. Rand, 20 Abb. N. C. 314; Rogers v. Wendell, 54 Hun, 540; Davis v. Stover, 16 Abb. (N. S.) 227; Bowman v. Tallman, 2 Robertson, 385.

From opinion.—"It is to be considered that the administrator is not the agent of the testator, or of the estate, and therefore allowed to contract in its behalf. We are apt to look upon an administrator as holding a like position to that held by a railroad manager, or a bank president. The latter officer orders and receives at the bank a set of ledgers, with the name of the bank entered in the same. A railroad manager orders and receives a quantity of rails, which are delivered and laid down upon the tracks of his company. In each of these cases it would be quite proper for the jury to find that the purchase was made for the corporation, and not by the officer individually. Not so, however with the administrator. He has the title to the personal estate. He has no principal behind him for whom he can contract as agent. This is the policy of the law. The estate in the personalty is given, by the law, directly to the administrator. For the purpose of use and sale the title vests in him and he is held responsible as owner. (1 Wms. Ex'rs, 530, 539, 546.) As owner, he must account to the persons ultimately entitled to distribution; and as owner, he sells, disposes and contracts, as his judgment dictates."

To exempt a party contracting from personal liability, he must so contract as to bind those he claims to represent; and the fact that he described himself as "trustee" in *signing* the instrument, does not relieve him or change the effect of his agreement.[1] (Mason, J.)

Held (all concurring), no trust appearing in the body of the contract, and it not appearing that defendant was making it for any other, or in any representative character, he was personally liable upon it, notwithstanding he added to his signature the words "trustee," etc.[2] *Pumpelly* v. *Phelps*, 40 N. Y. 59.

A contract made by executors in form as such, in consideration of services to be rendered in vindicating and asserting their claims to property in their representative capacity, and for the benefit of the estate they represent, does not bind the estate or create a charge upon the assets in the hands of the executors. *Austin* v. *Munro*, 47 N. Y. 360.

Services rendered an executor may be offset on indebtedness due the estate he represents. *Davis* v. *Stover*, 58 N. Y. 473.

See, Blood v. Kane, 130 N. Y. 514, *post*, p. 775.

An executor can not create an original liability on the part of the estate, nor enter into an executory contract binding upon it. *Barry* v. *Lambert*, 98 N. Y. 300.

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[1]Moss v. Livingston, 4 Comst. 208; Dewitt v. Walton, 5 Seld. 570; Bay v. Gunn, 1 Den. 108; Bush v. Cole, 28 N. Y. 261.

[2]Taft v. Brewster, 9 J. R. 334; White v. Skinner, 13 id. 307; Dewitt v. Walton, 5 Seld. 570; Bush v. Cole, 28 N. Y. 261.

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An administrator or executor is personally liable on his indorsements and acceptances, although he adds to his signature the name of his office. He can not bind the assets of the deceased by his contracts. *Schmittler* v. *Simon*, 101 N. Y. 555, digested p. 739.

See, also, Pinney v. Administrators of Johnson, 8 Wend. 500; Gould v. Ray, 13 id. 633.

An executor, as such, takes the unqualified legal title to all personalty not specifically bequeathed, and a qualified legal title to that which is so bequeathed, and holds as trustee for the benefit of, first, his testator's creditors; second, of the distributees under his will, or, if the whole is not bequeathed, under the statute of distributions.

The trust estate of a sole executor, who is also the sole devisee and legatee, is solely for the benefit of the testator's creditors; when they are paid, that estate sinks into and is merged with the beneficial interest and he as devisee and legatee becomes vested with the legal title.

Upon proof, therefore, that all the debts of the testator have been paid, an executor, who is sole legatee, may avail himself of a chose in action belonging to the estate, as a counterclaim in an action against him.

In an action by an undertaker to recover articles furnished and services performed in the burial of defendant's testator, defendant set up as a counterclaim an indebtedness of plaintiff to her testator, which was greater than the amount in suit, and asked for judgment for the excess. Defendant was the sole legatee and devisee under, and executrix of, the will. It was admitted that no notice to creditors to present claims had been published. Defendant testified that her testator owed very few debts when he died, and that she had paid those debts. She then offered to prove the counterclaim. The evidence was rejected, the referee ruling that the testator's claim was not available as a counterclaim or setoff.

Held (Bradley and Parker, JJ., dissenting), error; that defendant was entitled to show, by common law evidence, that all the testator's debts had been paid, and, having established that fact, was entitled to have the amount of the plaintiff's indebtedness allowed as a counterclaim. *Blood* v. *Kane*, 130 N. Y. 514, reversing 52 Hun, 225.

One member of a firm died leaving a will by which he directed his executors to "conduct his interest in the business"[1] in the firm name in conjunction with the surviving partner; the business was so carried

[1] As to executors continuing business of testator, see Meyer v. Cahen, 111 N. Y. 270; Willis v. Sharp, 113 id. 586, digested p. 778.

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on. Subsequently judgments were recovered against the firm and executions issued thereon. Action by other creditors to set aside said executions.

Construction:

The provisions of the Code of Civil Procedure in relation to the issuing of executions against executors did not apply (secs. 1731, 1825, 1826), as to the fund belonging to the estate, left under the directions of the will invested in the business, the executors became copartners and the debts incurred in the business were claims upon the partnership primarily, and not upon the testator's general estate; and the creditors dealing with the new partnership had the usual rights of partnership creditors.

Said provisions did not apply to executions issued upon judgments against the firm which were rendered upon debts originally owing by the old firm, but which had, with the consent of the judgment creditors, been assumed by the new firm. *The Columbus Watch Co.* v. *Hodenpyl*, 135 N. Y. 430, aff'g 61 Hun, 557.

Distinguishing, Willis v. Sharp, 113 N. Y. 585.

In an action brought by plaintiff as substituted trustee under the will of B. to foreclose a mortgage executed to the original trustees by defendant S., the latter set up a counterclaim for services rendered prior to plaintiff's substitution, to and under a contract with its predecessor in the trust. The trial court found the rendition of the services, and that the bond and mortgage had been fully paid thereby, but refused to render judgment for a balance against plaintiff.

Construction:

Such refusal was not error; plaintiff, when it succeeded to the trust, did not assume any obligation created by the contract between the former trustees and S., and none was imposed by law; assuming there was some equitable ground for charging the trust estate with the value of the services, this would furnish no reason for charging plaintiff personally with the debt; also, the Code of Civil Procedure (sec. 502, subd. 3) did not permit an affirmative judgment for the excess. *United States Trust Company* v. *Stanton*, 139 N. Y. 531.

Distinguishing, Davis v. Stover, 58 N. Y. 473.

NOTE.—"That contract bound the former trustees individually and though the services were rendered for the benefit of the trust estate they were not rendered under such circumstances, so far as appears, as to create a charge thereon, which could be

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enforced by Stanton. (Austin v. Munro, 47 N. Y. 360; New v. Nicoll, 73 id. 127.)" (533.)

Where executors, empowered by the terms of the will to sell their testator's real estate, enter into the executory contract for such sale, performance of the contract may be enforced in equity at the suit of the purchaser.

A purchaser of real estate for full value is entitled to have incumbrances removed out of the purchase money.

Where land contracted to be sold by executors is subject to a dower right of the testator's widow, the purchaser may elect to carry out his purchase and take title subject to the dower right, and if he does so elect, he is entitled to an abatement from the contract price, equal to the gross cash value of the dower right. *Bostwick* v. *Beach*, 103 N. Y. 414, modifying 31 Hun, 343.

3. AVOIDING PERSONAL LIABILITY BY CHARGING THE ESTATE.[1]

If the trustee have not the means in hand of defraying the expenses of protecting the trust estate, he may effectually charge such expenses upon the future income of the estate without incurring personal responsibility for their payment. *Noyes* v. *Blakeman*, 6 N. Y. 567, digested p. 802.

From opinion.—"If he had advanced his own means, or given his personal responsibility, he would clearly have had a lien upon the rents and profits for the purpose of reimbursing or indemnifying himself (Hide v. Haywood, 2 Atk 126; Balch v. Halsham, 1 P. Wms. 455; Caffrey v. Darby, 6 Ves. 497; Warral v. Hartford, 8 id. 8; Dawson v. Clark, 18 id. 254; Wilkinson v. Wilkinson, 2 Sim. & Stu. 237); and there is no rule of law or equity within my knowledge which would prevent his assigning that lien, if necessary for the protection of his *cestuis que trust*.

"It is undoubtedly true as a general rule, that where a trustee employs agents in the execution of his trust, they are to look to him individually, and have no lien upon the trust fund for their compensation. If he is in funds he is bound to protect the estate, in which case he has no lien, and consequently can not assign any, having none to assign. But being without funds, and a necessity arising for expenditures in order to protect the estate from spoliation, he may either make them himself, and be allowed for them in the passing of his accounts, or may engage others to do it upon the credit of the fund, reserving to himself the same management and directions as in any other case, and thus avoid the objection that he had delegated his trust."

Where a trustee is authorized by the terms of the instrument creating the trust to make an expenditure which is necessary for the protection

[1] As to the liability of trustees, executors and administrators, as stockholders, see Stock Corp. L., sec. 54, Banks's 9th ed. N. Y. R. S., p. 1026; Banking L., secs. 52, 162, Banks's 9th ed. N. Y. R. S., pp. 1059, 1108; Insurance L., sec. 42, Banks's 9th ed. N. Y. R. S., p. 1150; also Hirshfield v. Bopp, 145 N. Y. 84.

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or reparation of the trust estate, and has no trust funds in his hands for the purpose, he may, by express agreement with another, exempt himself from liability, and make the expenditure a charge upon the estate. To create such a lien or charge, however, there must be some agreement to that effect; it is not sufficient that the one doing the work or making the expenditures did it upon the faith and credit of the estate.

Where there has been no such agreement, and in consequence the trustee is chargeable individually for the expenditures, the trustee can not by a subsequent promise to pay out of the estate give a lien thereon; to transfer the charge from the trustee to the estate, there must either be an agreement based upon some new consideration, or an assignment of the lien or claim which the trustee has upon the estate for the expenditure. *New* v. *Nicholl*, 73 N. Y. 127, rev'g 12 Hun, 431.

Citing, Noyes v. Blakeman, 3 Sand. S. C. R. 531; s. c., 6 N. Y. 567; Randell v. Dusenbury, 7 J. & S. 174; s. c., 63 N. Y. 645; Stanton v. King, 8 Hun, 4; see also Rogers v. Wendell, 54 id. 540; Mann v. Lawrence, 3 Bradf. 424.

If services are rendered for an administrator without any agreement on the part of the plaintiff to look to or confine his claim to the estate itself or the defendant in his official capacity, he is personally liable. *Foland* v. *Dayton*, 40 Hun, 563.

See, also, Martin v. Platt, 51 Hun, 429.

4. WHEN CREDITORS HAVE A DOUBLE REMEDY AGAINST THE TRUSTEE AND AGAINST THE ESTATE.

A fund directed to be embarked in business, or the general assets, when expressly charged with the debts of a business, are liable to creditors in such business where the executor has become irresponsible. *Willis* v. *Sharp*, 113 N. Y. 586, aff'g 43 Hun, 434; s. c., 115 N. Y. 396; 124 id. 406.

See Perry v. Board of Missions of Albany, 102 N. Y. 99; Matter of Mullon, 74 Hun, 358.

From opinion.—"It has been held in numerous cases that an executor, carrying on a trade under the authority of the will, binds himself individually by his contracts in the trade. He is not bound to carry on the trade and incur the hazard, although authorized or directed to do so; but if he does carry it on, the contracts of the business are his individual contracts. (Ex parte Garland, 10 Ves. 119; Fairland v. Percy, L. R., 3 P. & D. 217; Labouchere v. Tupper, 11 Moore's P. C. 198; Downs v. Collins, 6 Hare, 418.) If, in this case, there was in the will simply an authority or direction to the executors to carry on a trade, and in pursuance of the power the executor continued the existing business, we think, under the authorities cited, the plaintiffs could have no remedy, except to pursue the assets embarked in the trade at the death of the testatrix. But as said by Story, J., in Burwell v. Cawood (2 How. U. S. 560), a testator may, if he chooses, bind his general assets for all the debts of a business to be carried on after his death. Where this was the intention of the testator expressed in the will, then in case of the insolvency of the executor, we see no reason to doubt

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that, in equity, the general assets become liable for the debts of the business. In Fairland v. Percy (*supra*), Sir J. Hannan states the principle: He says, 'where a testator, by his will, directs that his business may be carried on, and that his personal estate shall be used as capital with which to do so, the persons who after his death become creditors of the business in addition to the personal responsibility of the individuals who gave the order for the goods, or otherwise contracted the debt, are entitled in equity to claim against the estate to the extent that he authorized it to be used in that business.' (See Owen v. Delamere, L. R., 15 Eq. 134.)"

As to creditor's right to reach the trust estate without a recourse to the trustee, see, Trustee avoiding personal liability by chargiug the estate, *ante*, p. 777.

5. INTEREST.[1]

Where executors holding funds for investment, invest in stock of private corporations, the proper rate of interest to charge them is six per cent. with annual rests, the legal rate being seven. *King* v. *Talbot*, 40 N. Y. 76, digested p. 742.

"Where the failure of a trustee in his duty is willful, or characterized by bad faith, the highest rate of interest should be imposed. But where good faith and honest mistake occur, the rate of interest rests in a discretion, that permits the consideration of all circumstances, which show that substantial justice can be done to the *cestui que trust*, by allowing a less rate.

"Hence, in such cases we may not close our eyes to the fact, that in a long course of years, such as are now under consideration, there are periods in which it is impracticable to realize on investments, which give the requisite assurance of safety, the highest interest allowed by law, that loans for long periods will rarely be taken on such security, at the highest rates.

"That in a commercial community, like our own, fluctuations are frequent and large, and especially that in the management of funds of considerable amount, there must necessarily be intervals when funds lie idle, seeking investment, notwithstanding all reasonable diligence on the part of the trustee.

"These and like considerations have led the court of chancery in England to charge the executor with not exceeding four per cent., when he has acted in good faith, and has not himself realized a greater profit, the legal rate of interest being five per cent, and I think there is nothing in Ackerman v. Emot, 4 Barb. 628; Dunscomb v. Dunscomb, 1 Johns. Ch. 508, or Clarkson v. Depeyster, Hopk. Ch. 426, that forbids their due weight in our decision."

See, also, Bruen v. Gillet, 115 N. Y. 10.

Where an executor and his testator were, prior to the death of the latter, copartners, and the former without separating the interests of the latter in the firm property and assets, continues to employ and use the same in the business, he is properly chargeable upon final accounting with compound interest upon the value of the testator's share. While compounding interest is in some sense a penalty for negligence or wrong-

[1]See, Personal liability—for negligent and wrongful act, p. 747; see, also, *post*, p. 783.

doing, the executor here was properly chargeable with negligence. *Hannahs* v. *Hannahs*, 68 N. Y. 610.

But in the absence of bad faith or wrong to the beneficiary compound interest should not be allowed. *Brown* v. *Knapp*, 79 N. Y. 136.

See, also, Morgan v. Morgan, 4 Dem. 353; Tucker v. McDermott, 2 Redf. 312.

In the absence of satisfactory explanation trustees are liable for interest on funds uninvested, after six months' delay. *Lent* v. *Howard*, 89 N. Y. 169, digested p. 932.

Trustee was charged with full legal rate of interest. *Cook* v. *Lowry*, 95 N. Y. 103, digested p. 790.

Where an executor was charged with moneys received from him to pay a mortgage upon the testator's real estate, he was not, in the absence of evidence that he withheld or appropriated the money, properly charged with interest thereon. *Matter of Selleck*, 111 N. Y. 284.

A trustee is not chargeable with interest solely because he deposits the trust moneys with his own, or uses them in his business, there must be in addition a breach of trust, a neglect or refusal to invest the funds, at the time or in the manner the trust instrument or the law points out. *Price* v. *Holman*, 135 N. Y. 124.

Citing, Rapalie v. Hall, 1 Sandf. Ch. 399; Jacot v. Emmet, 11 Paige, 142.

See, also, Matter of Nesmith, 140 N. Y. 609; Matter of Barnes, id. 468; Shuttleworth v. Winter, 55 id. 624.

As a general rule, commissions are only to be allowed in settlement of the trustee's account, but where, under the circumstances, no injury or loss can be inferred from their taking in good faith and supposing they were entitled thereto, their commissions in advance of an accounting, they are not chargeable with interest thereon. *Beard* v. *Beard*, 140 N. Y. 260, digested p. 799.

When executors will be charged with interest on the arrears of an annuity. *Blauvelt* v. *Noyelles*, 25 Hun, 590.

When an executor will be charged with interest because of his failure to invest a fund in his hands. *Matter of Jackson*, 32 Hun, 200.

An executor will be compelled to pay compound interest only in cases of gross delinquency—interest on a legacy, from what date allowable for mere neglect to invest, simple interest is generally imposed. *Thorn* v. *Garner*, 42 Hun, 507, modified in 113 N. Y. 198.

Clarkson v. De Peyster, Hopk. 424, 427; Hannahs v. Hannahs, 68 N. Y. 610; Utica Ins. Co. v. Lynch, 11 Paige, 520; Barney v. Saunders, 16 How. (U. S.) 535, 542.

What interest is chargeable. *Wilcox* v. *Quinby*, 73 Hun, 524.

Mingling of property of the estate with property of the administrator, and its use

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in his business charges him with interest, even though he make no profits out of such use. *Matter of Mullon*, 74 Hun, 358, aff'd 145 N. Y. 98.

When a trustee is chargeable with interest—how computed. *Reynolds* v. *Sisson*, 78 Hun, 595.

Generally, however, commissions can not legally be taken for an accounting, and a previous withdrawal will render the trustee liable for interest. *U. S. Trust Co.* v. *Bixby*, 2 Dem. 494; Wyckoff v. Van Siclen, 3 id. 75; Matter of Peyser, 5 id. 244; Wheelwright v. Wheelwright, 2 Redf. 501; Matter of Freeman, 4 id. 211.

A trustee is not allowed to make a profit out of the trust fund for his own benefit, and if he employs it in trade whereby he makes more than simple interest, he will be charged the whole profit; either by making periodical rests and charging him with compound interest, or in such other manner as will best carry out the principle of giving to the *cestui que trust* the benefit of all profits made beyond the simple interest. *The Utica Ins. Co.* v. *Lynch*, 11 Paige, 520.

The law exacts fidelity of a trustee in the management of his trust. If he is guilty of fraud or mismanagement or is guilty of a breach of trust, or has used the trust funds for his own purpose, he may be compelled to pay interest. Price v. Holman, 135 N. Y. 133.

Executors have been charged with interest where by their wrongful acts, as by mispayments, they have disappointed claimants (Jones v. Ward, 10 Yerg. [Tenn.] 161); where without reason they have recalled funds out at interest (Verner's Est., 6 Watts [Penn.], 250); where they unreasonably refuse or neglect to account. Gray v. Thompson, 1 Johns. Ch. 82.

Applied. Cowing v. Howard, 46 Barb. 580; Duffy v. Duncan, 32 id. 593. They are liable for interest on moneys of the trust fund converted to their own use. Scheffelim v. Stewart, 1 Johns. Ch. 624; Brown v. Rickets, 4 id. 303; Manning v. Manning, 1 id. 535; Mumford v. Murray, 6 id. 1; Kellett v. Rathbun, 4 Paige, 102; De Peyster v. Clarkson, 2 Wend. 78; Dunscomb v. Dunscomb, 1 Johns. Ch. 508.

"The liability of executors and administrators for interest must depend largely upon the particular facts of each individual case; there are, however, certain well-defined principles applicable thereto. In Dunscomb v. Dunscomb, 1 Johns. Ch. 508, it is said: 'Executors and other trustees are chargeable with interest if they have made use of the money themselves, or have been negligent either in not paying over the money or in not loaning or investing it so as to render it productive.' This rule has been frequently recognized and applied. Cowing v. Howard, 46 Barb. 580; Duffy v. Duncan, 32 id. 593. They are liable for interest on moneys of the trust fund converted to their own use. Scheffelin v. Stewart, 1 Johns. Ch. 624; Brown v. Rickets, 4 id. 303; Manning v. Manning, 1 id. 535; Mumford v. Murray, 6 id. 1; Kellett v. Rathbun, 4 Paige, 102; De Peyster v. Clarkson, 2 Wend. 78.

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Matter of Oosterhoudt, 15 Misc. 566.

V. COMMISSIONS.[1]

(1) Debtor assigning for benefit of creditors can not allow higher rate than allowed to executors and administrators.

Barney v. Griffen, 2 N. Y. 365; Campbell v. Woodworth, 24 id. 304.

(2) Receivers—compensation.

Gardiner v. Tylor, 2 Abb. Ct. App. Dec. 247.

(3) When executors in making investments, collecting and paying interest, act as executors.[2]

Drake v. Price, 5 N. Y. 430.

(4) Commissions on transfer of stock specifically bequeathed.

Schenck v. Dart, 22 N. Y. 420, and cases cited thereunder.

(5) In absence of other provision in instrument creating the trust trustees are entitled to commissions by statute allowed to administrators and executors.

Ogden v. Murray, 39 N. Y. 202.

(6) If instrument provide that trustee shall have no commissions none will be allowed.

Matter of Gerard, 1 Dem. 244, and cases cited thereunder; Matter of Kernochan, 104 N. Y. 618; but trust instrument may fix any compensation, Matter of Kernochan, id., note.

(7) Statutory commissions alone can be allowed even in case of extraordinary services.

Collier v. Munn, 41 N. Y. 143.

(8) The last rule does not apply where the services are no part of the executorial duties.

Lent v. Howard, 88 N. Y. 169, and cases cited thereunder.

(9) Annual rests in accounts required by the court or rule thereof, or by statute, entitle executors to full commissions upon the amount, excluding reinvestments.

Morgan v. Hannas, 49 N. Y. 667; Hancox v. Meeker, 95 id. 528, and cases cited and distinguished in the opinion.

(10) From what fund commissions and expenses are payable.

Whitson v. Whitson, 53 N. Y. 479, and cases cited thereunder; Matter of Mason, 98 id. 527.

(11) When instrument directs that trustee shall have a reasonable compensation it is judicially determined, without regard to the statute.

Matter of Schell, 53 N. Y. 263.

(12) When a person is not entitled to receive commissions both as executor and trustee from the same fund for the same period.

Hall v. Hall, 78 N. Y. 535; Johnson v. Lawrence, 95 id. 154, and cases cited thereunder; McAlpine v. Potter, 126 id. 285.

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[1] For rules and cases relating to expenses, see Expenses, *post*, p. 800.

[2] When duties as executor cease. Matter of Hood, 98 N. Y. 363; Cluff v. Day, 124 id. 195.

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(13) When a person is entitled to receive commissions both as executor and trustee.

Hurlburt v. Durant, 88 N. Y. 122; Laytin v. Davidson, 95 id. 263; Matter of Mason, 98 id. 527; Matter of Willets, 112 id. 289; Matter of Crawford, 113 id. 560; Phœnix v. Livingston, 101 id. 451; Matter of Babcock, 52 Hun, 510.

(14) Compensation can not be increased when there is a power of sale attached to the executor's office.

Bruce v. Lorillard, 62 Hun, 416.

(15) If trustee serves to the end of the trust he is entitled to the statutory commissions, whatever his labor.

Matter of Allen, 96 N. Y. 327.

Rule in case of death or removal of trustee, id. note.

(16) Trustee may hold the fund out of which his commissions are payable until they are paid.

Wheelwright v. Wheelwright, 2 Redf. 537, and cases cited thereunder.

(17) Trustee's indebtedness to the estate may be deducted from his commissions.

Freeman v. Freeman, 4 Redf. 211, and cases cited thereunder.

(18) Commissions may be disallowed in cases of gross neglect or unfaithfulness by the executor.

Cook v. Lowry, 95 N. Y. 103, and cases cited thereunder; Wheelwright v. Rhoades, 28 Hun, 57; Widmayer v. Widmayer, 76 id. 251, and on disbursements illegally made; Matter of Hobson, 131 N. Y. 575, aff'g 61 Hun, 504.

(19) Jurisdiction of surrogate's court to award commissions.

Laytin v. Davidson, 95 N. Y. 263.

(20) What commissions are allowable in case trustee resign before the end of the trust.

Matter of Allen, 96 N. Y. 327, and cases collected thereunder.

(21) Bequest to an executor, in absence of contrary intent in the will, does not deprive him of statutory commissions.

Matter of Mason, 98 N. Y. 527.

(22) When a trustee is required to keep trust funds invested and to receive and pay over to the beneficiary the net income annually, if he performs these duties, and renders an annual account to the beneficiary, he has a right to deduct and retain full commissions each year, from the income received; but not monthly commissions for similar monthly services.

Matter of Mason, 98 N. Y. 527; Matter of Selleck, 111 id. 284.

(23) When there is a power of sale given to trustees they are not entitled to commissions on the value of real estate unsold.

Phœnix v. Livingston, 101 N. Y. 451, and note 1.

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(24) When trustees account in reference to income, which they are required annually to pay over whatever may be the amount of the estate or of the principal producing the income, sections 2736, 2811, as to commissions where personal estate amounts to $100,000, do not apply, unless the income exceeds $100,000, and but one commission is allowable.

Matter of Willets, 112 N. Y. 289, and cases gathered thereunder. See McAlpine v. Potter, 126 id. 285.

(25) Whether duty is performed as an executor or as a trustee.

McAlpine v. Potter, 126 N. Y. 285.

(26) Trustees are entitled to commissions for receiving all moneys, which constitute the corpus of the estate, and any additions thereto from increase of any kind, and the moneys paid out, on which commissions may be charged, are moneys paid out for debts, expenses, legacies, etc.; payments which operate to diminish the estate.

Beard v. Beard, 140 N. Y. 260.

(27) Although when a trustee invests money he pays it out, and when it is paid to him he receives it again, yet such payment and receipt are not within the meaning of the statute allowing a trustee commissions for "receiving or paying out" the moneys of the trust estate.

Beard v. Beard, 140 N. Y. 260, and cases collected under note 1.

(28) Allowance of commissions upon the estimated value of securities in advance of the conversion thereof into money for the purposes of paying legacies, or of the acceptance of the securities by the legatees as payment, is not allowable.

McAlpine v. Potter, 126 N. Y. 285; see Matter of McCaren, 6 Misc. 483; Matter of Blakeney, 1 Con. 128; Matter of Moffat, 24 Hun, 325.

(29) When trustees were not chargeable with interest for taking commissions in advance of accounting.

Beard v. Beard, 140 N. Y. 260.

(30) Commissions when trustees are directed to carry on business.

Beard v. Beard, 140 N. Y. 260.

(31) Commissions until ascertained and liquidated in the manner prescribed by law are not assignable.

Matter of Worthington, 141 N. Y. 9; see Beard v. Beard, 140 id. 260.

(32) The commissions of trustees are to be allowed on the settlement of their accounts, and the general rule is that they can not be legally taken before. There is an exception to the general rule when the trustees settle with the beneficiaries and pay out the residue of income or of the estate. Then they may first deduct and retain their commissions without waiting for a judicial settlement of their accounts.

Beard v. Beard, 140 N. Y. 260, and cases cited in note 2; Wheelwright v. Rhoades, 28 Hun, 57.

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(33) When commissions are to be allowed, as if estate were divided into distinct trusts.

Clute v. Gould, 28 Hun, 348; Foote v. Bruggerhof, 66 id., 406.

(34) Executor taking no part in the management of the estate is not entitled to share in commissions.

Matter of Manice, 31 Hun, 119.

(35) Agreement not to claim commissions is valid.

Matter of Hopkins, 32 Hun, 618.

(36) Commissions, by what law governed.

Naylor v. Gale, 73 Hun, 53.

(37) Commissions of substituted trustee.

Betts v. Betts, 4 Abb. N. C. 317.

(38) Trustee is entitled to commissions upon sums for which he is chargeable.

Meacham v. Sternes, 9 Paige, 398, and cases gathered thereunder.

(39) The time at which the valuation of an estate is to be made is that of the accounting.

Matter of Blakeney, 1 Con. 128.

"N. Y. Code of Civil Procedure, sec. 2730. Commissions of executor or administrator. On the settlement of the account of an executor or administrator, the surrogate must allow to him for his services, and if there be more than one, apportion among them according to the services rendered by them respectively, over and above his or their expenses:

"For receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five per centum.

"For receiving and paying out any additional sums not amounting to more than ten thousand dollars, at the rate of two and one-half per centum.

"For all sums above eleven thousand dollars, at the rate of one per centum.

"In all cases such allowance must be made for their necessary expenses actually paid by them as appears just and reasonable. If the value of the personal property of the decedent amounts to one hundred thousand dollars or more, over all his debts, each executor or administrator is entitled to the full compensation on principal and income allowed herein to a sole executor or administrator, unless there are more than three, in which case the compensation to which three would be entitled must be apportioned among them according to the services rendered by them, respectively, and a like apportionment shall be made in

all cases where there shall be more than one executor or administrator. Where the will provides a specific compensation to an executor or administrator he is not entitled to any allowance for his services, unless by a written instrument filed with the surrogate, he renounces the specific compensation. Where successive or different letters are issued to the same person on the estate of the same decedent, including a case where letters testamentary, or letters of general administration, are issued to a person who has been previously appointed a temporary administrator, he is entitled to compensation in one capacity only, at his election, except that where he has received compensation in one capacity he is entitled to the excess, if any, of the compensation allowed by law, above the sum which he has already received in the other capacity. (Am'd by ch. 595 of 1895. In effect Sept. 1, 1895.)"

"N. Y. Code of Civil Procedure, sec. 2802. Intermediate accounting. Any trustee created by any last will and testament, or appointed by any competent authority to execute any trust created by such last will and testament, may at any time file an intermediate account, and may also annually render and finally judicially settle his accounts before the surrogate of the county having jurisdiction of the estate or trust, in the manner provided by law for the final judicial settlement of the accounts of executors and admininistrators, and may for that purpose obtain and serve in the same manner the necessary citations requiring all persons interested to attend such final settlement; and the decree of the surrogate on such final settlement may be appealed from in the manner provided for an appeal from a decree of a surrogate's court on the final settlement of the accounts of an executor or an administrator, and the like proceedings shall be had on such appeal; in all such annual accountings of such trustees, the surrogate before whom such accounting may be had shall allow to the trustee or trustees the same compensation for his or their service, by way of commission, as are allowed by law to executors and administrators, besides their just and reasonable expenses therein; and also the additional allowance provided for in section 2562 of this act; the decree of the surrogate on such final annual settlement of an account provided for in this section, or the final determination, decree or judgment of the appellate tribunal in case of appeal, shall have the same force and effect as the decree or judgment of any other court of competent jurisdiction on the final settlement of such accounts, and of the matters relating to such trust which shall have been embraced in such accounts, or litigated or determined on such settlement. (Am'd ch. 518 of 1885.)"

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A debtor who assigns his property to pay creditors, can not provide for the trustees a higher rate of compensation than is allowed to executors and administrators and guardians for similar services. *Barney* v. *Griffen*, 2 N. Y. 365.

See, also, Meacham v. Sternes, 9 Paige, 398.

Executors, in making, in pursuance of the directions of the will, an investment of a portion of the testator's estate, at interest, and in collecting and paying over such interest, to a person to whom they are directed by the will to pay the same annually for life, act as executors, and are entitled only to such commissions on the sums so received and paid over, as are allowed by statute to executors. Paige, J., dissenting.

It seems, that in such case, the commissions are a charge upon the estate generally, and not upon the income received and paid over. *Drake* v. *Price*, 5 N. Y. 430.

The settled rule of the courts to allow to trustees only the same commissions as the statute allows to executors and guardians for similar services, is not applicable to receivers appointed by the court in actions pending therein. So held, of a receiver appointed to receive and apply rents, pending a controversy arising on the probate of a will. *Gardiner* v. *Tyler*, 2 Abb. Ct. App. Dec. 247.

See, Matter of Security Life Ins. Annuity Co., 31 Hun, 36; Attorney General v. Guardian Life Ins. Co., 93 N. Y. 631.

Executors are not to be allowed commissions upon the transfer of corporate stock which was specifically bequeathed to legatees. *Schenck* v. *Dart*, 22 N. Y. 420.

See, also, Hawley v. Suyer, 5 Dem. 82; Farquharson v. Nugent, 6 id. 296; but see Matter of DePeyster, 4 Sandf. Ch. 511; Cairns v. Chaubert, 9 Paige, 160, where in the first case, and in the second case an executor was entitled to commissions on securities received by him and transferred to legatees on account of legacies, see, also, McAlpine v. Potter, 126 N. Y. 285; Matter of Blakeney; 1 Con. 128; Matter of McCaren, 6 Misc. 483; Matter of Moffat, 24 Hun, 325.

An assignment in trust for creditors is not rendered void by a provision giving assignees (one of them being a lawyer) "a just and reasonable compensation for labor, time, services, and attention," in the business of the trust.

The language is to be construed as meaning no more than the commissions fixed by law. *Campbell* v. *Woodworth*, 24 N. Y. 304.

When an active trust, for the care and management, conveyance and appropriation of personal property, has been created, and the instrument creating the trust makes no provision for the compensation of the trustees, they, *prima facie*, are entitled to the same commissions as are, by

statute, allowed to administrators and executors. *Ogden* v. *Murray*, 39 N. Y. 202.

But if the will expressly provides that the trustee shall have no commissions none will be allowed.

Matter of Gerard, 1 Dem. 244; *Marshall* v. *Nysong*, 3 id. 173; *Secor* v. *Lentis*, 5 Redf. 570.

An executor can not receive from the estate, any greater compensation than the statute commissions, for his own services, however meritorious or extraordinary they may be.

So held as to an attorney who was also an executor. *Collier* v. *Munn*, 41 N. Y. 143.

See Pullman v. Willett, 4 Dem. 536; Lent v. Howard, 89 N. Y. 169, 179.
As to compensation for services outside regular duties see case last cited.

Where annual rests in the accounts of an executor or other trustee are required by the special direction of a court, in order to charge the trustee with interest, or where required by a rule of court or by provision of statute, full commissions may be computed upon the amount, excluding reinvestments of principal. *Morgan* v. *Hannas*, 49 N. Y. 667; 13 Abb. Pr. (N. S.) 361.

Matter of Meserole, 36 Hun, 298, and see Matter of Goodrich, id. note.

As a general rule, a bequest of the interest of a particular sum will not be construed as giving an annuity, although made payable annually, but will be regarded simply as the gift of the income or interest of the sum specified and the taxes and expenses of the trust should be paid out of such income, and not out of the estate. *Whitson* v. *Whitson*, 53 N. Y. 479.

See, also, Cammann v. Cammann, 2 Dem. 211; Lansing v. Lansing, 1 Abb. (N. S.) 280; Pinckney v. Pinckney, 1 Bradf. 269; Lawrence v. Holden, 3 id. 269; Williams on Exrs. 398; Dayton on Surrogates, 419, 466; but the expenses of the trust, including commissions, is payable from the estate, and is not levied on legacies, or fixed annuities, unless the estate is insufficient to pay both, in which case the commissions must be first paid. Chaplin's Express Trusts and Powers, 222.

Where an instrument creating a trust provides that the trustee shall have a reasonable compensation for his services, he is not confined to the statutory allowances to executors, etc., but his compensation is to be adjusted at what shall be determined, upon judicial investigation, to be reasonable under the circumstances, without regard to the statute. *Matter of Schell*, 53 N. Y. 263; s. c., 4 Hun, 65.

Citing Meacham v. Sternes, 9 Paige, 398.

A person was not entitled to receive commissions both as executor and as trustee from the same fund for the same time. *Hall* v. *Hall*, 78 N. Y. 535, digested p. 719.

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While, where all the parties to an accounting appear by counsel, it may be proper for them to agree to have the counsel fees of all paid out of the common fund, yet, where one of them has not litigated, and no allowance is made to him, he should not be compelled to contribute to the counsel fees of those who chose to litigate. *Savage* v. *Sherman*, 87 N. Y. 277, rev'g 24 Hun, 307.

Will of D. gave to his executors in trust a specified sum, which was stated to be "now invested in bond and mortgage," to hold as "invested during the continuance of the trust, and whenever the principal sums composing the trust shall be paid to reinvest," etc.

The executors were directed to pay to certain beneficiaries portions of the fund for five years after D.'s death, and thereupon to pay to said beneficiaries respectively the principal sums on which interest was directed to be paid.

The executors separated the amount of the fund from the residuary estate and paid interest thereon and finally the principal to the beneficiaries, but not until the beneficiaries had withdrawn their objection to the trustee retaining commissions. The surrogate erred in directing trustees to pay over the amount retained as commissions in proceedings taken under secs. 2717, 2718 of the Code, as it was at least doubtful under the defendant's answer whether the trustee was not entitled to the commissions.

Construction:

Where, by the terms of a will, an executor becomes a trustee or a donee of a trust power, and the duties arising therefrom are not incidents of his office as executor, but belong to that of trustee, the trust and executorship are distinguishable and separate, and a separate commission may be allowed for services as trustee, to be paid out of the trust fund. *Hurlburt* v. *Durant*, 88 N. Y. 122.

The rule prohibiting an executor from charging more than the statutory commissions from his personal services in the discharge of the duties of his trust does not apply where the services so rendered are no part of his executorial duties. *Lent* v. *Howard*, 89 N. Y. 169.

See, also, Secor v. Sentis, 5 Redf. 570; Waters v. Collins, 3 Dem. 374.

When by a will the two functions of executor and trustee coexist, and run from the death of the testator to the final discharge, inseparable double commissions or compensations in two capacities may not be allowed.

The will of G. directed his executors, "their survivors or successors," to carry on the testator's business with his "estate and property" during

the life of his wife and his daughter F.; the profits, beyond certain sums set apart for their support, to be added to the "working capital," and upon their death the business to be closed and the estate divided. Some portion of the estate being realty, power of sale was given to the executors, who were also made guardians of the estates of the infants during their minority. In an action by the executrix of one of the executors, who had himself received commissions as executor, upon the whole estate, to recover commissions as trustee held that under the will the duties of executor and trustee were inseparably blended; and that the plaintiff was not entitled to recover.

Construction:

The surrogate had no power to discharge the executors as such and make them trustees simply; that such attempted change was purely constructive and unwarranted. *Johnson* v. *Lawrence*, 95 N. Y. 154.

Citing, Hurlburt v. Durant, 88 N. Y. 121; Valentine v. Valentine, 2 Barb. Ch. 430; Drake v. Price, 5 N. Y. 430; Hall v. Hall, 78 id. 539; Lansing v. Lansing, 45 Barb. 182; Mann v. Lawrence, 3 Bradf. 424; Matter of Carman, 3 Redf. 47; Ward v. Ford, 4 id. 45.

From opinion.—"Taking the adjudged cases together, they appear to establish that, to entitle the same persons to commissions as executors and trustees, the will must provide either by express terms or by fair intendment, for the separation of the two functions and duties, one duty to precede the other and to be performed before the latter is begun, or substantially so performed; and must not provide for the co-existence, continuously and from the beginning, of the two functions and duties; and that where the will does so provide for the separate and successive duties, that of trustee must be actually entered upon and its performance begun, either by a real severance of the trust fund from the general assets, or a judicial decree which wholly discharges the executor and leaves him acting and liable only as trustee."

Commissions are allowed to trustees as a compensation for services in the execution of the trust, and in case of gross neglect or of unfaithfulness, the court may properly disallow them. *Cook* v. *Lowry*, 95 N. Y. 103, digested p. 514.

See, also, Clapp v. Clapp, 49 Hun, 195; Matter of Matthewson, 8 App. Div. 8; Gillespie v. Brooks, 2 Redf. 349; Fager v. Roberts, id. 247; Morgan v. Morgan, 4 Dem. 353.

L., *by will*, gave to his executors his estate, in trust, to pay debts and legacies and to construct a burial vault, and upon the further trust to divide the residue into five equal parts and to pay the income of one part to each of his children for life, and at the death of the child to distribute his share as directed. The executors, upon a final accounting in 1877, were allowed full commissions, the amount of the residuary estate was adjudged and it was decreed that they should hold it as

trustees under the will. Upon the death of one of the children in 1882, the trustees applied for a judicial settlement of their account and claimed one-half commissions on the whole trust fund, and one-half in addition on the share of the child dying, directed to be distributed.

Construction:

The trustees were entitled to the commissions, as the will contemplated a time when the duties of executors should cease and that they should assume the character exclusively of trustees, and the decree of the surrogate effected that change. *Laytin* v. *Davidson*, 95 N. Y. 263, aff'g 29 Hun, 622.

NOTE. The jurisdiction of the surrogate to award commissions to testamentary trustees, since the Code of Civil Procedure, in a proper case, has been assumed in several cases (267). Hulbert v. Durant, 88 N. Y. 121; Johnson v. Lawrence, 95 id. 154; In re Roosevelt, 5 Redf. 601.

Executors and trustees annually, after the testator's death, upon the anniversary thereof, paid the annuities given by the will, and after deducting commissions on the income, paid over the net proceeds to the residuary legatees, taking receipts. It was objected that they were not entitled to their commissions until an accounting, and that the retention thereof was unlawful. *Held*, untenable. *Hancox* v. *Meeker*, 95 N. Y. 528.

From opinion.—"The authorities hold that where the account is rendered yearly, in compliance with any statute, or rule, or order of the court, or where annual rests are necessary to charge the party accounting with the interest on the balances remaining in his hands, such accounting party is entitled to full commissions on each year's receipts and disbursements. (Vanderheyden v. Vanderheyden, 2 Paige, 288; Matter of Bank of Niagara, 6 id. 216; Matter of Kellogg, 7 id. 266; Hosack v. Rogers, 9 id. 467; Fisher v. Fisher, 1 Bradf. 336.)

"Some cases are cited which, it is claimed, sustain the position that the executors or trustees could only receive commissions at the final settlement of the accounts. These cases relate to executor's commissions, and whether the executors were entitled to commissions as executors and also as trustees, and do not cover the precise question here presented. (Valentine v. Valentine, 2 Barb. Ch. 430; Drake v. Price, 5 N. Y. 430; Betts v. Betts, 4 Abb. N. C. 317.) In the case of Morgan v. Hannas (13 Abb. Pr. [N. S.] 361), which is not cited by the plaintiff, it is said in the opinion: 'As a general rule annual rests in the accounts of an executor or other trustee can not be taken for the purpose of allowing him commissions at full rates upon the balances then found,' but it appears from the opinion that the decision was made upon another and different ground. The case is not very fully reported, and the rule there laid down might well apply in that case without affecting the question now considered. The case last cited is relied upon in the cases of Cram v. Cram (2 Redf. 246) and Tucker v. McDermott (id. 321) as authority for the doctrine that annual rest and full commissions are not allowed except when an annual accounting is had before the surrogate under the requirement of a rule of court or of statute. As we have seen, the

case cited is not authority for such a rule, and the question now discussed has never been precisely adjudicated."

See, also, Matter of Meserole, 36 Hun, 298.

Testamentary trustees who serve to the end of the trust are entitled to the statutory fees without regard to the actual trouble or labor to which they have been put.

Where such a trustee resigns, leaving the trust still existing and to be further executed by another, compensation may not be claimed by him as of course, but it is within the power and discretion of the court to award it. Within the statutory limit the trustee takes the allowance made, if any, as one of the terms or conditions of his discharge, and, if he accepts the relief, must take it upon such terms and conditions as the court thinks proper to impose (1 R. S. 730, sec. 69), and so he can not complain of the allowance. *Matter of Petition of Allen*, 96 N. Y. 327, aff'g 29 Hun, 7.

See, also, Matter of Hayden, 54 Hun, 197, aff'd 125 N. Y. 776; Phillips v. Lockwood, 4 Dem. 299; Matter of DePeyster, 4 Sandf. 511; Matter of Jones, id. 615; as to the case of removal see Matter of Humfreville, 8 App. Div. 312; Matter of Bevier, 17 Misc. 486; Lyendecker v. Eisemann, 3 Dem. 72; Matter of Baker, 35 Hun, 272.

As to the case of the death of a trustee see Matter of Newland, 7 Misc. 728; Welling v. Welling, 3 Dem. 571; Matter of Depew, 6 id. 54.

Where, by a will, trust duties are imposed upon the executor as to a portion of the estate, but there is no provision which expressly or by implication separates the two functions of executor and trustee, at least until there is a severance of the trust fund by the executor, or by a proper judicial decree, he may be held liable as executor and may be removed from his office as such for mismanagement.

A surrogate's decree settling the accounts of the executor, in the absence of a provision therein discharging him as executor, does not have that effect.

Even where by the terms of a will an executor may become a trustee simply, his liability as executor continues until there has been a final accounting, and a discharge by decree of the surrogate or a direction in such decree that he hold the fund thereafter as trustee, and an entering by him upon the duties of trustee as distinct and separate from those of executor. Laytin v. Davidson (95 N. Y. 263), distinguished.

In proceedings for the removal of an executor for misconduct and waste in the management of the estate adjudged to be in his hands by a decree of the surrogate settling his accounts, it appeared that after such settlement, and accounting proceedings had been instituted to compel an accounting, wherein it was adjudged that in the absence of averments in the petition of facts rendering a further accounting proper, the

former decree was a bar. (In re Hood, 90 N. Y. 512.) *Held*, that such adjudication was not conclusive as against, and did not affect the present proceedings. *Matter of Hood*, 98 N. Y. 363, reversing 33 Hun, 338; S. C., 104 N. Y. 103.

See this case considered, Cluff v. Day, 124 N. Y. 195.

A bequest to an executor, unless there is language in the will indicating that it was intended as a specific compensation for his services, does not deprive him of the right to charge commissions.

In the absence of anything in the will indicating contrary intent, the expenses of administrating the trust are chargeable upon the trust fund.

The executors were constituted trustees of three distinct trusts; the will directed property for those trusts to be set aside and the income paid over annually to the beneficiaries. The accounts of the executors as such were fully and finally settled; and the trust funds were separated by the decree of the surrogate on such accounting; thereafter the executors acted simply as trustees, and were entitled to commissions as such in addition to those received by them as executors.

Moreover, they were entitled to full commissions on the principal, payable out of the same, one-half for receiving, and upon the termination of the trust, and the full performance of their duties by the trustees, one-half for paying the same over to the beneficiaries; and this whether the fund was then in money or choses in action.

Where a trustee is required to keep the trust funds invested and to receive and pay over to the beneficiary the net income annually, if he performs these duties, and renders an annual account to the beneficiary, he has a right to deduct and retain full commissions, each year, from the income received.[1]

In such a case there is no occasion for a judicial settlement, the law does not require the filing of annual accounts.

It seems that a different rule might apply where the trustee is required to accumulate the income, or if he allowed it to accumulate in his hands for several years, and then accounted and paid over a gross sum to the beneficiary. *Matter of Mason*, 98 N. Y. 527.

Fisher v. Fisher, 1 Bradf. Surr. 335; Matter of Allen, 96 N. Y. 327; Hancox v. Meeker, 95 id. 528.

From opinion.—"We are of opinion that where a trustee is required to keep trust funds invested and to receive and pay out the income annually, and he receives the income and renders an account thereof to the beneficiary, and pays over the balance of the income, after deducting all expenses chargeable against the same, he has the right to deduct for his compensation full commissions on the income annually received, before paying it over. It was so held in Fisher v. Fisher (1 Bradf. Surr. 335),

[1] See, also, Campbell v. Mackie, 1 Dem. 185.

and in Matter of Allen (29 Hun, 10, and 96 N. Y. 327). It has been held that where a trustee renders annual accounts to the court, or where he is required to state his account with annual rests, he is entitled to full commissions upon his annual receipts and disbursements; and a guardian who is required by statute to file annual accounts with the surrogate each year, may, in his accounts thus filed, charge full commissions. (Morgan v. Hannas, 13 Abb. Pr. [N. S.] 361.) The same principle should be applied to cases like this where the trustees receive the annual income and render an account thereof, and pay over the balance thereof to the beneficiary each year. * * * *

"Whenever the time shall come that the trusts are terminated and the trustees have fully discharged their duties, then they will be entitled to have one-half commissions for receiving the trust funds, and the other half for paying or turning the same over to the beneficiaries, whether the funds be then in money or choses in action. (Matter of DePeyster, 4 Sandf. Ch. 511; Ogden v. Murray, 39 N. Y. 202.)"

The will of W., after directing the payment of debts and expenses, named six persons as "executors of and trustees under" it. A series of separate trusts were constituted, running for the lives of the specified beneficiaries. Some of these required specific sums to be set apart, others provided for the severance of the trust estate from the general assets and their management by five of the six persons so named, holding as trustees. A large portion of the trust estate consisted of real estate, and provision was made for partition. Authority was conferred upon the trustees to lease and to sell certain portions, and general authority for the management of the land. The trustees were also empowered, in their discretion, to commit, by revocable power of attorney, the management of certain of the trust estates to the beneficiary. The accounts of the executors as such were settled, leaving in their hands only the trust estates, which were severed from the general assets, and thereafter separate accounts were kept with each beneficiary.

Construction:

By the will the testator contemplated and provided for two separate duties to be performed by his representatives, first as executors, and thereafter as trustees, and they were entitled to commissions in both capacities, but they were not entitled to commissions on the value of the real estate unsold at the termination of the trusts.[1] *Phœnix* v. *Livingston*, 101 N. Y. 451, rev'g in part 28 Hun, 629.

Citing, Johnson v. Lawrence, 95 N. Y. 154; Laytin v. Davidson, id. 263. Wagstaff

[1]But no commissions are allowed where the persons entitled to the proceeds of sale elect to take the land. Smith v. Buchanan, 5 Dem. 169.

When, by a provision of the will, there is a separation of the functions and duties of the executors and those of the trustees, and the duties of the executors clearly precede those to be performed by them as trustees, they are entitled to full commissions upon the *corpus* of the estate, in each capacity. *Matter of Babcock*, 52 Hun, 510. See, also, Matter of Emerson, 59 id. 244; Matter of Jackson, 32 id. 200; Matter of Beard, 77 id. 111; Blake v. Blake, 30 id. 469; Wildey v. Robinson, 85 id. 362.

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v. Lowerre, 23 Barb. 209, questioned. In re DePeyster, 4 Sandf. Ch. 511, 512; McWhorter v. Benson, 1 Hopk. 28, distinguished. See, also, Estate of McLaren, 6 Misc. 483; Matter of Clinton, 16 id. 199; Matter of De Peyster, 4 Sandf. Ch. 511.

Commissions are not allowed on the amount of incumbrances when land is sold subject to the same.

But it is otherwise when the trustee pays the incumbrance on the sale, according to an obligation assumed by him so to do. *Matter of Security Life Ins. and Annuity Co.*, 36 Hun, 36, 39, aff'd 95 N. Y. 654.

Where an executor sells real estate, subject to mortgages, he is entitled to commissions on the whole purchase price. *Cox* v. *Schermerhorn*, 18 Hun, 16, 19.

By the will, Mrs. M. was appointed executrix; she duly qualified and acted as such. The will contained a direction that each executor and trustee, other than his wife, "do receive and take the full rate of commissions provided by law for each executor;" substantially the whole income of the estate was given to her.

Construction:

She was not entitled to commissions, as it was the intention of the testator to exclude her from compensation. *Matter of Kernochan*, 104 N. Y. 618.

NOTE.—The trust instrument may fix the compensation. Waters v. Collins, 3 Dem. 374.

While, when upon a final accounting of a testamentary trustee, it appears that the annual income of the trust estate was distributed to the beneficiaries, the trustee may be allowed full commissions annually, although he did not account annually, the fact that the income was received and distributed monthly, does not authorize the trustee to charge full commissions monthly. *Matter of Selleck*, 111 N. Y. 284.

Upon settlement of the accounts of the executors, the decree directed that they should pay to themselves, as trustees, the several trust funds.

Construction:

Under the will, the duties of the executors, as such, were to be first discharged, and then they were to assume the duties of trustees, and their functions as executors having been terminated by the decree, they were entitled thereafter to commissions as trustees. (Hurlburt v. Durant, 88 N. Y. 122; Johnson v. Lawrence, 95 id. 154; Laytin v. Davidson, id. 263; Matter of Accounting of Mason, 98 id. 527.)

The surrogate allowed the trustees on settlement of their accounts, as such, one-half commissions for receiving the trust funds from themselves as executors. No error.

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Same will:

The trustees were six in number. They were allowed three full commissions upon $13,287.69, income of the annuity fund received by them, under the provisions of the Code of Civil Procedure (secs. 2736, 2811), providing that where the personal estate of a decedent amounts to $100,000 over all his debts, each executor, administrator or testamentary trustee, where there are not over three, shall receive full commissions; where there are more than three, three full commissions "shall be apportioned among them." The personal estate of the decedent was more than $100,000, and the principal of the annuity fund was $400,000.

Construction:

The allowance was error; when trustees account in reference to income, which they are required annually to pay over, whatever may be the amount of the estate or of the principal producing the income, said provisions of the Code do not apply unless the income exceeds $100,000, and the trustees were entitled to but one commission. *Matter of Willets*, 112 N. Y. 289.

See, McAlpine v. Potter, 126 N. Y. 285, digested p. 798; also, Matter of Kenworthy, 63 Hun, 165; Welling v. Welling, 3 Dem. 511.

Where a will gave the testator's residuary estate to his executors in trust, with authority to sell the real estate and to divide the whole into specified parts, each to be kept invested and the income paid to a beneficiary named during life, the duties of the executors ceased, as such, upon the division and they held the property as trustees; and so they were entitled to double commissions. *Matter of Crawford*, 113 N. Y. 560.

C., by his will, gave all his property to T., who was appointed executor, in trust to convert the same into money, invest the proceeds, pay the interest to the widow of the testator during life and, upon her death, to divide the principal among his children.

In a proceeding instituted by the widow, the plaintiff therein, for a final settlement of T.'s accounts as executor, the surrogate's decree charged him with a balance then in his hands; this balance, it was decreed that "the said executor retain, invest and keep invested according to the trust contained in the will." The decree did not in terms discharge the executor. Plaintiff thereafter applied for a further accounting, upon which it was adjudged that T. should pay into court the principal of the estate, and to plaintiff a balance of income due her. T. failed to pay as directed, and thereupon his letters were revoked. The com-

plaint in this action, which was upon the bond given by T. as executor, alleged and it appeared that T. did not set apart any securities and made no investment of the trust fund. The defense was that the effect of the original decree was to terminate T.'s duties as executor, and that thereafter he acted only as trustee, and for such action his sureties were not liable. *Held*, untenable; that the retention by T. of the trust fund was not necessarily the act of a trustee as distinguished from that of an executor; that he did nothing to indicate that he treated the fund as held by him in any capacity other than that in which he had received it; that the duty in respect to investment having been imposed by the will, said decree might be treated as if it contained no direction in that respect, and the only practical effect of it was a settlement of T.'s account as executor; that it was entirely consistent therewith that the fund should be retained by T. in that capacity until invested; and that therefore, the sureties were liable for his failure to obey the subsequent decree. *Cluff* v. *Day*, 124 N. Y. 195, reversing 23 J. & S. 460, and considering previous decisions.

Double commissions to the same person, as executor and trustee, are to be awarded only when the will contemplates a several and separable action in each capacity, not at the same time, but at different stages of the administration.

The performance of a trust may be added to the ordinary duties of an executor in such a manner that the two functions run on together, and where a will makes no separation, but thus blends the two duties, single commissions only are allowable.

It is the duty of an executor, as such, to pay to a legatee the amount of the legacy, in the manner and at the time provided by the testator, and that duty is not changed by the fact that the payment of the principal is postponed and the income made payable annually in the meantime; the trust duty thus imposed becomes a function of the office of executor.

The will of P. gave his entire estate in trust, and directed the "executors and trustees hereinafter named" to retain it undivided until the period of distribution, and meanwhile to pay funeral expenses, debts, accruing taxes, repairs, reasonable insurance, one fixed and definite annuity and aliquot parts of the net accruing income to beneficiaries named until the final distribution. Upon an accounting the executors were allowed double commissions. Error.

The bulk of the estate came to the executors invested in securities which had not been turned into money. The executors were allowed

half commissions upon the estimated value of the securities for receiving so much of the funds of the estate.

Construction:

Error; such allowance in advance of the conversion of the securities into money for the purposes of payment, or of acceptance of them by the legatees as payment was premature and not justified.[1]

It seems that such an allowance upon all sums of money received would have been proper. In re Mason (98 N. Y. 536), distinguished.

Same will:

The surrogate allowed to each executor full commissions upon the income received and paid out; this did not exceed $100,000. Error. *McAlpine* v. *Potter*, 126 N. Y. 285. Distinguishing, In re Willetts 112 N. Y. 289.

Under the statute allowing commissions to trustees for "receiving and paying out" the moneys of the trust estate, they are entitled to commissions for receiving all moneys which constitute the *corpus* of the estate, and any additions thereto from increase of any kind, and the moneys paid out on which commissions may be charged are moneys paid out for debts, expenses, legacies, etc.; payments which operate to diminish the estate.

Commissions may not be charged on moneys disbursed and received in the conduct of a business carried on to produce net income, but only upon the net income which increases the *corpus* of the estate.

While as a general rule, commissions are only to be allowed to trustees on settlements of their account, where they have rendered the services in conducting a business for which the law allows the commissions, and it appears from the situation of the estate, the nature of their duties and the character of the business, no injury or loss can be inferred from their taking in good faith and supposing they were entitled thereto, their commissions in advance of an accounting, they are not chargeable with interest thereon.[2]

By the will of B. he directed his executors and trustees to keep, improve and manage certain property, and to carry on the business con-

[1]See, Schenck v. Dart, 22 N. Y. 420 and cases gathered thereunder; Matter of Mason, 98 id. 536.

In determining the amount of the estate, property, though not subject to commissions until actually converted, is to be counted in. Matter of McLaren, 6 Misc. 483; Matter of Clinton, 16 id. 199; see, also, Matter of Blakeney, 1 Con. 128.

[2]Price v. Holman, 135 N. Y. 124.

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nected therewith as freely and fully as he could if living. In carrying on the business the trustees paid out large sums of money, their gross receipts were $600,000 and they made a net profit of over $300,000.

Construction :

The trustees were not entitled to commissions upon the whole gross receipts, but only upon the net profits. *Beard* v. *Beard*, 140 N. Y. 260.

NOTE 1.—"If a trustee invest money he pays it out, and when it is repaid to him he receives it again. But it has been held that in such cases the money is not received and paid out within the meaning of the statute. (Matter of Kellogg, 7 Paige, 265; Betts v. Betts, 4 Abb. [N. C.] 317, 436; Drake v. Price, 5 N. Y. 430, 433.) The same rule was laid in Matter of Hayden (54 Hun, 196, affirmed in this court, 125 N.Y. 776). (263, 264)."

NOTE 2.—"The commissions of trustees are to be allowed on the settlement of their accounts, and the general rule is that they can not be legally taken before. (Code, sec. 2802; 2 R. S. 93; Wheelwright v. Rhoades, 28 Hun, 57; Hancox v. Meeker, 95 N. Y. 528; Matter of Mason, 98 id. 527; Matter of Selleck, 111 id. 284.) There is an exception to the general rule where the trustees settle with the beneficiaries and pay out the residue of income or of the estate. There they may first deduct and retain their commissions without waiting for a judicial settlement of their accounts. (265, 266.)"

The commissions of an executor, until ascertained and liquidated in the manner prescribed by law, are not subject to his disposal, but upon grounds of public policy are unassignable. *Matter of Worthington*, 141 N. Y. 9.

Commissions are to be computed upon the entire fund, including securities never converted by him into money. *Matter of Moffat*, 24 Hun, 325.

Executors can not take commissions until they have been ascertained by the court. The court has power to withhold them entirely where there has been misconduct on the part of the executors resulting in losses to the estate greater than the lawful compensation. *Wheelwright* v. *Rhoades*, 28 Hun, 57.

Even though there has been no actual division of the estate into separate funds, commissions are to be allowed on each of several distinct trusts; they are to be charged upon the income. *Clute* v. *Gould*, 28 Hun, 348.

See, also, Foote v. Bruggerhof, 66 Hun, 406.

One of several executors who takes no part in the management of the estate is not entitled to share in the commissions under 2 R. S. 93, sec. 58, as amended by L. 1863, ch. 362. *Matter of Manice*, 31 Hun, 119.

See, also, Walke v. Hitchcock, 5 Redf. 217.

The commissions of testamentary trustees are governed by the law in force at the time of the settlement of their accounts, notwithstanding the services may have been performed prior to the enactment of such a law. *Naylor* v. *Gale*, 73 Hun, 53.

Where there is a power of sale in trust attached to the executor's office, there is no statutory authority for the allowance of any compensation to executors beyond their legal fees. *Bruce* v. *Lorillard*, 62 Hun, 416.

An agreement by administrators not to claim commissions is valid and will be enforced. *Matter of Hopkins*, 32 Hun, 618, aff'd 98 N. Y. 636.

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The settlement of an executor's account is conclusive as against an application for changes in the commissions allowed therein. *Matter of Tilden*, 44 Hun, 441.

Forfeiture of extra compensation given by the will results from removal for misconduct. *Widmayer* v. *Widmayer*, 76 Hun, 251.

A substituted trustee is not entitled to commissions on money paid over to his predecessor as the latter's commissions. *Betts* v. *Betts*, 4 Abb. N. C. 317.

A trustee may hold a fund out of which his commissions are payable until they are paid. *Wheelwright* v. *Wheelwright*, 2 Redf. 537; Matter of Aymar, 5 Dem. 428.

A trustee's debts and liabilities to the estate may be taken out of his commissions. *Freeman* v. *Freeman*, 4 Redf. 211; Ward v. Ford, id. 34.

A trustee is entitled to commissions upon sums with which he is charged in consequence of losses arising from his negligence, and on debts due to himself as one of the *cestui que trusts;* and also on the balance in his hands which he is directed by the decree to pay over to the *cestui que trust*. *Meacham* v. *Sternes*, 9 Paige, 398.

See, also, Matter of Carman, 3 Redf. 46; Matter of Mount, 2 id. 405; Ward v. Ford, 4 id. 34.

See, further, on subject of commissions, Reynolds v. Sisson, 78 Hun, 595; Matter of Matthewson, 8 App. Div. 8; Matter of Curtiss, 15 Misc. 545; 9 App. Div. 285; Matter of McCord, 2 App. Div. 324; Matter of Bevier, 17 Misc. 486; McKee v. Weedin, 1 App. Div. 583.

VI. EXPENSES.

(1) Expenses of protecting the estate are allowable.

Noyes v. Blakeman, 6 N. Y. 567.

(2) When trustees may charge expenses upon future income.

Noyes v. Blakeman, 6 N. Y. 567.

(3) Counsel fees are allowable for the necessary professional services of a lawyer.

Code of Civil Procedure, secs. 2561–2; Downing v. Marshall, 37 N. Y. 380, and cases gathered thereunder; Woodruff v. N. Y., L. E. & W. R. Co., 129 id. 27; Matter of Hutchinson, 84 Hun, 563.

(4) When counsel fees are allowed, for what services and the amount thereof.

Downing v. Marshall, 37 N. Y. 380, notes.

(5) Expenses of defending an invalid trust.

Leavitt v. Yates, 4 Edw. Ch. 134.

(6) Counsel fees of beneficiaries.

Matter of Attorney-General v. North American Life Ins. Co., 91 N. Y. 57; Matter of Holden, 126 id. 589.

(7) Counsel fees in settlement of accounts of resigning trustee.

Matter of Holden, 126 N. Y. 589.

(8) Expenses of counsel growing out of trustee's mismanagement.

Hannahs v. Hannahs, 68 N. Y. 610.

(9) Counsel fees—surrogate can not make decree in favor of attor-

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ney for his services, as charges of the attorney are against the trustee personally.

Seaman v. Whitehead, 78 N. Y. 306.

(10) Hence the attorney is not bound by the allowance, but may collect the value of his services from the trustee personally.

Seaman v. Whitehead, 78 N. Y. 306, note.

(11) Trustee acting as lawyer can not be allowed fee.

Buisse v. Paige, 1 Abb. Ct. App. Dec. 140, and cases gathered thereunder.

(12) Services of another person to protect an estate.

Davis v. Stover, 58 N. Y. 473.

(13) When the beneficiary claims the benefit of the trustee's act, the expenses attending its accomplishment must be allowed.

Town of Lyons v. Chamberlain, 89 N. Y. 578.

(14) Items of expenses which are not a legal charge against the fund in trustee's hands are not allowed.

Matter of Selleck, 111 N. Y. 284.

(15) From what fund expenses are payable.

Woodruff v. N. Y., L. E. & W. R. Co., 129 N. Y. 27.

(16) Office and office expenses, when necessary, are allowable.

Matter of Nesmith, 140 N. Y. 609.

(17) Repairs.

Stevens v. Melcher, 80 Hun, 514; Matter of Deckelmann, 84 id. 476.

(18) Clerical expenses necessary for the administration of the estate are allowable.

Vanderheyden v. Vanderheyden, 2 Paige, 287, and cases gathered thereunder; Davis v. Stover, 58 N. Y. 473.

(19) But a trustee can not be employed as clerk.

Clinch v. Eckford, 8 Paige, 412.

(20) Nor can he employ a clerk to perform clerical services that trustee should perform.

Matter of Harbeck, 81 Hun, 26, aff'd 145 N. Y. 648.

(21) As to what are trustee's duties.

See Glover v. Holley, 2 Bradf. 291.

(22) Whom trustee may employ as clerk.

Clinch v. Eckford, 8 Paige, 412, note.

(23) Traveling expenses.

Elliot v. Lewis, 3 Edw. Ch. 40.

It is the duty of the trustee to use reasonable diligence to protect the trust estate, and he will have a lien upon it for the expenses of such protection although not expressly provided for in the instrument creating the trust.

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If the trustee have not the means in hand of defraying the expenses of such protection, he may effectually charge such expenses upon the future income of the estate, without incurring personal responsibility for their payment.

Where the trustee, after creating such charge is removed, and a new trustee appointed, the trust estate in the hands of the new trustee remains subject to the charge. *Noyes* v. *Blakeman*, 6 N. Y. 567.

NOTE.—As to the circumstances under which this "lien" can be transferred so as to relieve the trustee of personal liability and give the creditor a right to reach the estate, see New v. Nicholl, 73 N. Y. 127, digested p. 778.

So far as trustees incur expense in managing trust property, they are entitled to be reimbursed from the trust fund. Reasonable attorney's and counsel fees connected with the management of the business of the trust, will be allowed as a part of the expenses. *Downing* v. *Marshall*, 37 N. Y. 380.

Citing, 2 Williams on Exrs. 1137; Stewart v. Hoare, 2 Brown Ch. 663; Fearns v. Young, 10 Ves. 184; Attorney General v. City of London, 1 id. 243; Lewin on Trusts and Trustees (Phil. ed. 1858), 557; Beames on Eq. Costs, 13 *et seq.*, 157 *et seq.*, 214 *et seq.*; Tiff. and Bullard on Trusts, 697 *et seq.*; Matter of Spooner, 86 Hun, 9.

NOTE 1.—The propriety of the counsel fee may be adjudged by the court, and payment thereof made thereafter by the trustee, whereupon he is entitled to allowance therefor. Douglas v. Yost, 64 Hun, 155; citing, Matter of Att'y Gen'l v. North Am. Life Ins. Co., 91 N. Y. 61; Gilman v. Gilman, 16 T. & C. 211, aff'd 63 N. Y. 41.

NOTE 2.—The services of counsel must be necessary and must be rendered in the performance of duties not due from the trustee personally. Matter of Quinn, 16 Misc. 651.

NOTE 3.—For the amount of allowances, see Matter of Smith, 2 Con. 418; Seaman v. Whitehead, 78 N. Y. 306; Code of Civ. Proc. secs. 2561–2.

The reasonableness of the charges is affected by the character, importance, and results obtained. Matter of Quinn, 16 Misc. 651; Randall v. Packard, 142 N. Y. 47.

A trustee of an invalid trust, who reasonably defended it, but who was cognizant of all the transactions out of which its invalidity arose, was decreed to bear his own costs. *Leavitt* v. *Yates*, 4 Edw. Ch. 134.

An administrator, who files a bill of foreclosure and has to take a journey to be examined, was allowed a fair charge in his accounts against the estate, for loss of time and traveling expenses. Elliot v. Lewis, 3 Edw. Ch. 40.

Where one, indebted to an estate in the hands of a receiver, executor or trustee, is employed to render necessary services for the benefit and protection of the estate, the value of his services is a proper counterclaim in an action to recover the debt. *Davis* v. *Stover*, 58 N. Y. 473.

The allowance to an executor for counsel fee upon the final settlement of his accounts, is in the discretion of the surrogate; the courts

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will not favor a claim upon the part of an executor or trustee to charge the beneficiaries as his tenants; or otherwise for the use of his property, where, instead of settling up the estate placed in his charge, he has kept it open and unadjusted, mingling its affairs with his own, without ascertaining what is due and payable to each of the beneficiaries in the way the law has marked out. There is but this one way to manage the estate, whether the executor or trustee be of the blood of the testator and the beneficiaries, or a stranger. *Hannahs* v. *Hannahs*, 68 N. Y. 610.

A surrogate has no authority, upon the accounting of an executor, to direct him to pay a sum to his counsel for the services of the latter; charges for services rendered by an attorney to an executor are against the executor individually, and there is no authority warranting a decree in favor of the attorney against the estate, or against the executor as such. *Seaman* v. *Whitehead*, 78 N. Y. 306.

NOTE.—Hence, the attorney is not bound by the allowance of the court, but may collect the amount due for his services from the trustee. Mygatt v. Wilcox, 1 Lans. 55.

A trustee can not be allowed a counsel fee for his own services as a lawyer, in addition to his expenses and commissions. *Buisse* v. *Paige*, 1 Abb. Ct. App. Dec. 140.

Citing, Green v. Winter, 1 Johns. Ch. 22; see, also, Collier v. Munn, 41 N. Y. 143; s. c., 7 Abb. Pr. N. S., affirming, Matter of Munn's Estate, Tuck. 136; Manning v. Manning, 1 Johns. Ch. 527; Meacham v. Sternes, 9 Paige, 398; Wagstaff v. Lowerre, 3 Abb. Pr. 411; s. c., 23 Barb. 309; 6 Paige, 215; 8 id. 412.

Where municipal bonds were placed by commissioners in the hands of a trustee and the town claimed the proceeds of such as had been sold, the trustee was entitled to deduct from such amount expenses properly made and commissions. *Town of Lyons* v. *Chamberlain*, 89 N. Y. 578, aff'g 25 Hun, 49.

Where, in an action brought by the attorney general, against an insolvent life insurance company, after the entry of judgment dissolving the corporation, and appointing a receiver of its assets, certain of the policyholders were allowed to intervene, who appeared by attorneys, and contested the allowance of commissions, claimed by the receiver, which were materially reduced, the court had no power to make an allowance to the intervenors out of the funds in the hands of the receiver, for their disbursements and counsel fees, as they were simply individual parties protecting their own interests.

The cases where such allowances have been made to trustees or to one or more persons interested in a common fund, who have brought

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suit to protect or recover the fund, are distinguished. *Matter of Atty. General* v. *North American Life Ins. Co.*, 91 N. Y. 57.

An executor has no authority to credit in his accounts items not constituting a legal charge against the fund in his hands.

Credits, therefore, for payment of taxes not a lien on property of the testator at the time of his death, or on property not owned by the testator, and credits for payments made by the executor, by request of heirs, and for which the estate was not liable, are improper and may not be allowed upon settlement of the executor's accounts. *Matter of Selleck*, 111 N. Y. 284.

Where, in a special proceeding, instituted by a trustee of a trust fund, for leave to resign and to procure the appointment of a new trustee, the several beneficiaries, being made parties, appeared by separate counsel and took an active part in the examination and settlement of the account of the retiring trustee, it was error to make allowances for counsel fees to several of them.

Certain of the parties who were infants appeared by guardian; they had no present interest in the fund, but simply a contingent and reversionary interest in the share of one of the beneficiaries; an allowance to the guardian payable out of the trust fund was error.

It seems, an allowance to the new trustee, appointed in such proceedings, was improper. *Matter of Holden*, 126 N. Y. 589.

Distinguishing, Wetmore v. Parker, 52 N. Y. 466; Savage v. Sherman, 87 id. 277; Downing v. Marshall, 37 id. 380.

In the disposition of a trust estate the trust fund must bear the expenses of its administration, and this although no provision therefor is made in the instrument of trust.

Trustees, and, it seems, others, acting in a fiduciary character are entitled to reasonable allowances for costs and expenses incurred in the course of the performance of their duties out of a fund which has been secured or protected by their efforts. This right includes all reasonable fees paid attorneys for counsel for services in litigation, successfully prosecuted for the benefit of the fund. *Woodruff* v. *N. Y., L. E. & W. R. Co.*, 129 N. Y. 27.

See, also, Young v. Brush, 28 N. Y. 667.

Where the surrogate found, from sufficient evidence, that it was necessary to have an office in connection with the business, the trustee was properly credited with items of money retained for office rent and expenses. *Matter of Nesmith*, 140 N. Y. 609; 71 Hun, 139.

Accounting by a trustee—allowances of payments claimed to have been made by him. *Cook* v. *Lowry*, 29 Hun, 20.

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Cost of repairs to real property belonging to a trust estate—when properly chargeable to the *corpus* of the trust fund. *Stevens* v. *Melcher*, 80 Hun, 514, modified 152 N. Y. 551.

Executors and trustees—manual clerical duties of—right to employ clerical assistants. *Matter of Harbeck*, 81 Hun, 26, aff'd 145 N. Y. 648.

Repairs to real estate forming part of the *corpus* of a trust fund—expense of making, how chargeable as between life tenant and remainderman. *Matter of Deckelmann*, 84 Hun, 476.

Authority to incur reasonable expenses for counsel fees. *Matter of Hutchinson*, 84 Hun, 563.

An executor or guardian may employ a clerk or agent or accountant and charge the estate with the expenses, where, from the peculiar nature or situation of the property, the services of such clerk or agent will be beneficial to the estate. *Vanderheyden* v. *Vanderheyden*, 2 Paige, 287; see, also, Underhill v. Newburger, 4 Redf. 499; Meeker v. Crawford, 5 id. 450; Matter of Butler, 1 Cou. 58; Matter of Quin, id. 381; Hall v. Campbell, 1 Dem. 415; Glover v. Holley, 2 Bradf. 291; Fisher v. Fisher, 1 id. 335.

Without an authority contained in the will for that purpose the executors are not authorized to employ one of their number to perform extra services as clerk in keeping the accounts of the estate, and to allow him a salary for his services out of the property, in addition to the commissions allowed by law. Clinch v. Eckford, 8 Paige, 412.

NOTE.—In a proper case the *cestui que trust* may be employed. Phœnix v. Livingston, 101 N. Y. 451; or the creator of the trust, Browning v. Hart, 6 Barb. 91.

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Code Civil Pro. sec. 449. "Party in interest to sue, trustee, etc., may sue alone. Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A person, with whom or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section."

This statute does not prevent a beneficiary from maintaining an action against the trustee to protect his beneficial interest.[1] Hubbell v. Medbury, 53 N. Y. 98.

Matter of Straut, 126 N. Y. 201; see opinion, *post*, p. 808; see Beneficiary, *post*, p. 825.

And so a beneficiary may bring suit to enforce the performance of the trust, p. 812, and also against the trustee or the trustee and third persons (1) to recover trust property wrongly diverted from the trust, p. 811; (2) against third persons making the

[1] See cases illustrating this section collected in Rumsey's Practice, vol. 1, 119–120; also, see Chaplin's Express Trusts and Powers, 113, *et seq.*

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trustee a defendant, where the trustee refuses to bring the action, or unduly neglects so to do, p. 811. In each of these two cases the beneficiary represents the trustee.

Trustees, in whom is the title to the trust fund are the proper parties plaintiff in an action to maintain and defend the fund against wrongful attack or injury, tending to impair its safety or amount. Neither the *cestuis que trust* nor beneficiaries can maintain such action against a third person, except in case the trustees refuse to perform their duty, and then the trustees should be made parties defendant. *Western Railroad Co.* v. *Nolan*, 48 N. Y. 513.

Matter of Straut, 126 N. Y. 201, digested p. 808; Mortimer v. M. R. Co., 129 id. 81. The trustee is regarded as the sole owner of the title to the trust property for all purposes of redress against the estate. Schwab v. Cleveland, 28 Hun, 458.

S. died, leaving his wife and four daughters surviving him. By his will he directed his executors to divide one-half of his residuary estate, real and personal, into four equal parts, which he gave to said executors in trust to receive and apply the rents and profits to the use of the testator's wife during her life; after her death the rents and profits of one of said parts to the use of each of his said children during life, and upon her death "to pay over, transfer and deliver the principal of said one-fourth part, together with any arrears of income" to her heirs, or to such person or uses as said daughter "may by her will appoint."

Action for partition of certain real estate of an interest in which the testator died, seized, and which was included in the said residuary clause.

Construction:

An infant child of one of the daughters was not a necessary or proper party defendant under the Code of Civil Procedure (sec. 1538). *Delafield* v. *Barlow*, 107 N. Y. 535.

Devise of land to G. in trust for C. for life and upon his death "to assign, transfer and convey the said share" to his child or children, or if he leave none, then to his heirs—remaindermen not made parties to partition action—title was defective. *Moore* v. *Appleby*, 108 N. Y. 237,

An action by an executor upon a claim, alleged to be due the estate, arising out of transactions between the testator and another, must be brought by the executor as such; it is not maintainable by him in his individual capacity.

In such an action the executor, unless mismanagement or bad faith is shown, is not chargeable individually with costs. (Code of Civ. Pro., sec. 246.)

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The rule is not changed by the fact that the executor is beneficially interested in the estate as residuary legatees. *Hone* v. *DePeyster*, 106 N. Y. 645, rev'g 44 Hun, 487.

Children with contingent remainders were necessary parties to a partition action. *Wilson* v. *White*, 109 N. Y. 59, digested p. 323.

Interest of grandchildren in remainder was not cut off by foreclosure to which they were not parties. *Scholle* v. *Scholle*, 113 N. Y. 261, digested p. 938.

Beneficiary was not a party to foreclosure of mortgage on trust property. *United States Trust Co.* v. *Roche*, 116 N. Y. 120, rev'g 41 Hun, 549, digested p. 341.

A husband and wife agreed to live separately, and to effectuate that agreement, entered into articles of separation, through the medium of a trustee, by the terms of which the husband agreed to pay to the trustee, annually a sum named, for the support of the wife during life, the same to be in full satisfaction for such support and maintenance and of all alimony; the wife and trustee covenanted to save the husband harmless from his obligation to support her, and upon execution of the agreement the parties separated.

In an action against the husband, to recover a payment under the agreement, held, that it was valid; that the trustee named was the trustee of an express trust, and that the action was properly brought in his name; also held (Follett, Ch. J., dissenting), that the agreement was not abrogated by a subsequent divorce of the parties, at least when no provision for alimony was made in the decree of divorce. *Clark* v. *Fosdick*, 118 N. Y. 7.

Citing, Code of Civ. Pro., sec. 449; Calkins v. Long, 22 Barb. 97; Greenfield v Mass. M. L. Ins. Co., 47 N. Y. 430; Slocum v. Barry, 38 id. 46; Hughes v. Mercantile Mut. Ins. Co., 44 How. Pr. 351.

Action by the testamentary trustee to recover trust property or for its conversion is not brought by him in a representative capacity, but in his own right as the legal owner of the property—action by foreign trustee. Toronto General Trust Co. v. Chicago, etc. R. Co., 123 N. Y. 37, digested p. 638.

See, Palmer v. Phœnix M. L. Ins. Co., 84 N. Y. 63.

The rule in equity as to the joinder of parties in a foreclosure action affects those who have vested estates in remainder or reversion, and does not concern itself with those who have future contingent interests merely. (Story's Equity Pldgs. sec. 144.) *Townshend* v. *Frommer*, 125 N. Y. 446, 468, digested p. 315.

This case is followed in Curtis v. Murphy, 129 N. Y. 645; distinguished in Knowl-

ton v. Atkins, 134 id. 313, 317, and Campbell v. Stokes, 142 id. 23, 30; and see, also, cases collected under same case at p. 341, *ante*.

Infants, having contingent and reversionary interest in the share of one of the beneficiaries, had no present interest in the trust fund. *Matter of Application of Holden*, 126 N. Y. 589.

Trustees of an express trust have the legal title to and are the legal owners of the personal property belonging to the trust estate.

In an action by such trustees against a stranger, alleged to have in his possession or to be liable to account for property belonging to the trust estate, to reduce such property to possession or to subject it to their control, or for an accounting, unless the action involves and requires the determination of the rights as between the beneficiaries themselves, or as between them and the trustees, it is not necessary to make them parties (Code Civ. Proc. 449), and in the absence of fraud or collusion they are bound by the result.

In proceedings in surrogate's court commenced by one claiming an interest as *cestui que trust* under the will of S. to compel the executor of E., the surviving executor and trustee under said will, to account for the trust estate, which the petitioner alleged went into the hands of E., and after his death into the hands of his executor, it appeared that prior to the death of E. other trustees were duly appointed in his place by the supreme court, and E. was enjoined from thereafter acting as trustee; that an action was brought by said new trustee against the executor of E., the complaint in which alleged the wasting and misappropriation of the estate by E., and that all the property of which he died seized belonged to plaintiffs as such trustees. The relief asked, among other things, was that defendant, as executor, account to the plaintiffs concerning the property and the income thereof which came in the hands of the testator under the will of S. Said action resulted in a judgment against the plaintiffs therein, dismissing the complaint.

Construction:

The petitioner was bound by that adjudication, although not a party to the action; and the same was a bar to the proceedings.

Same will:

The petition was filed more than thirty years after the death of S., more than six years after the death of E., and more than four years after the death of H., to whom, by the will of S., the income of the trust fund was to be paid during life.

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Construction:

After such a lapse of time the petitioner could not claim that doubtful questions of law or of fact should be resolved in his favor. *Matter of Estate of Straut*, 126 N. Y. 201.

NOTE.—Trustees may sue to remedy their own wrongful act. Onondaga T. & D. Co. v. Price, 87 N. Y. 542; Zimmerman v. Kinkle, 108 id. 282; Wetmore v. Porter, 92 id. 76.

From opinion.—"But this petitioner claims that he is not bound by that adjudication for the reason that he was not a party to that action. It is the general rule, undoubtedly, that one is not bound by an adjudication in an action to which he is not a party. But to this rule there are many well recognized exceptions. Executors, administrators, assignees and receivers all act representatively as trustees of other persons, and yet in actions brought by them to recover trust property or to reduce trust property to possession, the beneficiaries and parties ultimately entitled to the benefit of the property are not necessary parties. Here these trustees, appointed to take the place of the trustees under the will of Jacob Straut, had the legal title to, and were the legal owners of the personal property belonging to the trust estate (T. G. T. Co, v. C., B. & Q. R. Co., 123 N. Y. 37); and it has never been held that in an action by the trustees to reduce such property to possession, or to subject it to their control, it is necessary to make the beneficiaries parties. In such an action they represent the whole title and interest, and their action, in the absence of fraud or collusion, is binding upon the beneficiaries. In the action brought by these trustees there was no question between them and the beneficiaries, and no question between the beneficiaries themselves. The only question at issue was between the trustees and a stranger to the trust, who was alleged to have in his possession, or to be liable to account for, certain property belonging to the trust, and in such an action it is well settled now that the beneficiaries are not necessary parties. (Horsley v. Fawcett, 11 Beav. 565; Goldsmid v. Stonehewer, 9 Hare App. 38; Doody v. Higgins, id. 32; Fowler v. Bayldon, id. 78; Adams v. Bradley, 12 Mich. 346; Ashton v. Atlantic Bank, 3 Allen, 217; Boyden v. Partridge, 2 Gray, 190; Cary v. Brown, 92 U. S. 171; Kerrison v. Stewart, 93 id. 155; Western R. R. Co. v. Nolan, 48 N. Y. 513.) If the purpose of the action had been, among other things, to determine rights as between the beneficiaries themselves, or as between the trustees and the beneficiaries, then it would have been necessary to bring them in as parties. The rule is thus laid down in Perry on Trusts, section 328: 'It is the duty of a trustee to defend and protect the title, to the trust estate, and as the legal title is in him, he alone can sue and be sued in a court of law. The *cestui que trust*, the absolute owner of the estate in equity, is regarded in law as a stranger.' In Story's Equity Pleadings (9th ed.), p. 192, note a, it is said: 'Where a suit, brought by a trustee, to recover the trust property, does not give rise to any conflict of interests between the *cestui que trusts*, and does not involve an investigation of their relations with each other, the *cestui que trusts* are not necessary parties.' In Western R. R. Co. v. Nolan (*supra*), it was *held*, that trustees who have the title to the trust fund, are the proper parties plaintiff in an action to maintain and defend the fund against wrongful attack or injury tending to impair its safety or amount, and that neither the *cestui que trust* nor other beneficiaries can maintain such an action against a third person, except in case the trustees refuse to perform their duty, and then the trustees should be made parties defendant. In Cary v. Brown (*supra*), it was held that a suit brought by a trustee to recover trust prop-

erty, or to reduce it to possession, in nowise affects his relations with his *cestui que trusts*, and it is unnecessary to make them parties. In Horsley v. Fawcett (*supra*), the master of the rolls, says: 'If the object of the bill were to recover the fund with a view to its administration by the court, the parties interested must be present; but it merely seeks to recover the trust moneys, so as to enable their trustee hereafter to distribute them conformably with the trust declared. It is, therefore, unnecessary to bring before the court, the parties beneficially interested.'"

When donee of a power of sale was not a necessary party in a foreclosure suit. *Steinhardt* v. *Cunningham*, 130 N. Y. 292, digested p. 642.

Where an estate is vested in persons living, subject only to the contingency that persons may be born who will have an interest therein, the living owners of the estate, for all purposes of any litigation in reference thereto, and affecting the jurisdiction of the courts to deal with the same, represent the whole estate, and stand not only for themselves, but also for the persons unborn. *Kent* v. *Church of St. Michael*, 136 N. Y. 10, digested p. 290.

In action for partition, although afterborn issue may have an interest, they will be concluded by the judgment, as will also be the trustee when appointed, and so, the purchasers would receive a good title. *Kirk* v. *Kirk*, 137 N. Y. 510. See p. 1428; see Geobel v. Iffla, 48 Hun, 21.

Grandchildren entitled to remainders were necessary parties to a partition, as they took vested estates irrespective of any action for a division of the estate as directed. *Campbell* v. *Stokes*, 142 N. Y. 23, digested p. 291.

Testamentary trust estate, trustee of the *income* only, is not a necessary party to a lease made by the trustee of the *corpus* of the estate. *Corse* v. *Corse*, 72 Hun, 39, aff'd 144 N. Y. 569.

For further cases see Stanton v. King, 8 Hun, 4, aff'd 69 N. Y. 609; Harrison v. Union T. Co., 80 Hun, 463, aff'd 144 N. Y. 326; People v. Powers, 147 id. 449.

XI. BENEFICIARY

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I. BENEFICIARY'S INTEREST.

1. ITS NATURE.

The Revised Statutes,[1] in the case of an express trust vested the whole estate in the trustees, in law and in equity, subject only to the execution of the trust, and the person for whose benefit the trust was created took no estate or interest in the lands, but could enforce the performance of the trust in equity. The Real Property Law, section eighty, provides that an express trust "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."[2]

If this section has not changed the relation of the trustee or beneficiary to the property embraced in the trust, and it will be assumed that it has not, the latter takes no estate or interest, but merely a right to enforce the performance of the trust, and the trustee takes the whole estate, in law and in equity. The result is that, as is elsewhere stated, the trustee for purposes of actions in behalf of or against the estate is the proper party plaintiff or defendant.[3]

And when he takes the whole title his neglect to recover land belonging to the trust estate held adversely by a third person will permit the adverse possession to ripen into title binding those finally entitled.[4]

A seeming exception to the rule as to parties permits the beneficiary, as well as creditors, to bring or enforce an action or appeal involving the protection of the trust estate, when the trustee after demand,[5] refuses or neglects to do so, making the trustee a party.[6]

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[1] 1 R. S. 729, sec. 60.

[2] The object or propriety of this change in the language is not apparent; but Mr. Chaplin suggests some possible theoretical effects from this changed phraseology. See Chaplin's Express Trusts and Powers, p. 92, sec. 134.

[3] See Parties, p. 805.

[4] Bennett v. Garlock, 79 N. Y. 302; Townshend v. Frommer, 125 id. 469.

[5] Where a demand is impracticable, as where the trustee is absent and insane or is a party to the wrong, it is not required. Ettlinger v. Persian Rug & Carpet Co., 142 N. Y. 189; Brinckerhoff v. Bostwick, 88 id. 52; see, also, Anderton v. Wolf, 41 Hun, 571.

[6] Dewey v. Moyer, 72 N. Y. 70; Bate v. Graham, 11 id. 207; in re Connell, 110

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But the beneficiary is then acting in the place of the trustee and enforces rights that pertain to the office of the trustee and not the personal rights of the beneficiary, and the fruits of the recovery are administered as the terms of the trust require.[1]

And the beneficiary suing, but not the other beneficiaries are bound by the result of the action.[2]

But the beneficiary pursuant to his statutory right to "enforce the performance of the trust in equity" may initiate various actions and proceedings, to follow trust property illegally diverted by the trustee[3] for waste or neglect;[4] for improper investment;[5] for the removal of the trustee;[6] for an account;[7] for the appointmentment of another trustee, in case of death, resignation or removal,[8] and for similar redress or purposes.

Beneficiary may have other estates in the land.

The statute in providing that the trustee shall take the "whole estate" does not intend that he shall necessarily take all the estates, that exist, or that may be created in the land, but only such estate as the purposes of the trust require.[9]

If the trust is created for the sale of the land and the application of the proceeds to pay debts, the trustee must have the whole title, and so in other cases where the purposes of the trust require it.[10]

But the trust may be one commonly created to pay the rents and profits to a person for his life or until he reaches a certain age, or for a certain number of years, unless he sooner die. In such case the trustee takes an estate commensurate with the beneficial right of the *cestui que trust*, and when this right ceases, the purpose of the trust, and the estate

id. 351; Ft. Stanwix v. Leggett, 51 id. 552; Harvey v. McDonnell, 113 id. 526, 531; Bockes v. Hathorn, 78 id. 227; National Tradesmen's Bank v. Wetmore, 124 id. 241, 251; Kirsch v. Lozier, 143 id. 390.

[1] Crouse v. Frothingham, 97 N. Y. 105, 114; Bate v. Graham, 11 id. 237; Dewey v. Moyer, 72 id. 70 (see cases cited); Spring v. Short, 90 id. 538.

[2] Boerum v. Schenck, 41 N. Y. 182; as a *cestui que trust* may sue concerning his own interest without joining other beneficiaries. Hitchcock v. Linsly, 17 Hun, 556.

[3] See pp. 609, 805, 825.

[4] See p. 747.

[5] See p. 741 *et seq.*

[6] Real Prop. L., sec. 92, see p. 841 *et seq.*

[7] Chaplin's Express Trusts and Powers, secs. 221, 234.

[8] Real Prop. L., secs. 91, 92, see p. 837; for a helpful discussion of the subject, see Chaplin's Express Trusts and Powers, secs. 120–132.

[9] Nichols v. Walworth, 4 Denio, 385.

[10] Bennett v. Garlock, 79 N. Y. 317.

I. BENEFICIARY'S INTEREST.

1. ITS NATURE.

of the trustee cease.[1] In the case of such a trust all estates creatable in the land are not exhausted, and a future estate, like a remainder, may be given to another, taking effect after the termination of the trust estate, or if no such future estates be created, all estates not given to the trustee remain in the creator of the trust.[2]

Indeed, section 81 of the Real Property Law provides that "the last section[3] 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," and section 82 provides, that "when 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."[4]

These expectant estates so created in the trust property are subject to but not otherwise affected by the trust, and the beneficiary may take or acquire the same as fully as if he were not also the *cestui que trust.*[5]

And there is no merger of the trust estate and the future estates so owned by the beneficiary.[6]

But under the recent amendment to the statute the beneficiary owning the remainder may be able to destroy the trust.[7]

So a beneficiary may have an estate that precedes the trust to be enjoyed by him before the trust shall take effect, and subject to the trust term, he may be the donee of a power or even a trustee for some other person in a valid trust.[8]

2. WHAT TRUST INTEREST MAY BE ALIENATED.

Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896), sec. 83. "What trust interest may be alienated. The right of a beneficiary of

[1] Losey v. Stanley, 147 N. Y. 560; Real Prop. L., sec. 89.

[2] Stevenson v. Lesley, 70 N. Y. 512; Losey v. Stanley, 147 id. 560.

[3] Section 80, see p. 711

[4] Embury v. Sheldon, 68 N. Y. 234; Stevenson v. Lesley, 70 id. 512; Losey v. Stanley, 147 id. 560.

[5] Crooke v. County of Kings, 97 N. Y. 421; Asche v. Asche, 113 id. 232; Stevenson v. Lesley, 75 id. 512.

[6] Martin v. Pine, 79 Hun, 426; Asche v. Asche, 113 N. Y. 236.

[7] See, Real Prop. L., sec. 83, see p. 813.
Crooke v. County of Kings, 97 N. Y. 421.

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." [1]

1 R. S. 730, sec. 63, Banks's 9th ed. N. Y. R. S., p. 1798 (repealed by Real Prop. L., sec. 300), read as follows: "No person beneficially interested in a trust for the receipt of the rents and profits of land, 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." The sentence for which the last sentence of the above section (Real Prop. L., sec. 83) was substituted was added by L. 1893, ch. 452 (not expressly repealed), and provided substantially that where a beneficiary, in whole or in part, of a trust to receive the rents and profits of land or the income of personal property, is entitled to a remainder, in whole or in part, subject to the trust, he may release his beneficial interest to himself or the person presumptively entitled to the remainder or reversion upon the then termination of such trust estate, and thereby terminate the trust estate, or so much of it as affects his remainder in which such trust estate forthwith becomes merged.

The Real Property Law, sec. 83, and the Revised Statutes (1 R. S. 730, sec. 3) to an extent limit the power of the *cestui que trust* to transfer his beneficial interest; but obviously such prohibition does not apply to the other estates, last above considered, not embraced in the trust; nor to accrued income;[2] and it even has been held that the *cestui que trust* could give a valid order on the trustee for future income, revocable at pleasure.[3]

The general rule is, however, that the income can not be anticipated by the *cestui que trust* or encumbered by any contract entered into by him providing for its pledge, transfer or alienation *previous* to its accumulation.[4] This follows from the provision of the statute that "the

[1] Alienation of interest of *cestuis que trust* in rents and profits of land held in trust; 1 R. S. 730, sec. 63, has no application to trusts created prior to its enactment. Dyett v. Central Trust Co., 140 N. Y. 54.

[2] Bramhall v. Ferris, 14 N. Y. 41, 49; Tolles v. Tolles, 99 id. 617–618.

[3] Matter of Valentine, 5 Misc. 479, 483, citing Perry on Trusts (2d ed.), sec. 671.

[4] Noyes v. Blakeman, 6 N. Y. 567; Douglas v. Cruger, 80 id. 15; Tolles v. Tolles, 99 id. 616, 617–619.

right of a beneficiary of an express trust to receive rents and profits of real property[1] and apply to the use of any person, can not be transferred by assignment or otherwise."[2]

Annuities.—The principal discussion under section sixty-three (R. S. 730; now Real Prop. L. 83), has arisen over the question whether an express trust[3] to pay annuities from the rents and profits was within the prohibition of that section, or whether the interest of the beneficiary fell within that part of section 83 which provides that "the rights and interest of every person for whose benefit a trust for the payment of a sum in gross is created, are assignable." If the trust fall under subdivision two of former section 55 (Real Prop. L. 76), the interest would be alienable; but it has been questioned whether it would be inalienable if the trust fell under subdivision three of the same section.[4]

The Real Property Law, sec. 76, somewhat changed the wording but not the scope of subdivision two of section 55 of the Revised Statutes by authorizing an express trust, "2. To sell, mortgage * * * for the benefit of *annuitants, or other* legatees," etc., the underscored words having been added.

The Real Property Law, sec. 83, also changes former section 63 of the Revised Statutes by omitting the phrase with reference to the assignability of "a sum in gross," above quoted, and in lieu thereof providing, "but the right and interest of the beneficiary of any other trust may be transferred."

The addition of the word "annuitants" to subdivision two does not enlarge its scope. Radley v. Kuhn, 97 N. Y. 26, 31–2, and it is not apparent that the above mentioned change in the wording of section 83, affects the question of the alienability of annuities in the case of trusts created under subdivision 3, of sec. 76.

The decisions under the Revised Statutes were numerous, but two recent cases discuss and review the earlier authorities. In Radley v. Kuhn, 97 N. Y. 26, there was a devise to the executors of certain land,

[1] The rule is the same in the case of personal property. Cochrane v. Schell, 140 N. Y. 534; see *ante*, p. 519.

[2] Real Prop. L., sec. 83; Cochrane v. Schell, 140 N. Y. 516; Cuthbert v. Chauvet, 136 id. 330; Noyes v. Blakeman, 6 id. 567.

[3] Of course if annuities are merely directed to be paid from rents and profits without the creation of a trust, as in Clark v. Clark, 147 N. Y. 644, the question here discussed does not arise.

[4] The subject is carefully reviewed in Chaplin's Suspension of the Power of Alienation, and again in the same author's Express Trusts and Powers, secs. 99–100.

in trust to receive the rents and profits, and out of the same to pay to each of two grandsons of the testator $700, when he became of age. In case either died before majority the survivor to have the whole $1,400; the trust to continue until the testator's son C. arrived at the age of twenty-five, unless he died before that time. If C. lived to reach that age he was to have the net income, less the $1,400, during life, and if he died leaving children the land was given to them.

It was held that the provision for the benefit of the grandchildren was simply a mode of securing payment of the legacies, not a provision for the maintenance of the infants, and so did not render the estate inalienable; that the interests of the *cestui que trust* were assignable, the trust being for the payment of a sum in gross, and that this was so whether the trust fell under the second or fourth subdivision, and that "only a trust to receive rents and profits * * * and apply them to the use of a person generally, or a trust to accumulate rents and profits generally for the benefit of one or more minors, renders the estate inalienable." When the sole object of the trust is to pay a sum in gross, by collecting and accumulating rents, etc., to a specific amount, the *cestui que trust* may release or assign." (See opinion, pp. 1–2.)

In Cochrane v. Schell, 140 N. Y. 516, the testator gave his executors an estate real and personal, in part, to collect and receive the rents and income, and out of the net proceeds to pay certain annuities amounting in all to $20,000 during the life of S. and upon her death to convey said estate to such of his grandchildren named, as should then be living. It was held that the will created a valid trust, and the grandchildren took remainders, vesting in possession upon the death of S.; that the trust interest was inalienable and required the estate to continue in the trustee during the life of S. (1 R. S. 730, sec. 63). In the opinion the court reviews earlier cases,[1] and the following conclusion is reached: "We are brought to the conclusion that the opinion of Nelson J. (in Hawley v. James, 16 Wend. 61) that a valid trust to pay annuities out of the rents and profits of land, may be created under sub. 3 of sec. 55, is a sound exposition of the law; we concur also with the opinions of Judge Nelson, and Judge Bronson, expressed in Hawley v. James, that an annuity is not a gross sum within the exception in section 63 (now 83). That term is applicable where a single sum is given, payable at one time or in

[1] Hawley v. James, 16 Wend. 61; Griffen v. Ford, 1 Bos. 123; Lang v. Ropke, 5 Sandf. 363; Clute v. Bool, 8 Paige, 83; McSorley v. Wilson, 4 Sandf. ch. 515; De-Peyster v. Clendining, 8 Paige, 295.

installments, but not to periodical sums given as annuities are usually given for permanent maintenance. Such provisions are within the policy of the prohibition against assignments contained in that section. But if an annuity may be considered as a gross sum, we do not perceive that it would change the result in this case, provided a trust for payment of annuities may be created under the 3d subdivision of section 55. The case of Radley v. Kuhn, 97 N. Y. 27, is an example of a provision in a will for the payment of a gross sum within the statute." (See opinion, pp. 534–5.) It will be observed that in Radley v. Kuhn (see opinion, p. 31), it is stated that as the payment is of a gross sum, it is alienable whether the trust is to lease, hence falling under subdivision 2, or "to receive the rents and profits of lands and to accumulate the same," hence falling under *subdivision 4*, but in Cochrane v. Schell, it is stated that if the trust could be regarded for the payment of a gross sum it would not change the result of that case (which was that the prohibition of section 631 [now 83] applied), provided a trust for the payment of annuities may be created under the 3d subdivision of section 55 (now 83), which was that case.[1]

If Cochrane v. Schell is to be deemed a solution of the question the following would seem to be the result. (1) If the trust is for the payment of a gross sum the beneficial interest is assignable under section 63 (now 83), unless the trust is created under subdivision 3 of section 55 (now 76), in which case it is inalienable. (2) A trust is for the payment of a gross sum "when a single sum is given, payable at one time or in installments," but is not for the payment of a gross sum, in the case of "periodical sums given as annuities are usually given, for permanent maintenance."

Beneficial interests made inalienable by the terms of the trust instrument.

The instrument creating an express trust for the benefit of a person other than the creator of the trust, may prohibit alienation by the beneficiary.[2] The rule is otherwise in England.[3]

[1] See cases where trusts on the payment of annuities were created under the 3d subdivision in Chaplin's Express Trusts and Powers, p. 383.

[2] Nichols v. Eaton, 91 U. S. 716; Hyde v. Woods, 94 id. 523; Fisher v. Taylor, 2 Rawl. 33; Thackara v. Mintzer, 100 Pa. 151; Broadway Nat. Bank v. Adams, 133 Mass. 170; Stieb v. Whitehead, 111 Ill. 247; Nickell v. Handly, 10 Gratt. 336; Pope's Exp. v. Elliott, 8 B. Mon. 56; Lampert v. Haydel (Mo.), 3 West. Rep. 172.

[3] Brandon v. Robinson, 18 Ves. 433; and see cases cited in Bramhall v. Ferris, 14 N. Y. 41; but see, Estate of Valentine, 5 Misc. 483; Perry on Trusts, 2d ed., sec. 671.

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It was held in Bramhall v. Ferris, 14 N. Y. 41, that a testator might provide, that the interest of a beneficiary for life in property should cease on the recovery of a judgment by creditors to reach it, yet it was stated in the opinion "that if the bequest to" the beneficiary "had been given to him absolutely for life, with no provision for its earlier termination, and no limitation over in the event specified, any attempt of the testator to make the interest of the beneficiary inalienable, or to withdraw it from the claims of creditors, would have been nugatory. Such an attempt would have been clearly repugnant to the estate in fact devised or bequeathed, and would be ineffectual for that reason as well as upon the policy of the law. (Citing cases.)[1] This doctrine, however, and the cases on which it rests do not deprive a testator of the power to declare effectually that the bequest shall cease on the happening of an event which would subject it to the claims of creditors, and then to give it a different direction." See Conditions, *post*, p. 1028.

When alienation is permitted by the trust instrument.

The estate of the trustee, or the right of the beneficiary may be alienated, if the instrument creating the trust permit it.[2]

Act of creator of the trust.

The creator of trust, after its creation, can not waive the prohibition of section 83.[3]

Disavowal by beneficiary.

The beneficiary may disavow an unauthorized alienation.[4]

Alienation by consent or order of the court.

The court can not give validity to an alienation of the beneficial interest when section 63 prohibits it.[5]

When the cestui que trust is remainderman.

The Real Prop. L., sec. 83, contains a provision, not before existing, that permits the beneficiary in a trust for the receipt of rents and prof-

[1] The Blackstone Bank v. Davis, 21 Pick. 42; Hallett v. Thompson, 5 Paige, 583; Graves v. Dolphin, 1 S. 66; Brandon v. Robinson, 18 Ves. 429.

[2] *Belmont* v. *O'Brien*, 12 N. Y. 394.

[3] See pp. 684, 694, nor destroy the beneficial interest. Wright v. Miller, 8 N. Y. 9; Wallace v. Berdell, 97 id. 13; Short v. Bacon, 99 id. 275; Briggs v. Davis, 21 id. 574; 20 id. 15.

[4] Douglas v. Cruger, 80 N. Y. 15, 20.

[5] Wood v. Wood, 5 Paige, 595; see p. 684.

its, when he is entitled to a remainder in the principal fund held in trust, subject to his beneficial estate for a life or lives, or a shorter term, to release his beneficial interest in the rents and profits, and thereby terminate the trust. Under this provision the beneficiary, if he takes a remainder, or acquires an outstanding remainder, may release his beneficial interest, thereby destroying the trust estate, and of course he can thereupon alienate the property. The result of this section is in many cases to dispose of the restraint, that has been so carefully thrown about the interests of beneficiaries under trusts, created under subd. 3 of sec. 76. See p. 395. See Oviatt v. Hopkins, 20 App. Div. 168.

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A trust may be created for the benefit of any person, although he be the creator of the trust.

But "all deeds of gift, all assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person." 2 R. S. 131, sec. 1.[1] (See Code Civ. Pro., sec. 1871.) See ch. 417, L. 1897, sec. 23.

Aliens may be beneficiaries, even where the trust property consists of land.[2]

Persons not in being at the creation of the trust may be beneficiaries.[3]

Corporations. There would seem to be no objection to creating a trust in which a corporation is beneficiary. The objection to such a trust has usually been that the rule against the suspension of the power of alienation was violated.[4]

Beneficiary also the trustee.

A beneficiary in a trust can not also be a trustee thereof, but he may act as trustee for others, and if other trustees be named they may act for him.[5]

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[1] Knapp v. McGowan, 96 N. Y. 75.

[2] Austin v. Brown, 6 Paige, 443; Marx v. McGlynn, 88 N. Y. 376.

[3] Manice v. Manice, 43 N. Y. 303, 386; Harrison v. Harrison, 36 id. 543; Woodgate v. Fleet, 64 id. 566; see Accumulation, p. 499.

[4] Adams v. Perry, 43 N. Y. 487; Codman v. Grace, 112 id. 299; Booth v. Baptist Church, 126 id. 215.

[5] Wetmore v. Truslow, 51 N. Y. 338; Amory v. Lord, 5 Selden, 103; Tiffany v.

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But an appointment of a beneficiary as trustees, made by the court, on the death or resignation of the testamentary trustee, does not extinguish the trust, whether the trust would be void or not in its inception, if the sole beneficiary had been appointed trustee by the instrument creating the trust.[1]

Number of beneficiaries.

It is no objection to a trust that during the authorized period of suspension of alienation more than two persons are to enjoy the same.[2]

Change of beneficiaries.

A provision for shifting the beneficial interest from one person to another is allowable.[3]

When the beneficiary's family is included in provision for his support, (see pp. 760 *et seq.*)

No beneficiary named.

When the trust instrument is silent as to the beneficiaries, no valid trust is created; it does not necessarily result that the creator of the trust is the beneficiary.[4]

Third parties.

Where three persons each executed a mortgage to a trustee to secure to each other an equal payment of notes, on which they were indorsers, the trust was not created for and did not inure to the benefit of the holders of the notes.[5]

In contracts of insurance the persons for whose benefit the insurance was procured may stand in the relation of beneficiaries.[6]

When stockholders and members of corporations and partnerships

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Clark, 58 N. Y. 632; Lewin on Trusts, 6th ed., 57; Parson on Trusts, 2d ed., sec. 59; Moke v. Norrie, 14 Hun, 128. See, also, pp. 716–717.

[1] Losey v. Stanley, 147 N. Y. 560.

[2] Woodgate v. Fleet, 64 N. Y. 566; Crooke v. County of Kings, 99 id. 421; Schermerhorn v. Cutting, 131 id. 48.

[3] Harrison v. Harrison, 36 N. Y. 543; Holmes v. Mead, 52 id. 332.

[4] Dillaye v. Greenough, 45 N. Y. 438; see cases *post*, p. 822, n. 1.

[5] Seward v. Huntington, 94 N. Y. 104, rev'g 26 Hun, 217, distinguishing Lawrence v. Fox, 20 N. Y. 268; Burr v. Beers, 24 id. 178.

[6] Duncan v. China Mutual Ins. Co., 129 N.Y. 237; Phillips on Ins. sec. 383; 2 Pars. on Marine Ins. 45; Hooper v. Robinson, 98 U. S. 528; Henshaw v. M. S. Ins. Co., 2 Blatchf. 99; Rogers v. Traders Ins. Co., 6 Paige, 583; Waring v. Indemnity Fire Ins. Co., 45 N. Y. 612; see, "Trusts Arising from Contracts of Insurance," p. 681.

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created a trust and the trustees issued certificates, transferees of the certificates were subrogated to the rights of the original holders.[1]

Relations similar to those of a cestui que trust to the trustee.

The relations between a savings bank and its trustees and directors is that of principal and agent, and that between the trustees and depositors is similar to that of a trustee and *cestui que trust.*[2]

A trust relation is sometimes established between persons bidding in property on foreclosure for the benefit of bondholders, which authorizes the bondholders to take proceedings for the protection of their rights similar to those pertaining to a beneficiary under an express trust.[3]

The holders of bonds secured by mortgage may bring an action to foreclose the mortgage in case of improper refusal of the trustee to do so after demand,[4] and also without demand where a demand would be useless, or is impossible, as where the trustee has left the country or has become insane.[5]

But the right of bondholders to a fund out of which the debt is agreed to be paid establishes no trust relation between the bondholders and the company authorizing accounting.[6]

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The beneficiary must be a person so named or described as to be ascertainable or capable of identification by the court. This has been the law of the state of New York, applicable also in the case of trusts created for charitable uses. However it is to be observed, that by the Laws of 1893, ch. 701, by the Real Property Law, sec. 93, a qualification or extinction of the former rule has been attempted as to beneficiaries in trusts for religious, charitable, educational or benevolent purposes, and in such cases it seems that the trust may be valid, although the beneficiaries be indefinite or uncertain. See, "Trusts for charitable uses," *post*, p. 847.

Disregarding the new statute for the present discussion, the usual rule is that the donor must use such language as will so describe the beneficiary or a definite class of beneficiaries, that the court can, from the instrument creating the trust, determine what persons have or within

[1]Rice v. Rockefeller, 134 N. Y. 174, rev'g 56 Hun, 516.

[2]Hun v. Carey, 82 N. Y. 65.

[3]Zebley v. The Farmer's Loan & Trust Co., 139 N. Y. 461, rev'g 63 Hun, 541; Brooks v. Dick, 135 N. Y. 652; White v. Wood, 129 id. 527.

[4]Davis v. N. Y. Concert Co., 41 Hun, 492.

[5]Ettlinger v. The Persian Rug & Carpet Co., 142 N. Y. 189, aff'g 66 Hun, 94.

[6]Thomas v. N. Y. & Greenwood R. Co., 139 N. Y. 163.

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the due continuance of the trust shall have the right to enforce the same. This doctrine rests on the rule that a certain designated beneficiary is essential to the creation of a valid testamentary trust, and that a trust without a beneficiary who can claim its enforcement is void.[1]

When a person presents himself to the court claiming that he is the beneficiary entitled to enforce the trust, the instrument creating the trust must be found to be sufficiently definite in designating the beneficiary to enable the court to identify such person as the one possessing such right, or if the trust be for the benefit of a class, there must be such a description of the class as will enable the court to judicially recognize it, and it then simply remains for the beneficiary to show that he is a member of such class. Tilden v. Green, *supra.*

Such are the common trusts for the benefit of children, heirs at law, next of kin, nephews, etc., but even though the designation be less definite, yet it will be sufficient if the intended beneficiaries can be gathered from an examination of the whole instrument.[2]

If, however, the creator of the trust, instead of making the selection, confer power upon the trustee to make such selection, the same rule applies, that he must definitely describe the class of persons, in whose favor the power may be exercised, with such certainty, that the court can ascertain the object or objects of the power, to the end, that, when they shall seek the enforcement of the trust, the class may be identified as that intended by the donor. Tilden v. Green, *supra.*

For, obviously, if the selection of the beneficiary by the trustee depend upon a discretionary selection from an unlimited field of persons, or classes of persons, it follows, that there being no language enabling the court to recognize the beneficiary, no person could demand an enforcement of the trust, as his very necessary status depends upon the exercise of the discretion by the very trustee against whom the trust was sought to be enforced and by whom such discretion might never be exercised. If, however, the class from whom the selection is authorized be sufficiently described to enable the court practically to ascertain it, and hence those falling within it, the court could, in case of failure by the trustee to make selection, decree the execution of the trust.[3]

[1]Tilden v. Green, 130 N. Y. 29, 45; Levy v. Levy, 33 id. 107; Prichard v. Thompson, 95 id. 76; Holland v. Alcock, 108 id. 312; Read v. Williams, 125 id. 560.

[2]Kinnier v. Rogers, 42 N. Y. 537.

[3]Power v. Cassidy, 79 N. Y. 602, 613; Owens v. The Missionary Society of the M. E. Church, 14 id. 408; Tilden v. Green, 130 id. 29, 64, 65; Read v. Williams, 125 id. 560, 569; Holland v. Alcock, 108 id. 312, 320, 321, 323; sec. 137

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In what manner the trust may be enforced, in case the trustee should not finally make selection, has received judicial notice. Section 140 of the Real Prop. Law provides that "if the trustee of the power, with the right of selection, dies leaving the power unexecuted, its execution must be adjudged for the benefit, equally, of all persons designated as beneficiaries of the trust." In case, however, the trustee from absence, incapacity, or for other reason should not make the selection, there is holding that the court would have the power similar to that defined in section 140 of the Real Property Law.[1]

It is observable that the question of a proper designation of a beneficiary by the testator is quite distinct from that of the power of trustees to select the beneficiary. Such a power may be exercised, but the discretion of the trustee can not be substituted for the unlimited discretion of the testator. The power of selecting the beneficiary from an ascertainable class, and of allotting the share or sum which each shall receive, and hence of entirely excluding members of the class from all participation, exists by force of statute, and is sanctioned by authority.[2]

When the designation of the beneficiary will be regarded as too indefinite has been determined in a number of cases on differing states of facts.[3]

On the contrary, a trust was sustained where the testator gave to his executors his residuary estate "to be divided by them among such Roman Catholic charities, institutions, schools or churches in the city of New York," as the majority of his executors should decide, and in such proportions as they should think proper.[4] The court, however, has since declined to extend the holding in that case, and seems to approve it with reluctance.[5] In pursuing the investigation those cases should be dis-

of the Real Prop. Law, provides that "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."

[1] Real Prop. L., sec. 162; Prichard v. Thompson, 95 N. Y. 82; Holland v. Alcock, 108 id. 312; People v. Powers, 147 id. 104, 109.

[2] Real Prop. L., secs. 115, *et seq.* and cases, *supra.*

[3] Tilden v. Green, 130 N. Y. 29; Pritchard v. Thompson, 95 id. 76; Rose v. Hatch, 125 id. 427; Fisdick v. Town of Hempstead, id. 581; Matter of O'Hara, 95 id. 403; Holland v. Alcock, 108 id. 312; O'Conner v. Gifford, 117 id. 275, 280; Horton v. Cantwell, 108 id. 255, 265; Matter of Ingersoll, 131 id. 573, rev'g 59 Hun, 571; People v. Powers, 147 N. Y. 104, rev'g 83 Hun, 449. See, Beekman v. Bonsor, 23 N. Y. 298; Riker v. Leo, 115 id. 93, 103; Cross v. The U. S. Trust Co., 131 id. 330, 348; Gross v. Moore, 68 Hun, 412.

[4] Power v. Cassidy, 79 N. Y. 602.

[5] Pritchard v. Thompson, 95 N. Y. 76; Matter of Will of O'Hara, id. 418; People v. Powers, 147 id. 111.

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tinguished where it was held that no trust was created, but a valid gift was made directly to a class of objects.[1]

But even where a gift is direct it may be void for uncertainty.[2]

It is however sufficient in such cases, if the legatees be so described that they can be ascertained and known when the right to receive the legacy vests.[3]

Manner of designation.

Although the beneficiaries must be sufficiently described to permit their identification by the court, when they shall appear to enforce the trust, yet it is not necessary that they shall be designated by name if the description be sufficiently accurate to permit of their identification.[4]

Nor is an error in name material if it may be gathered from the will what persons or class of persons are intended.[5]

In some cases the court have been able to identify the beneficiary, where it was not correctly described by name.[6]

While in other cases the court failed to recognize the claimant as entitled to the gift.[7]

Corporations and voluntary associations.

It sometimes happens that a gift is to trustees for a corporation to be formed. This is sufficient if there be a provision for such formation within two designated lives in being.[8]

The question has sometimes arisen whether a devise to the trustees or other officers of the corporation is a gift to such officers or to the corporation itself. In some cases the gift has been held to be to the trustees.[9]

[1] Bird v. Merklee, 144 N. Y. 544; rev'g Schell v. Merklee, 75 Hun, 74.

[2] Wyman v. Woodbury, 86 Hun, 277; Levy v. Levy, 33 N. Y. 97.

[3] Shipman v. Rollins, 98 N. Y. 311; Holmes v. Mead, 52 id. 332; Lefevre v. Lefevre, 59 id. 434; Lougheed v. Dykeman's Baptist Church, 129 id. 211.

[4] Hoppock v. Tucker, 59 N. Y. 202, 208.

[5] Matter of Wehrhane, 40 Hun, 542, aff'd 110 N. Y. 678; New York Institution for the Blind v. How's Executors, 10 id. 84; Lefevre v. Lefevre, 59 id. 434; Preston v. Howk, 3 App. Div, 43.

[6] Lefevre v. Lefevre, 59 N. Y. 434; St. Luke's Home v. Association for Indigent Females, 52 id. 191; Preston v. Howk, 3 App. Div. 43; Matter of Wehrhane, 110 N. Y. 678.

[7] Riker v. Leo, 115 N. Y. 93.

[8] Rose v. Rose, 4 Abb. Ct. App. 108; Booth v. Baptist Church, 126 N. Y. 215; Fosdick v. Town of Hempstead, 125 id. 581; Kearney v. St. Paul Missionary Society, 10 Abb (N. C.) 274; Burrill v. Boardman, 43 N. Y. 254; Philson v. Moore, 23 Hun, 152; Cruikshank v. Home, etc., 113 N. Y. 337; Dammert v. Osborn, 140 id. 30.

[9] Adams v. Perry, 43 N. Y. 487; Dodge v. Pond, 23 id. 69; Cootman v. Grace, 112 id. 299; Williams v. Williams, 8 id. 525.

II. WHO MAY BE A BENEFICIARY.

1. CERTAINTY OF BENEFICIARY.

But in some cases it has been held to be a direct gift to the institution itself.[1]

But an immediate gift to a voluntary or unincorporated association is void.[2]

III. BENEFICIARY'S RIGHTS AND REMEDIES.

While the creator of a trust may reserve a power of revocation, or provide that the trust shall end upon the happening of specified events, or upon the doing of certain acts,[3] yet in the absence of fraud or mistake,[4] if no power of revocation be reserved, the destruction or impairment of the trust is beyond the power of the creator of the trust, or the trustees, or the court.[5]

It is the right of the beneficiary to preserve the integrity of the trust property against any effort of the trustee to impair it,[6] or against the hostile act of a third person, if the trustee refuse to do so. This right may be exercised in various ways, some of which have been pointed out elsewhere.[7]

The beneficiary may avoid unauthorized sales,[8] may follow into lands trust funds which have been misappropriated by the trustee and applied to their purchase, and elect either to hold the unfaithful trustee personally responsible, to claim the lands, or to cause the lands to be sold for his indemnity, and hold the trustee for any deficiency,[9] or in case

[1]New York Institution for the Blind v. How's Executors, 10 N. Y. 84; Preston v. Howk, 3 App. Div. 43, 47; Matter of Wesley, 43 N. Y. St. Rep. 952; Currin v. Fanning, 13 Hun, 458; Manice v. Manice, 43 N. Y. 387; The Consistory of the Reformed Dutch Church v. Brandow, 52 Barb. 228; The Att. General v. Minister, etc., 36 N. Y. 452.

[2]Owens v. Missionary Society, etc., 14 N. Y. 380; Marshall v. Downing, 23 id. 366; Rice v. Rockefeller, 134 id. 174; Banks v. Phelan, 4 Barb. 80; Sherwood v. Am. Bible Society, 4 Abb. Ct. App. Dec. 227; 1 Keyes, 561; Marx v. McGlynn, 88 N. Y. 357; White v. Howard, 46 id. 144, 163; First Pres. Society v. Bowen, 21 Hun, 389; Follett v. Badeau, 26 id. 253.

[3]Van Cott v. Prentice, 104 N. Y. 45; Locke v. Farmer's Loan & Trust Co., 140 id. 135.

[4]Barnard v. Gantz, 140 N. Y. 249.

[5]See "Indestructibility of an express trust," p. 683.

[6]Pendergast v. Greenfield, 127 N. Y. 23, 30.

[7]See pp. 811, 812.

[8]People v. Open Board, etc., 92 N. Y. 98, 103; Hubbell v. Medbury, 53 id. 98; Smith v. Bowen, 35 id. 83.

[9]Ferris v. Van Vechten, 73 N. Y. 113; Holmes v. Gilman, 138 id. 369; Baker v. Dubrow, 18 Hun, 29.

of divisible investments the beneficiary may accept such as he chooses and reject others.[1]

And when a trustee, in breach of his trust, disposes of the trust property, the beneficiary may pursue it or its proceeds wherever he can trace them, so far as the law will permit him to do so, without relieving the trustee.[2]

A trust creditor upon an accounting and in bankruptcy or insolvency is not entitled to preference over general creditors of the insolvent merely on the ground of the nature of the claim but must show an equity founded on some agreement, or relation of the debt to the assigned property, entitling him according to equitable principles to preferential payment.[3]

Whether beneficiary may be estopped.

See on this subject, *ante*, p. 748.

This election on the part of the beneficiary indicates that he may be estopped by his election, acts or laches. As the Real Prop. L., sec. 83, prohibits a transfer by the beneficiary of his interest, it would seem that a *cestui que trust* could not be estopped from asserting that the act of the trustee, although done with the consent of the beneficiary, effected a transfer of the beneficial interest in violation of that section.[4]

But it has been held[5] that where a trustee to sell, or one having a power of sale in trust, bids in the property at the sale for himself, the transaction is not void but voidable at the election of the beneficiary (when *sui juris*), and the latter may, if he choose, hold the trustee to the consequence of his act.

And where there is no legal incapacity in the *cestui que trust* and he has full knowledge of all the facts, and is free from undue influence arising out of the relation of the parties, a clear and unequivocal affirmance of the sale may conclude him.

Ordinarily, the acceptance of the proceeds of such sale by the beneficiary with full knowledge would be such an affirmance. But, as between the immediate parties, the act is open to explanation, and where such proceeds are received under protest and within an express reservation of the right to controvert the validity of the sale it does not estop or preclude a subsequent proceeding by the beneficiary to disaffirm and obtain a resale. (Grover and Daniells, JJ., *contra.*)

[1]King v. Talbot, 40 N. Y. 76.

[2]Fowler v. Bowery Savings Bank, 113 N. Y. 450, 455.

[3]Matter of Cavin v. Gleason, 105 N. Y. 256.

[4]Douglas v. Cruger, 80 N. Y. 15, 19, 20; Bliven v. Robinson, 83 Hun, 208.

[5]Boerum v. Schenck, 41 N. Y. 182.

III. BENEFICIARY'S RIGHTS AND REMEDIES.

So, also, an estoppel has also been held to operate against a beneficiary receiving the avails of the sale of trust property.[1]

It has been held that where a certain sum is bequeathed to executors in trust, to pay the interest thereof at a fixed and stated rate to one, and upon his death to divide the principal among others, the executors can not, without the consent of the *cestui que trust*, or, in case they are infants, without an order of the court, set apart and appropriate bank stocks to the satisfaction of the trust, and release the residue of the estate from its liability to perform the trust.

The *cestui que trust* may assent to and accept such an appropriation; but if, before this is done, new interests and new parties have intervened, the situation of the property at the time of such intervention must determine the rights of all who claim to be interested in it.[2]

In another case[3] it was held that a married woman may acquiesce in an unauthorized investment of trust property given to her sole and separate use, so as to bar her right of action against her trustee therefor. She is not estopped, however, by such acquiescence from seeking a withdrawal of the fund from the unauthorized investment, and the placing of it as required by the trust.

The opinion in the above case[3] contains the following: "It is stated generally in the text-books that acquiescence, by the *cestui que trust*, in a breach of trust by the trustee, will bar a recovery therefor. (Hill on Trustees, *525 *et seq;* Perry on Trusts, secs. 467, 849; Lewin on Trusts, *773, 774.) And this proposition is sustained by the authorities cited, of which see Brice v. Stokes (11 Vesey, Jr., 325). This generality is stated to be so limited, as that the *cestui que trust* must be *sui juris* and capable of acting for themselves; so that married women, minors and others thus under disability can not be bound by alleged acquiescence, or even by urgent requests. This, again, is qualified to the extent, that a married woman may acquiesce in an unauthorized investment of trust property, given to her sole and separate use, in such manner as to bar her, after complaint of the investment as improper, so as to affect her trustee personally. (Walker v. Shore, 19 Vesey, Jr., 387; Jacques v. Meth. Epis. Ch., 17 J. R. 548.) Such is the case here."

In a later case,[4] it was held that a *cestui que trust* may not allege an act upon the part of his trustee to be a breach of trust which has been

[1] Anderson v. Mather, 44 N. Y. 249.

[2] *Leitch* v. *Wells*, 48 N. Y. 585.

[3] Sherman v. Parish, 53 N. Y. 483.

[4] Butterfield v. Cowing, 112 N. Y. 486, also, 82 id. 449.

done under his sanction, either by previous consent or subsequent notification.

The beneficiary may be barred by the statute of limitations,[1] or precluded by his laches.[2]

XII. TRANSFEREE OF TRUST PROPERTY PROTECTED.

Real Prop. L., sec. 84 (L. 1896, ch. 547, took effect Oct. 1, 1896). "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."

1 R. S. 730 sec. 64, Banks's 9th ed. N. Y. R. S., p. 1799 (repealed by Real Prop. L., sec. 300), was practically the same.

The title of a subsequent *bona fide* purchaser for value and without notice, when there is nothing on the record to show that his grantors had not a full right to convey, can not be impeached, even in equity; he takes the land freed from the trust. *Harrington* v. *Erie County Savings Bank*, 101 N. Y. 257.

NOTE 1.—As to persons receiving trust property with notice that it is subject to a trust, see Wetmore v. Porter, 92 N. Y. 76; Zimmerman v. Kinkle, 108 id. 282; Dillaye v. Greenough, 45 id. 438; Kirsch v. Tozier, 143 id. 395; People v. Merchant's Bank, 35 Hun, 97; Gautier v. Douglas Manufact. Co. 13 id. 514; James v. Cowing, 17 id. 256; Tiffany & Bullard on Trusts, 107; Perry on Trusts, secs. 217, 328; Wormly v. Wormly, 8 Wheaton, 421; McArthur v. Gordon, 126 N. Y. 597; s. c., 51 Hun, 511; Waterman v. Webster, 108 N. Y. 157, 164; McPherson v. Rollins, 107 id. 316 Swift v. Smith, 102 U. S. 442. When there is in an instrument creating the trust a designation of the method in which, or the conditions on which, the trust estate is to be sold, if at all, the trustee can not convey any title, except in the manner specified or in compliance with the conditions, and it excludes all other powers in respect to the alienation. O'Connor v. Waldo, 83 Hun, 489; Kissam v. Dierkes, 49 N. Y. 602; Suarez v. DeMontigny, 1 App. Div. 494.

Where in a deed the word "trustee" is added to the name of the grantee, but there is no declaration of trust, and the conveyance is not

[1] Hubbell v. Medbury, 53 N. Y. 98; People v. Open Board, etc., 92 id. 98.

[2] Matter of the Estate of Straut, 126 N. Y. 201.

to him as trustee, said word, in the absence of evidence other than the deed, may be regarded as merely *descriptio personae.*

Where it appears that the grantee was a trustee, but the conveyance is to him and "to his successors and assigns" absolutely with no limitation upon his power to convey and no disclosure of the object of the trust a grantee from him takes a good title. *The Greenwood Lake and Port Jervis R. Co.* v. *The New York and Greenwood Lake R. Co.*, 134 N. Y. 435.

Citing, Towar v. Hale, 46 Barb. 34; People v. Board of Stock Brokers, 49 Hun, 349, aff'd, 112 N. Y. 670.

XIII. WHEN TRUSTEE MAY CONVEY TRUST PROPERTY.[1]

Real Prop. L., sec. 85 (as amended by ch. 136, L. 1897). 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."

1 R. S. sec. 65, Banks's 9th ed. N. Y. R. S., p. 1799 (repealed by Real Prop. L., sec. 300), was the same as the first sentence of the above section; "except as provided in this section" was omitted. The power to mortgage under the authority of the court was added by Laws 1882, ch. 275 (amended as to its title by Laws 1884, ch. 26) (both repealed by Real Prop. L., sec. 300). The power to sell under authority from the court was added by Laws 1886, ch. 257, and re-enacted in Laws 1891, ch. 209, and Laws 1895, ch. 886 (all repealed by Real Prop. L., sec. 300). The last clause in regard to sale of an undivided share was added by Laws 1891, ch. 209, and re-enacted in Laws 1895, ch. 886, which contains the section practically as it now appears in the Real Prop. Law.

[1] In addition to cases digested below, see, Waterman v. Webster, 108 N. Y. 157. See, also, Swift v. Smith, 102 U. S. 442; McPherson v. Rollins, 107 N. Y. 316. See, also, "Indestructibility of an express trust," p. 683; Trustee—Limitation of Authority, p. 738.

XIV. WHEN TRUSTEE MAY LEASE TRUST PROPERTY.

See cases digested, pp. 831–5.

Real Prop. L., sec. 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 4, 1895, 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."

Laws 1895, ch. 886, Banks's 9th ed. N. Y. R. S., p. 1799 (repealed by Real Prop. L., sec. 300), contained substantially the same provision.

XV. NOTICE TO BENEFICIARY WHERE TRUST PROPERTY IS CONVEYED, MORTGAGED OR LEASED.

See cases digested, pp. 831–35.

Real Prop. L., sec. 87 (as amended by ch. 136, L. 1897). "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

See Laws 1895, ch. 886; Laws 1882, ch. 275; Laws 1884, ch. 26; Laws 1886, ch. 257; Laws 1891, ch. 209, all of which were repealed by Real Prop. L., sec. 300.

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."

A trust created to receive the rents and profits of unoccupied and unimproved real estate liable to large expenses and payments, for the lives of the testator's children, was held to authorize a lease for twenty-one years with a covenant to renew or pay for buildings to be erected by the lessee. *Greason* v. *Keteltas*, 17 N. Y. 491.

The power of the legislature to authorize or direct sale of land is considered. *Leggett* v. *Hunter*, 19 N. Y. 446, digested p. 903, considering and distinguishing Powers v. Bergen, 2 Seld. 358.

The court of chancery had power both before and since the Revised Statutes, to compel infant trustees to convey, in such manner as the

interests of the *cestuis que trust* might demand, and the statutory provision (sec. 65, art. 11), forbidding any conveyance in contravention of the trust, is a restriction upon the trustee, and not a limitation of the powers of the court.

Authority for the care and protection of equitable estates of infants is inherent in the court, independently of any statutory provisions; the power conferred by statute relating only to lands of which the infant is seized, and not to equitable interests.

Proceedings having been had in the court of chancery during the minority of the appellant (one of the plaintiffs in this action), by which the trust estate was sold and a portion of the proceeds invested in other real estate, giving to her the same equitable interest therein as in the lands so sold, the appellant having accepted her proportion of the avails of a partition sale of such lastly acquired lands, after service of the respondent's answer in this action, settling up such sale of the trust estate and investment of proceeds in the lands so partitioned, is estopped from claiming her proportion of the trust estate, as against a purchaser thereof. And this is so, although the appellant is a *feme covert*, since acting as a *feme sole* in the management of her separate estate and the conduct of this action, she is bound by her acts and all lawful inferences to be drawn from them. *Anderson* v. *Mather*, 44 N. Y. 249-50.

The court can not authorize a sale or mortgage of the trust property in contravention of the trust[1], nor consent to its diversion from the purposes of the trust. *Douglas* v. *Cruger*, 80 N. Y. 15.

See Cruger v. Jones, 18 Barb. 467; Fitzgerald v. Topping, 48 N. Y. 438.

As to whether on an application made under the statute (ch. 275 Laws of 1882, and ch. 26, Laws of 1884 amending part 2, ch. 1, tit. 2, art. 2, of the Revised Statutes "relating to uses and trusts") by a trustee to mortgage real estate held by him for the purpose of raising funds to be applied in preserving or improving it, not only the interest of the trustee and beneficiary of the trust, but also the rights and interests of those who may be entitled in remainder on the expiration of the trust, may be covered, *quære*. *Goebel* v. *Iffla*, 111 N. Y. 170.

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[1]Nor in contravention of the provisions of the will unless permitted by statute, and *bona fide* purchasers are not protected. O'Donoghue v. Boies, 92 Hun, 3, citing Rogers v. Dill, 6 Hill, 415; Muller v. Struppman, 6 Abb. N. C. 343; Thompson v. Hardman, 6 Johns. Ch. 436; 17 Am. & Eng. Ency of Law, 785; 3 Pom. Eq. Juris. sec. 1390; Forbes v. Halsey, 26 N. Y. 53.

Mortgage made for the protection and safety of the trust estate was sustained in Yonkers' Savings Bank v. Kinsley, 78 Hun, 186; citing, New v Nicoll, 77 N. Y. 127; Payne v. Wilson, 74 id. 348; McLean v. Ladd, 66 Hun, 341.

Authority was properly granted to mortgage trust property to pay for support and education of testator's family. *Rogers* v. *Rogers*, 111 N. Y. 228. Also to pay taxes omitted to be paid by trustee. *United States Trust Co.* v. *Roche*, 116 N. Y. 120, rev'g 41 Hun, 49.

Where a testator, in creating a trust in real estate, has withheld from the trustees a power of sale and organized the trust for a fixed period, it amounts to a direction that the land, not its proceeds, shall be held for the beneficiaries, and a sale by the trustees would be in contravention of the trust, unless an emergency has arisen in which funds are required to save the estate from threatened loss, to improve it, where authority to improve is given, or to prevent serious and increasing injury.

Under the provisions of the act of 1886 (Laws of 1886, ch. 257), which authorizes a sale of real estate, held in trust, whenever it appears "that it is for the best interest of the estate so to do, and that it is necessary and for the benefit of the estate to raise * * * funds for the purpose of preserving or improving such estate," to justify an order of sale some necessity must be shown to exist for the use of the money in the preservation or improvement of the property which the estate is not in a condition to supply, and which can only be supplied by borrowing upon a mortgage or selling a part and using the proceeds. A sale may not be ordered for the purpose of reinvestment and with a view only to increase the income, even though the real estate be unproductive.

The will of F. created a trust in her executors to receive the rents and profits of the trust estate and the accumulations therefrom, and "after payment of all taxes and assessments and of so much money as may be necessary for repairs, insurance or improvements, or betterments of any or all" of the real estate, to invest the balance as prescribed. An application under said statute for leave to sell certain of the real estate was based solely upon the ground that the sale and reinvestment of the proceeds would result in increasing the trust fund; no necessity for the sale was shown; on the contrary, it appeared the income after all the disbursements authorized, was ample for all the purposes of the trust.

Construction:

An order of sale was erroneously granted; the improvements contemplated were not of the trust fund, but of the real estate, and of the class indicated by the other elements of the phrase used. *Matter of Roe*, 119 N. Y. 509, aff'g 53 Hun, 433.

"The trust created by the deed being for the life of Mrs. Gomez, terminated with her death, and with her death the powers of the trustees

were, as we have seen, at an end, except to turn over and convey the trust property as directed by the deed. They, therefore, had no power under the deed to thereafter renew leases, or in the leases executed by them to provide for the renewal of leases after her decease." *Gomez* v. *Gomez*, 147 N. Y. 200–1.

Citing, In the Matter of McCaffrey, 50 Hun, 371.

Vested interests in remainder of infants which are not included in a trust estate for life can not be included in a mortgage by the trustee under direction of the court by virtue of the proviso added by the Laws of 1886, ch. 257, as an amendment to the 65th section of the statute of uses and trusts (1 R. S. 730), whereby a trustee under direction of the court or judge may, in a proper case, be allowed to mortgage or sell real estate held in trust. *Losey* v. *Stanley*, 147 N. Y. 560.

As to sales in execution of a power of sale, see, Power of sale, *post*, p. 973.

The "estate" referred to in ch. 257, Laws of 1886, providing that the supreme court shall have power to authorize a trustee to mortgage or sell real estate, held in trust by him, whenever it shall appear to the satisfaction of the court or judge "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," is not the general estate of the decedent or creator of the trust, but only such estate as is held by the trustee under the provisions of the trust.

Upon such an application by a testator's widow to mortgage real property, it appeared that the money to be raised by the mortgage was desired to pay taxes and assessments thereafter to be levied, and to pay to the petitioner an annuity in arrears, which was alleged to be charged upon testator's real estate. *Held*, that no grounds were shown justifying the application. *Matter of Clarke*, 59 Hun, 557.

From opinion.—"But there is another fatal objection to this proceeding, and that is, that the statute under which it is brought does not authorize the sale or mortgaging of lands for the purposes mentioned in the petition and in the order. At the time the petition was filed no taxes or liens by assessments or other liens existed upon the property. It appeared at the time of the hearing that there was due and unpaid to the widow the sum of $600 of annuities. In reality, therefore, the only ground upon which the prayer of the petition was based at the time this proceeding was begun and upon which it has been granted, is this outstanding indebtedness to the widow. It does not appear but that the remaindermen are able to and will pay all taxes and assessments which may be laid upon the property. No necessity for making repairs is shown. Even if the annuity was a charge against the real estate under the will, within the decision of Hoyt v. Hoyt (85 N. Y. 142), cited by the learned judge at the special term, still such charge could not be worked out under the provisions of this act by an application of the court by the so called trustee. By the amendment introduced by the act of 1886, authorization to the trustee to mortgage or sell the real estate, the title of which he holds can be made only when it is shown that such sale or mortgage will be for the benefit of the estate, and that such funds are necessary for the purpose of preserving or improving the real estate. The language of the statute is plain and its application certain. In the Matter of Roe (119 N. Y. 509), it was held that, to justify an order of sale some necessity must be shown to exist for the use of the

money in the preservation or improvement of the property, which the estate is not in a condition to supply, and which could only be supplied by borrowing upon a mortgage or selling a part and using the proceeds, and that a sale could not be ordered for the purpose of reinvestment and with a view only to increase the income, even though the real estate be unproductive; that the improvements contemplated by the statute were not for the purpose of supplying funds to the trustees or for the purpose of increasing the trust funds, but for the purpose of the improvement of the real estate and saving it.

"The estate referred to in the statute is not the general estate of the decedent, but only such as is held by the trustee under the provisions of the trust. When, therefore, the statute speaks of the improvement or preserving of such estate it does not mean the estate at large, but the particular real estate held by the trustee under the statute."

Where property, conveyed to a trustee to pay the income to the use of the widow after deducting necessary expenses, subsequently rose rapidly in value and was heavily assessed so that the income was insufficient to maintain the widow in her accustomed style and pay the assessments, the court considered it a proper case in which to authorize the trustee to mortgage the property or sell part of it. (R. S. pt. 2, ch. 1, tit. 2, art. 2, sec. 65, as amended by ch. 257, of the Laws of 1886.) *Matter of Morris*, 63 Hun, 619, aff'd 133 N. Y. 693.

XVI. PERSON PAYING MONEY TO TRUSTEE PROTECTED.

Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896), sec. 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."[1]

1 R. S. 730, sec. 66, Banks's 9th ed. N. Y. R. S., p. 1801 (repealed by Real Prop. L., sec. 300), was substantially the same.

An executor has a right to sell and transfer stocks and other securities of the estate, and one who buys in good faith, paying in money the price agreed upon, or who loans money upon security of the property, is not responsible for the application of the purchase money or money loaned, and his right to the property transferred is not affected by knowledge upon his part, of the existence of a claim for a legacy or a debt

[1] In addition to the cases digested below see Waterman v. Webster, 108 N. Y. 157; see, also, "Transferee of trust property protected," p. 828.

against the estate generally. *Leitch* v. *Wells*, 48 N. Y. 585, digested p. 686.

See McNeil v. Tenth National Bank, 46 N. Y. 325; Bogert v. Hertell, 4 Hill, 492; 2 Wms. on Exrs. 838, 841.

The general rule of the common law, which relieves a purchaser from an executor of any concern as to the disposition of the purchase money by the executor, applies only where the purchaser in making the purchase relied upon the official character of the executor.

Neither that rule nor the statute (1 R. S. 730, sec. 66) relieving one who pays money in good faith to a trustee, which the latter is authorized to receive, from any responsibility as to its application, will protect a purchaser or a mortgagee who is a party to a breach of trust on the part of an executor, or has knowledge that the transaction was not within the usual course of administration, nor may he rely simply upon the representations of the executor; he can escape liability only by ascertaining that there are debts or obligations of the estate, and seeing to it that the money is paid thereon. *Moore* v. *American Loan and Trust Co.*, 115 N. Y. 65.

See, also, Dyett v. Central Trust Co., 140 N. Y. 54, 69; Reid v. Sprague, 72 id. 457.

XVII. WHEN ESTATE OF TRUSTEE CEASES.

Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896), sec. 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."

1 R. S. 730, sec. 67, first clause Banks's 9th ed. N. Y. R. S., p. 18 (repealed by Real. Prop. L., sec. 300) was substantially the same.

See, Duration and termination of express trusts, p. 692; Beneficiary, *ante*, pp. 812–13; Conditions, p. 1098; Indestructibility of an express trust, p. 683.

XVIII. TERMINATION OF TRUSTS FOR THE BENEFIT OF CREDITORS.

Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896), sec. 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."

1 R. S. 730, sec. 67, last clause Banks's 9th ed. N. Y. R. S., p. 1801 (added by L. 1875, sec. 545, repealed by Real Prop. L., sec. 300), omitted "or is especially prescribed by law."

See, "Duration and termination of an express trust," p. 692–3.

XIX. APPOINTMENT OF TRUSTEE.

I. UPON DEATH.

II. UPON RENUNCIATION OR FAILURE TO APPOINT IN TRUST INSTRUMENT.

I. UPON DEATH.

Real Prop. L., sec. 91. Trust estate not to descend. "On the death of the last surviving or sole[1] 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 bene-

[1]On the omission of this provision for the death of a "sole trustee from the R. S." see Chaplin's Express Trust and Powers, p. 82–3.

ficiary thereof shall have been brought into court by such notice[1] in such manner as the court or a justice thereof may direct."

L. 1882, ch. 185 (passed May 19th), same, except "heirs" is omitted; also the words "in the absence of a contrary direction on the part of the person creating the same." Moreover there is no reference to "sole" trustees.

1 R. S. 730, sec. 68 (passed Dec. 10th, 1828, took effect Jan. 1st, 1830, repealed by L. 1896, ch. 547, sec. 300). "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."

On the death of a mortgagee holding in trust for a third person, the trust does not *ipso facto* fall on the court of chancery. Such a trust is a trust of personalty, and is not governed by 1 R. S. 730, sec. 68, which applies only to realty.[2]

Although where there are successive owners of the cause of action for equitable relief, and the right to prosecute arises in the time of the first, the period of limitation commences at that time, and continues attached to the demand during the several subsequent changes of both; and when the period is elapsed, the demand is barred, though the last proprietor had recently acquired his right; yet, if the first legal proprietor of the claim is a trustee having no interest, the cause of action (in this case the right to foreclose a mortgage), may be regarded as vesting in the *cestui que trust;* and if she were then under the disability of infancy, the statute does not begin to run until her majority. *Bucklin* v. *Bucklin*, 1 Abb. Ct. App. Dec. 242.

A proceeding simply for the appointment of a trustee to execute trust duties and powers, is a matter within the discretion of the court, and it will direct to whom notice of such proceedings shall be given.

In such proceedings, the rule requiring the presence of all parties interested is one of convenience, subject to modification and discretion, and infant *cestuis que trust* may or may not be notified, as the court shall see proper to direct. *Matter of Robinson*, 37 N. Y. 261.

The trust estate descended to the heirs of a trustee of an express trust created in 1827 by a conveyance to A. and his heir. *Anderson* v. *Mather*, 44 N. Y. 249, digested p. 832.

Upon the death of a trustee a power in trust is confided to the supreme

[1] On questions of those bound by appointment, see, Matter of Robinson, 37 N.Y. 261. As to estoppel, see, Emerson v. Bleakly, 2 Abb. Ct. App. Dec. 22; People v. Norton, 9 N. Y. 176 (trustee can not dispute the validity of), N. Y. S. Co. v. Saratoga Gas Co., 88 Hun, 569 (stranger can not question).

[2] See, cases reviewed in Matter of Tousey, 2 App. Div. 569, *post*, p. 840.

I. UPON DEATH.

court, to be executed by some person to be appointed by it. (1 R. S. 730, sec. 68.) *Clark* v. *Crego*, 51 N. Y. 646.

See, also, Delaney v. McCormack, 88 N. Y. 174.

A testator, in providing for the execution of his will is not limited to the designation by name and the direct appointment of an executor, but he may, by his will, delegate the power of naming an executor to another. *Hartnett* v. *Wandell*, 60 N. Y. 346, digested p. 1007.

See, also, Belmont v. O'Brien, 12 N. Y. 394.

When the court could appoint manager of fund without appointing administrator with will annexed. *Holden* v. *N. Y. & Erie Bank*, 72 N. Y. 286.

Upon the death of a trustee of a debt, his rights as trustee pass to his administrator. *Boone* v. *Citizens' Bank*, 84 N. Y. 83, digested p. 668.

Citing, Banks v. Exrs. of Wilkes, 3 Sandf. 99; Bucklin v. Bucklin, 1 Abb. Ct. App. Dec. 242; Bunn v. Vaughan, id. 253; Emerson v. Bleakley, 2 id. 22; Trecothick v. Austin, 4 Mason, 16, 29.

See, also, Wetmore v. Hegeman, 88 N. Y. 69, digested p. 628. Butler v. State M. L. A. Co., 55 Hun, 296, aff'd 125 N. Y. 769.

See review of authorities and statement of present law in Matter of Tousey, 2 App. Div. 569, *post*, p. 840.

Upon the death of a surviving trustee his powers and duties become vested in the supreme court and may be exercised by some one person appointed by it for that purpose. (1 R. S. 734, sec. 102; id. 730, sec. 68.) *Delaney* v. *McCormack*, 88 N. Y. 174, digested p. 339.

See, also, Farrar v. McCue, 89 N. Y. 139; Mott v. Ackerman, 9 id. 539; Cooke v. Platt, 98 id. 35; In re Hawley, 104 id. 250; Greenland v. Waddell, 116 id. 243.

Court can not construe will in proceeding for appointment of a new trustee. *Matter of Petition of Waring*, 99 N. Y. 115.

Under the act of 1882 (Laws of 1882, ch. 185), vesting in the supreme court an unexecuted express trust in personal property, upon the death of a surviving trustee, a *new trustee*[1] may be appointed upon a *prima facie* case being made, not conclusively disproved, showing that property in the hands of the executor or administrator of a decedent was either held by him at the time of his decease as trustee, or was the proceeds of the trust estate.

It seems, such an appointment will not conclude the legal representatives of the decedent's estate from contesting the existence of the trust,

[1] As to the power of the court to appoint a *new trustee* on the death of a sole trustee, under 1 R. S. 730, sec. 68; Brater v. Hopper, 77 Hun, 244; Wildey v. Robinson, 85 id. 362; see *post* p. 1017.

I. UPON DEATH.

1. TRUST ESTATE NOT TO DESCEND.

or from claiming that the property belonged to the decedent. *Matter of Carpenter*, 131 N. Y. 86.

Citing Matter of Waring, 99 N. Y. 114.

A new trustee will not be appointed in place of one deceased where it clearly appears that the trust or power in trust is void. *Matter of Will of Butterfield*, 133 N. Y. 473, digested p. 469.

An appointment of the beneficiary as trustee, made by the court on the death or resignation of the testamentary trustee, does not extinguish the trust, whether the trust would be void or not in its inception, if the sole beneficiary had been appointed trustee by the instrument creating the trust. *Losey* v. *Stanley*, 147 N. Y. 560, rev'g 83 Hun, 120, but not on this question.

Where an assignee for the benefit of creditors died, the trust vests in the supreme court under the provisions of chapter 185 of the laws of 1882, and does not vest in the personal representatives of the deceased assignee.[1] *Matter of Tousey*, 2 App. Div. 569.

From opinion.—"Before the Revised Statutes, upon the death of any trustee of an express trust, the trust estate, if it was real estate, descended to his heir, and if it was personal estate, passed to his personal representatives. It that case the new trustee was not appointed by the court, but he took the property because his ancestor or testator had been the owner of it, and it came to the heir or executor like any other property which had belonged to the ancestor. (DePeyster v. Ferrers, 11 Paige, 13; Dias v. Brunnell's Exrs., 24 Wend. 9, 13; Perry on Trusts, sec. 344.) Under the Revised Statutes this rule was altered so far as regards the trusts of real estate; and it was provided that, on the death of the trustee of an express trust, the trust estate should not descend to the heir nor pass to his personal representatives, but should vest in the court of chancery, whose duty it was to appoint some person to execute the trust under its direction (1 R. S. 730, sec. 68). This section of the statute was in that portion of the Revised Statutes which treated of uses and trusts, and which had prescribed the purposes for which express trusts of real estate might be created. It therefore applied by its terms only to trusts of real estate, and such has been the generally received notion with regard to it, although in the case of Hawley v. Ross (7 Paige, 103), it was suggested by the chancellor that the statute applied to express trusts of personal property as well as to those of real estate. But that suggestion does not seem to have been adopted in practice, and down to the year 1882 it had been generally understood that upon the death of the trustee of an express trust of personal property, the trust estate vested in his personal representatives, who were bound to execute the trust precisely as had been the case before the passage of the Revised Statute. Such was the case in Boone v. The Citizens' Saving Bank (84 N. Y. 83), where the trustee died before 1882 and the personal representative was held to be the proper person to execute the trust.

[1] In the case of the death or resignation of an executor, his unperformed duties are to be executed by the administrator with the will annexed. Greenland v. Waddell, 116 N. Y. 234; but see Matter of Application of Hecht, 71 Hun, 62.

I. UPON DEATH.

"Whatever may have been the proper interpretation of this section of the Revised Statutes, there is no doubt that chapter 185 of the Laws of 1882 altered the common law rule with regard to express trusts of personal property and put them upon the same footing as express trusts of real estate had been by section 68 of the Revised Statutes above cited. * * * Under this section (L. 1882, ch. 185) there can be no doubt that all express trusts of personal estate now vest in the supreme court upon the death of the trustee, and that they are to be executed by some person to be appointed by the court for that purpose. (Delaney v. McCormack, 88 N. Y. 182.) It is not particularly important whether the person so appointed is called a trustee or assignee, or by any other name. It is his duty to execute the trust under the direction of the court, and for that purpose he is vested with all the rights and powers which any other trustee would have except so far as he receives special directions from the court with regard to this particular case."

When court has power to appoint a trustee for the protection of tenants for life and remaindermen. *Livingston* v. *Murray*, 4 Hun, 619.

II. UPON RENUNCIATION[1] OR FAILURE TO APPOINT IN TRUST INSTRUMENT.

Court has power to appoint a trustee if none capable of acting be named in the trust instrument, or to take upon itself the execution of the trust. *Levy* v. *Levy*, 33 N. Y. 97, digested p. 855, note, 858.

Rogers v. Rogers, 111 N. Y. 228; Greenland v. Waddell, 116 id. 242; Kirk v. Kirk, 137 id. 510; Cross v. United States Trust Co., 131 id. 330; Real Prop. L., sec. 93; Sheldon v. Chappell, 47 Hun, 89; Montignani v. Blade, 74 id. 297; Losey v. Stanley, 147 N. Y. 560; Burrill v. Sheil, 2 Barb. 457.

See, also, "Whether the trust duty is annexed to the office or person," p. 718.

An administrator with the will annexed is not authorized by the statute (2 R. S. 72, sec. 22), to execute a power to sell land conferred by the testator, upon his executor. But the supreme court may appoint a trustee to execute the power. *Roome* v. *Phillips*, 27 N. Y. 357.

See, also, DePeyster v. Clendining, 8 Paige, 295, aff'd 26 Wend. 21.

The executor named renounced and refused to accept the trust. Ten years later the supreme court appointed a trustee to carry out the trust. *Dunning* v. *Ocean Nat. Bank*, 61 N. Y. 497.

See, also, Mury v. Mury, 89 Hun, 532; DePeyster v. Clendining, 8 Paige, 295.

On refusal of trustee to act the court could appoint another in substitution. *Rogers* v. *Rogers*, 111 N. Y. 228, digested p. 833.

See, also, Farrar v. McCue, 89 N. Y. 139.

An executor who renounces his office, the renunciation being followed by many years of total noninterference with the estate, is deemed also to have renounced the trusts conferred by the will, which are personal and discretionary. *Beekman* v. *Bonsor*, 23 N. Y. 298.

[1] Person appointed may renounce. Burritt v. Silliman, 13 N. Y. 93.

II. UPON RENUNCIATION OR FAILURE TO APPOINT IN TRUST INSTRUMENT.

Where a trustee named in a will refuses or neglects to accept the trust and qualify as trustee for a period of twenty years, he must be deemed to have renounced the trust. *Matter of Robinson*, 37 N. Y. 261, digested p. 838.

Whether there was sufficient evidence of renunciation as to justify court to enforce a contract of purchase. *Fleming* v. *Sternberger*, 100 N. Y. 1.

In the absence of proof to the contrary, a devisee of property in trust is presumed to accept the trust estate. But he can not be vested with such an estate against his will; and where he declines to accept it, his disclaimer need not be in such form as to pass an estate in the property devised. *Burritt* v. *Silliman*, 13 N. Y. 93.

XX. RESIGNATION AND REMOVAL OF A TRUSTEE AND APPOINTMENT OF SUCCESSOR.

Real Prop. L., sec. 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.

1 R. S. 730, secs. 69, 70, 71, 72, are superseded by the above section.

A trustee can not divest himself of the obligation to perform the duties of his trust, without an order of the court, or the consent of all the *cestuis que trust*. *Thatcher* v. *Candee*, 4 Abb. Ct. App. Dec. 387.

Citing, Shepherd v. McEvers, 4 Johns. Ch. 136; Cruger v. Halliday, 11 Paige, 314, 319; Ridgeley v. Johnson, 11 Barb. 527; see, also, McArthur v. Gordon, 126 N. Y. 597.

The fact that a man is a professional gambler is presumptive evidence of such improvidence as to render him incompetent to discharge the duties of executor or administrator. *McMahon* v. *Harrison*, 6 N. Y. 443; see, 1 Bradf. Rep. 283; 10 Barb. 659.

The late court of chancery had power by its general authority, independent of any special statute, to remove a trustee on good cause shown, and to substitute another in his stead. *The People* v. *Norton*, 9 N. Y. 176.

Where the trusts under a will vested in the executor are distinguish-

[1]As to power of surrogate to remove a testamentary trustee, and to appoint a successor, see Code of Civil Procedure, sections 2817-2819.

As to power of surrogate under these sections, see Haight v. Brisbin, 100 N. Y. 132; Hetzel v. Barber, 6 Hun, 534; Matter of Cody, 36 id. 122 (removal for habitual drunkenness); Coggeshall v. Green, 9 id. 471 (what is improvidence); Stout v. Betts, 74 N. Y. 266.

able from those attached to his office, the court may dismiss him as to the former and not as to the latter. But if one of several executors is guilty of misconduct in his dealings with the estate, the court will interfere, in a proper case, to regulate his conduct and compel him to place the notes, bonds and other securities in his possession belonging to the estate, in such custody as to enable his coexecutors to obtain access to the same; and may direct the mode in which he shall cooperate with his coexecutors in discharging his duties as executor under the will.

It seems the surrogate is authorized, under the statutes of this state, upon an accounting by the executor, to administer the same remedy. *Wood* v. *Brown*, 34 N. Y. 337.

The supreme court have power, upon petition, to remove as trustee one upon whom, by the terms of a will naming him executor, as such executor, an express trust is conferred; and this, although he has not at the time completed his duties as executor.

The removal of such a trustee is proper, where the relations between him and his cotrustee are such, that they will not probably cooperate in carrying out the trusts beneficially to those interested, and a majority of the beneficiaries ask for such removal. And it is not essential, how such relations originated, or whether the trustee, whose removal is sought, caused them by his own misconduct or not. *Quackenboss* v. *Southwick*, 41 N. Y. 117.

From opinion.—"In Leggett v. Hunter it was held by this court, that these sections with regard to removal of trustee were applicable to an executor and trustee under a will where the duties of the executor had been fully performed, and all the remaining duties were those of a trustee. If this be so I can see no reason why such a person may not, under the same sections, be removed as trustee, leaving him in the exercise of his powers and to discharge the duties of an executor, when the powers and duties are separate and distinct, as in the present case."

Where, by a will, trust duties are imposed upon the executor as to a portion of the estate, but there is no provision which expressly or by implication separates the two functions of executor and trustee, at least until there is a severance of the trust fund by the executor, or by a proper judicial decree, he may be held liable as executor and may be removed from his office as such for mismanagement.

A surrogate's decree settling the accounts of the executor, in the absence of a provision therein discharging him as executor, does not have that effect.

Even where, by the terms of a will, an executor may become a trustee simply, his liability as executor continues until there has been a final accounting, and a discharge by a decree of the surrogate or a direction in such decree that he hold the fund thereafter as trustee, and an enter-

ing by him upon the duties of trustee as distinct and separate from those of executor. *Matter of Hood*, 98 N. Y. 363; s. c., 104 id. 103.

See this and other cases reviewed, Cluff v. Day, 124 N. Y. 195.

Where the execution of a power of sale devolved upon an executor as such, not as trustee, the acceptance of his resignation as trustee does not permit the court to appoint a trustee to succeed him in the exercise of his functions as executor. *Greenland* v. *Waddell*, 116 N. Y. 234.

As to this class of cases, see "Whether the trust duty is annexed to the office or the person," p. 718.

The provision of the Code of Civil Procedure, sec. 2818, which provides that when a sole testamentary trustee dies, or is removed or resigns, and the trust has not been fully executed, the surrogate's court may appoint a successor, is not limited to a case where there is but one trustee; where there are more than one and all die or resign, the surrogate has power to appoint a successor.

The supreme court also has authority to make such appointment. *Royce* v. *Adams*, 123 N. Y. 402, digested p. 726.

See also, Matter of Van Wyck, 1 Barb. Ch. 565; Leggett v. Hunter, 19 N. Y. 445, digested p. 831; Lahey v. Kortright, 132 id. 450, digested p. 727.

When trustee will be removed for waste. *Matter of McGillivray*, 138 N. Y. 308, digested p. 766.

Trustee—after removal from office of trustee may still act as executor. *Deraismes* v. *Dunham*, 22 Hun, 86.

Only the trustee of a valid express trust can apply to the court for leave to resign. *Matter of Hall*, 24 Hun, 153.

Application to remove a trustee upon the ground that he has converted a portion of the trust property to his own use will not be defeated by proof that he has made a settlement with those of the beneficiaries whose property he had converted, and that the residue of the trust property is then in the possession of and properly invested by his co-trustees. *Matter of Wiggins*, 29 Hun, 271.

In an application to remove a trustee, all the beneficiaries must be made parties. *Bear* v. *American Rapid Tel. Co.*, 36 Hun, 400.

When a trustee will not be removed. *Matter of O'Hara*, 62 Hun, 531.

Executors and trustees—created by the same instrument—jurisdiction of supreme court—removal of trustee for misconduct—forfeiture of extra compensation given by the will—solvency of trustee. *Widmayer* v. *Widmayer*, 76 Hun, 241.

An assignee for creditors is a trustee of an express trust.

Where an assignee for the benefit of creditors dies, the trust vests in the supreme court, under the provisions of chapter 185 of the Laws of 1882, and does not vest in the personal representative of the deceased assignee.

Section 10 of chapter 466 of the Laws of 1877, known as the Assignment Act, does not require the court to appoint the personal representative of the deceased assignee.

Where an assignee has died, the court, in appointing his successor, should direct that the personal representative of the deceased assignee account for his proceedings and turn over to the new assignee the property of the estate, and that thereupon his sureties be discharged. *Matter of Tousey*, 2 App. Div. 569.

Upon an application made by all the beneficiaries under the will of Mary J. Havemeyer for the removal of J. Lee Humfreville as executor and trustee under the will of Mary J. Havemeyer, it appeared that the will contained a provision directing the trustees to keep all bank accounts in their joint names, and to deposit all moneys, and that all checks should be signed by both the trustees, and that no investment, sale, lease or other change in the estate should be made unless both of the trustees or executors concurred in it; that J. Lee Humfreville frequently violated these provisions of the will by opening accounts in his own name, investing moneys on his own motion, and making changes in the estate without the concurrence of his cotrustee; that he drew out on a check to his own order some $7,000 of the moneys of the estate which he loaned to an individual on call upon railroad bonds as collateral security; that he endeavored to induce his coexecutor to place in his hands as an individual certain moneys of the estate; he took a considerable sum for commissions before the commissions had been allowed to him and he invested certain moneys of the estate in the second mortgage bonds of a railroad company.

Held, that these acts were indefensible, and that the surrogate should have removed him as executor and trustee. *Matter of Havemeyer*, 3 App. Div. 519.

Where a trustee has the discretion under the will as to distributing stock during the life of the *cestuis que trust* or of holding it, he is guilty of misconduct in placing himself in a position in which his personal interest may conflict with that of the estate.[1]

In an action by beneficiaries against their trustee the latter can not be compelled to account for moneys unlawfully received whilst president of a corporation in which the trust estate owned the control of the stock. The corporation alone could demand such accounting, and the interest of the plaintiffs as shareholders is too remote to entitle them to an accounting in an action prosecuted only in their own interest. The corporation could not be joined in such an action, as the cause of action by the beneficiaries to remove their trustee and that in the interest of the corporation are not susceptible of union in the same complaint. *Elias* v. *Schweyer*, 17 Misc. 707.

Where it was doubtful whether the administrator with the will annexed was authorized to execute a trust power given to a person who was also named in the will as executor, but who refused to accept the trust, the court appointed such administrator trustee, and directed him to execute the conveyance of the property, under the power in trust, both as administrator and as trustee. *DePeyster* v. *Clendining*, 8 Paige, 294.

Where a portion of the trusts of a will can be so far severed from the general trust committed to the executors, as to be capable of being vested in different persons, the court, upon sufficient cause shown, and on the giving of proper security to protect the rights of the *cestuis que trust*, may accept the resignation of the trustees appointed by the will, as to those particular trusts, and appoint others in their places. *Craig* v. *Craig*, 3 Barb. Ch. 76.

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[1]Munson v. R. R. Co., 103 N. Y. 58, 74; Davoue v. Fanning, 2 Johns. Ch. 251, 252; Cowee v. Cornell, 75 N. Y. 91, 100; Barnes v. Brown, 80 id. 527, 535; Ogden v. Murray, 39 id. 202, 207, 208; Quackenboss v. Southwick, 41 id. 117; Deraismes v. Dunham, 22 Hun, 86; Matter of Morgau, 63 Barb. 621.

XXI. CHARITABLE USES.

Real Prop. L. (L. 1896, ch. 547, took effect Oct. 1st, 1896), sec. 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."

See this statute discussed in Dammert v. Osborn, 140 N. Y. 30, 43, digested p. 1331.

L. 1893, ch. 701, Banks's 9th ed. N. Y. R. S., p. 2937 (not expressly repealed), used "gift, grant, bequest or devise" instead of "conveyance or devise."

See, also, Beneficiaries, p. 823; Corporations, p. 1480; also cases collected on p. 1381.

The enactment of the above statute gives the subject of "charitable uses" an additional importance, and an attempt will be made to state briefly and clearly their nature, and essential features. In the proper sense there "can be no charitable use without a trust." Owens v. Missionary Society, etc., 14 N. Y. 380, 385.

The law of New York authorizes land to be given in trust for certain purposes (Real Prop. L., sec. 76) and personal property in trust for any lawful purpose; but it is essential in such cases (1) that the trust shall not continue for more than the limited period, which has been prescribed by the statute (see pp. 392–5, Real Prop. L., secs. 76, 32); (2), that the beneficiary or *cestui que trust* shall be either definitely named, or so described as to be practically ascertainable (see Beneficiary, p. 823). Hence such statutes permit trusts for the benefit only of defined or ascertainable persons or corporations. These are private trusts for the benefit of designated private persons under both our own and the English law, Holland v. Alcock, 108 N. Y. 312, 324, 330, and it is unimportant that the grantor of the trust created the same with the purpose and result of aiding charity. But charitable uses as recognized in England are distinguished from private trusts in this (1) they must be public in their nature, and are not created for certain and ascertained

persons. Owens v. Missionary Society, 14 N. Y. 380, 397; Levy v. Levy, 33 id. 104.

(2) On the contrary it is immaterial how uncertain the objects or persons, to be benefited may be, whether they are in being or not, or whether capable in law of taking or not. Levy v. Levy, 33 N. Y. 119, 120.

(3) The scheme of the charity may be so indefinite as to preclude practical administration, and indeed, no scheme or plan of appropriation is required in the instrument creating the charity, provided it appear, that the gift is devoted to charity.[1] *Holland* v. *Alcock*, 108 N. Y. 324.

(4) The gift must be for charitable or pious purposes. Charitable uses include charities in their usual sense, also education and religion. Owens v. Missionary Society, 14 N. Y. 380, 409. Judge Denio, in that case (p. 410) defines such uses, and gives instances of provisions that did not fall within their definition.[2] The objects for which charitable uses may be created are enumerated in the statute of charitable uses (43 Eliz. ch. 4). See Owens v. Missionary Society, 14 N. Y. 403–4; Kent's Com. vol. 2, *287; Holland v. Alcock, 108 N. Y. 328.

(5) It is no objection to a charitable use that there is no limitation upon its duration or execution. Williams v. Williams, 8 N. Y. 525; Holland v. Alcock, 108 id. 312, 324. From these features a definition of a gift for a "charitable use" may be evolved, viz., it is a gift of property in trust,[3] may be unlimited in duration,[4] for charity, religion, or education,[5] with undefined or uncertain beneficiaries,[6] or without designated beneficia-

[1] A gift may even under the English system be too indefinite; see, Ommanney v. Butcher, T. & R. 270; Attorney General v. Power, 1 Ball & B. 145; Williams v. Kershaw, 5 Cl. & F. 111; Ellis v. Selby, 1 Myl. & C. 286; 5 L. J. (N. S.) Ch. 214; Williams v. Williams, id. 84; Attorney General v. Sibthorpe, 2 Russ. & M. 107; Thomson v. Shakspeare, 6 Jur. (N. S.), 281; 29 L. J. Ch. 276.

[2] Gifts for charitable or pious uses does not allow gifts for mere benevolent purposes, unless the word "benevolent" is shown by the context to be used in the sense of "charitable." James v. Allen, 3 Meriv. 17; Morice v. Durham, 9 Ves. 399; 10 id. 522, nor for the purposes of general utility, Kendall v. Granger, 5 Beav. 300; 11 L. J. (N. S.) Ch. 405; nor for such objects as the appointee should consider most deserving, Harris v. De Pasquier, 26 L. T. (N. S.) 689; 20 W. R. 668; nor for a museum at Shakspeare house or for such other purposes as the trustees thought desirable to carry out testator's wishes. Thomson v. Shakspeare, 6 Jur. (N. S.) 281, 29 L. J. Ch. 276. Nor for the political betterment of a particular nationality, Habershon v. Vardon, 20 L. J. (N. S.) Ch. 549; but gifts for the prevention of cruelty to animals is a charitable purpose. Marsh v. Means, 3 Jur. (N. S.) 790.

[3] Owens v. Missionary Society, 14 N. Y. 385.

[4] Holland v. Alcock, 108 N. Y. 324; Williams v. Williams, 8 id. 525; Lewis on Perp. 689.

[5] Owens v. Missionary Society, 14 N. Y. 409.

[6] Holland v. Alcock, 108 N. Y. 324.

ries[1] or without beneficiaries competent to take in law or equity,[2] and, may be, without any scheme for administration.[3]

The cases given in the note are practical instances of charitable uses.[4]

How charitable uses are administered in England.

It is of present interest, in view of section ninety-three of the Real Property Law, to consider how these indefinite gifts for charities are administered under the English law. The disposition of the gift is either in the court of chancery, or in the king by sign manual. The division of jurisdiction is as follows: "Where there is a *general, indefinite charitable purpose*, not fixing itself upon any particular object, the disposition is in the king by the sign manual; but where the gift is to trustees, with *general*, or some objects pointed out, the court takes upon itself the execution of the trust." Williams v. Williams, 8 N. Y. 549; citing, Ommanney v. Butcher, 1 Turner & Russell, 260; Moggridge

[1] Levy v. Levy, 33 N. Y. 119, 120.

[2] Levy v. Levy, 33 N. Y. 119, 120. Such is an unincorporated association. Owens v. Missionary Society, 14 N. Y. 380, 385; Hornbeck's Exr's v. Am. Bible Society, 2 Sandf. Ch. 133.

[3] Holland v. Alcock, 108 N. Y. 324.

[4] Such are gifts for the use of Roman Catholic priests in and near London, Attorney General v. Gladstone, 13 Sim. 7; 11 L. J. (N. S.) Ch. 361; Jur. 498; for such charities and other public purposes as lawfully might be in the parish of T., Dolan v. Macdermot, 16 W. R. 68; 5 L. R. Eq. 60; 3 L. R. Ch. 676; for the benefit of the poor, dissenting ministers living in any country, Waller v. Childs, Ambl. 524; to the poor of a parish, Attorney General v. Pearce, 2 Atk. 87; to the widows and orphans of the parish of L., Attorney General v. Comber, 2 Sim. & S. 93; for the good of poor people, Attorney General v. Syderfern, 1 Vern. 224; to the widows and children of seamen belonging to the town of L., Powell v. Attorney General, 3 Meriv. 48; for building a house for twelve decayed gentlewomen, Attorney General v. Powers, 1 Ball & B. 145; to enable persons professing the Jewish religion to observe its rights, Straus v. Goldsmid, 8 Sim. 614; and so gifts to executors or trustees, with discretionary power of application or selection, for religious and charitable institutions and purposes within the kingdom of England, Baker v. Sutton, 1 Keen. 224; 5 L. J. (N. S.) Ch. 264; for the benefit, advancement and propagation of education and learning in every part of the world, Whicker v. Hume, 7 H. L. Cas. 124; 28 L. J. Ch. 396; gift of an estate to be divided amongst different institutions named or for *other religious institutions and purposes*, Wilkinson v. Lindgren, 38 L. J. Ch. 613; 39 id. 722; 23 L. T. N. S. 375; a devise to trustees to expend at their discretion, a certain sum annually until testator's son became of age "in the service of my Lord and Master," Powerscourt v. Powerscourt, 1 Moll. 616; Beat. 572; and so gifts for founding and maintaining institutions of learning, University of London v. Yarrow, 1 DeG. & J. 72; 26 L. J. Ch. 430; and so a gift to a government to be applied in its discretion to charitable, beneficial and public works in a designated city, of Bengal, for the exclusive benefit of the native inhabitants, Mitford v. Reynolds, 1 Ph. 185; 12 L. J. (N. S.) Ch. 40; so gifts for the assistance or support of congregations of designated religious sects, Shrewsbury v. Hornby, 5 Hare, 406.

v. Thackwell, 7 Ves. 36; see, also, the argument of Mr. Noyes, in Beekman v. Bonsor, 23 N. Y. 583.

When the matter is brought before the court of chancery, and the donor has not provided a scheme, admitting of practical administration, the court orders a reference to a master in chancery, to devise a scheme for administration, which should, as nearly as possible, conform to the intention of the founder of the charity, and there is called into operation what was known as the *cy pres* doctrine. Holland v. Alcock, 108 N. Y. 324.

The most zealous advocates for the existence of the law of charitable uses in the state of New York have, at least, so far as the decisions of the court of appeals indicate, never urged that charitable uses were sustainable in that state in cases where the disposition would, under the English law, be in the king by sign manual, or where the gift could only be administered by the application of the *cy pres* doctrine. Williams v. Williams, 8 N. Y. 548–9, and this is placed upon the ground that the nature of our institutions, and the constitution of our judicial system, are inconsistent with the exercise of such a jurisdiction so purely discretionary by the court, and while the state, as *parens patriæ*, may enact laws for the administration of charities, yet it could not execute gifts by retroactive legislation. Owens v. Missionary Society, 14 N. Y. 387; Beekman v. Bonsor, 23 id. 310, 606; Holmes v. Mead, 52 id. 336; Holland v. Alcock, 108 id. 312; Tilden v. Greene, 130 id. 45.

The doctrine of charitable uses does not exist in this state.

Unless partially introduced by section 93 of the Real Property Law above, the doctrine of charitable uses does not exist in this state. Although it was held otherwise in Williams v. Williams,[1] 8 N. Y. 525, and earlier authorities, yet that case was first distinguished and modified, Owens v. Missionary Society, 14 N.Y. 380; Beekman v. Bonsor, 23 id. 310; Downing v. Marshall, id. 382; (as to the *dictum* in these cases, see Holland v. Alcock, 108 N. Y. 331), and was finally overruled and its conclusion in this regard rendered utterly unauthoritative. Levy v. Levy, 33 N. Y. 97; Bascom v. Albertson, 34 id. 584; Burrill v. Boardman, 43 id. 254; Holmes v. Mead, 52 id. 332; Holland v. Alcock, 108 id. 312; Prichard v. Thompson, 95 id. 76; Read v. Williams, 125 id. 560; Fosdick v. Town of Hempstead, id. 581; People v. Powers, 147 id. 104, 109.

[1]The conclusion in this case was that the law of charitable uses existed in England before the statute of 43 Elizabeth, ch. 4 (known as the statute of charitable uses). If the doctrine of charitable uses derived its origin from this statute of uses, it was admitted that it was no part of the law of this state, as that statute was repealed by stat. 1788, ch. 46, sec. 37; (N. Y.) Williams v. Williams, 8 N. Y. 542; Owens v. Miss. Soc.,

System of administering charity in New York.

In the place of the system of charitable uses obtaining in England, there exists in the state of New York a system established by the statute law for organizing corporate bodies with power to administer public charities, with the legal capacity to receive and hold property for that purpose.[1] Holland v. Alcock, 108 N. Y. 312; Levy v. Levy, 33 id. 97, 112 *et seq.*

Under this system the validity of the gift depends upon the question whether "the grantor or devisor of a fund designed for charity is competent to give, and whether the organized body is endowed by law with capacity to receive and to hold and administer the gift." Holland v. Alcock, 108 N. Y. 312; Bird v. Merklee, 144 id. 544.

These corporations, by reason of the power conferred upon them, may hold the property directly given to them, perpetually. In a sense it permits a perpetuity to be created from the fact that the corporation authorized to receive a gift may hold it forever; but the gift is none the less valid. Adams v. Perry, 43 N. Y. 487; Williams v. Williams, 8 id. 225, 531, *et seq.*

Nor does a provision in the instrument of gift confining the use to a particular corporate function or restraining alienation or use of the prin-

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14 id. 411; Holland v. Alcock, 108 id. 336. If, on the other hand, the law of charitable uses derived its origin from the common law, the statute of 43 Elizabeth, it was urged should be regarded as only declaratory or remedial, and, in such case, the doctrine of charitable uses, as a part of the common law, should be deemed as having been adopted in this state, so far as it was applicable to our circumstances, and conformable to our institutions. Williams v. Williams, 8 N. Y. 541. This case held, that it derived its origin from the common law, and hence, so far as conformable, was a part of our system In later cases it was on the other hand held, that it substantially derived its origin from the statute of uses (43 Elizabeth), and was no part of our system, as that statute was repealed as above stated, Owens v. Miss. Soc., 14 N. Y. 380; Levy v. Levy, 33 id. 97, 112, and that even if charitable uses had prevailed in England previous to the statute of uses, yet, that the repeal of that statute was intended to sweep away the entire system of charitable uses, of which it was the chief support, and supplant it with the system now to be noticed, which latter view prevailed (see cases cited above).

[1]The English policy has not favored testamentary gifts of lands to corporations (Statute 7 Edw. I, St. 2. C 1: Stat. West. 2d: Stat. 15 Ric. II, c. 5.) They are excepted from the statute of wills (53 Henry VIII); but devises for charitable uses to corporations under the statute of charitable uses (43 Eliz.) were held to be valid. Kent's Com. vol. 2, *286; vol. 4, *507; but corporations fell under the prohibitions of the later statute (9 Geo. II, c. 36) by which all transfers in any way of land or of money to be laid out in land, in trust for charitable uses are prohibited, except to certain universities and colleges, unless the gift be executed by deed at least twelve months before the donor's death, and enrolled in the court of chancery within six months of its execution.

cipal create a perpetuity. Wetmore v. Parker, 52 N. Y. 450; Bird v. Merklee, 144 id. 544; Williams v. Williams, 8 id. 525, 530; Matter of Howe, 1 Paige, 214.

Thus by giving to a corporation capacitated to take, property can be perpetually devoted to charitable purposes, and if there be no corporation in existence, which on account of location, management, purpose, or other reason, meets the donor's views, he can give the property to trustee to hold, until under general laws, or by special act, such a corporation can be formed within two designated lives. See p. 401. As has been pointed out, the gift must be to the corporation, not to the trustees of the corporation, p. 824, nor to trustees to hold for the corporation, beyond the two lives. There is no other way that a gift to be *perpetually* administered for charity can be given.

A grantor or devisor may in aid of charity create a trust of real property to benefit any needy beneficiaries described and made certain as the law requires (see Beneficiary, p. 821) for any purpose allowed by section 76 of the Real Property Law, or he may create a trust of personal property for the generally unrestricted purposes, for which trusts in that kind of property are allowed, but as stated above, such trusts would have no greater latitude, than is permitted in the case of trusts for other purposes. Levy v. Levy, 33 N. Y. 97 (opinion p. 121).

The effect of section ninety-three of the Real Property Law.

By section ninety-three of the Real Property Law, a trust for charitable uses, as recognized under the English system, and perhaps for benevolent uses in addition, if valid in other respects, is not to be deemed invalid by reason of the indefiniteness or uncertainty of the "persons designated as the beneficiaries;" the attorney general is to represent the beneficiaries and enforce the trust. Obviously this section does not change the existing law in New York, unless in the particular, that heretofore the beneficiaries were required to be so sufficiently named or described that the court could identify them for the purposes of the enforcement of the trust. (See p. 823.) The section by the expression "uncertainty of the persons *designated as the beneficiaries*" suggests that the statute does not contemplate cases where no persons are named as beneficiaries, save a general gift for public charitable uses, with no more definite description of the object of the trust, than is necessary under the English system, which is administered by the king or through the *cy pres* power of the court of chancery. (See *supra.*) Indefiniteness or uncertainty of "persons designated" fall very far short of introducing into our jurisprudence a system of law, that requires no designation of beneficiaries, beyond an expressed intention to give to charitable

or pious uses generally (see instances given in note, p. 849) and which enables a court of chancery by the exercise of its *cy pres* power to frame a discretionary scheme for distributing the charity, or the king to arbitrarily dispose of it. Does not the section rather intend that in cases where *persons* are named or described, but so indefinitely that no one is forthcoming to enforce the trust, the attorney general by proper proceedings shall, for that purpose, act as the representative of the beneficiaries, to bring the matter before the court?

Thereupon the court may recognize the trust as lawfully constituted, as well as the trustee's right to administer the trust estate, and the court may order the trustee to administer the trust, if it is practicable to do so, and when the trustee is given a power to select the beneficiaries in the place of the donor, it may be that this statute gives him power to do so, and if no beneficiary be ascertainable, it may be the duty of the court to order the trustee to deliver the estate to those entitled, either as heirs at law or next of kin.

Rather than this must it be assumed, that it was the intention of the legislature, that the court should have *cy pres* powers and frame a scheme of charities, contrary to all the traditional jurisdiction of that court, contrary to the policy of law and the long line of decisions, that even from Williams v. Williams, 8 N. Y. 525, have regarded the execution of indefinite gifts to charity, as no part of and as unsuited to our jurisprudence.

But if this be the purpose it is not apparent, why our courts of equity should not be soon engaged in administering charities, from those that involve gifts to "twenty aged widows and spinsters" to be selected from the borough of Manhattan (Thompson v. Corby, 27 Beav. 649), to gifts to the chancellor for the time being, "to be by him appropriated to the benefit and advantage of my beloved country." Nightingale v. Goulbourn, 16 L. J. (N. S.) Ch. 270; 17 id. 296.

All this proceeds on the theory that the trust is otherwise valid. This attempt to interpose a partial feature of the doctrine of charitable uses will probably result in the trust being otherwise invalid, for it is probable that the law against the undue continuance of the trust will be often violated, or the trust be created for unauthorized purposes.

The law of charitable uses as it existed in England at the time of the Revolution, and the jurisdiction of the court of chancery over the subject, became the law [1] of this state upon the adoption of the constitution of 1777, and has not been repealed.

[1] *Contra*, Owens v. Missionary Society, 14 N. Y. 380; Levy v. Levy, 33 id. 97; Bascom v. Albertson, 34 id. 584; Holland v. Alcock, 108 id. 312; Cottman v. Grace, 112 id. 299.

It does not derive its origin from the statute 43 Eliz. ch. 4, nor does it depend upon it.[1] It was borrowed from the civil law as modified by the institutions of Christianity, and at a very early period became part of the common law.

The statute of Elizabeth merely furnished a remedy for the abuse of charities. It was never applicable to the circumstances of this country, and could never have been executed in it.

Religious corporations formed under the general statute can receive bequests to an amount not exceeding that limited by its fourth section. (2 R. S. 212.)

The object of religious corporations being to perpetuate the uses of the property acquired by them, a donor may prescribe as a condition of his gift that it be preserved in a particular manner, in order to render it subservient to the object for which he gives it.[2]

The provisions of the Revised Statutes, "Of accumulations of personal property and of expectant estates in such property," do not affect property given in perpetuity to religious or charitable institutions.[3]

Where a legacy is given to a religious corporation for a purpose authorized by law, but with a direction that it accumulate until it reaches a certain sum before its income shall be expended, the *direction* only is void, and the legacy is not defeated.

Conveyances, devises and bequests for charitable uses, although defective for the want of a grantee or donee capable of taking, are supported by courts of equity.

The law in England by which the court of chancery applies a gift to *charity generally*, is here in force only so far as it is adapted to our political institutions. We have no magistrate clothed with the prerogative of the crown to direct the manner of executing *an indefinite bequest to charity*. Where a gift to a charitable use is so indefinite as to be incapable of being executed by a judicial decree, the representative of the donor must prevail over the charity.[4] *Williams* v. *Williams*, 8 N. Y. 525.

The testator by his will made in 1832, and taking effect in 1834, bequeathed, after certain legacies, the residue of his estate "to the Methodist General American Missionary Society, appointed to preach the gospel to the poor, L. C.," a voluntary association then existing and which,

[1] *Contra*, Owens v. Missionary Society, 14 N. Y. 380.

[2] Wetmore v. Parker, 52 N. Y. 450.

[3] *Contra*, Adams v. Perry, 43 N. Y. 487, and cases in note ,page 860.

[4] Beekman v. Bonsor, 23 N. Y. 298; Bascom v. Albertson, 34 id. 584; Pritchard v. Thompson, 95 id. 76; Holland v. Alcock, 108 id. 312; Holmes v. Mead, 52 id. 336; Tilden v. Green, 130 id. 29.

subsequently to his death merged, in and became incorporated as the Missionary Society of the Methodist Episcopal Church. Suit between the incorporated society and the next of kin of the testator.

Construction:

The bequest is not valid as one made to the association for its own benefit, on account of its want of capacity to take; nor can it be sustained as a charitable or religious use.

Where there is no trustee competent to take, named, our court of chancery has not jurisdiction to uphold a bequest for a charitable or religious purpose.

The objects of the corporation which claimed the bequest in controversy were "to diffuse more generally the blessings of education, civilization and Christianity throughout the United States and elsewhere."

It could not be sustained as a charitable bequest on account of the generality of the object.

It seems that the law as to charitable uses, as it existed in England at the time of the American Revolution, is not in force in this state; and that our courts have only such jurisdiction over trusts for charitable and religious purposes as was exercised by the court of chancery in England, independently of the prerogatives of the crown and the statute 43 Eliz. ch. 4.

The law of charitable uses, and the origin of the jurisdiction of the English court of chancery over the subject, discussed per Selden, J.

This case is distinguishable from Williams v. Williams (4 Seld. 525), inasmuch as there the fund was bequeathed to trustees competent to take, in the first instance, while none such have been named here. And the decision in this case is not intended to deny the powers of courts of equity in this state to enforce the execution of trusts for public and charitable purposes, where the fund is given to a trustee competent to take,[1] and where the charitable use is so far defined as to be capable of

[1] "The learned judge who prepared the leading opinion in Owens v. The Missionary Society of the Methodist Episcopal Church (4 Kern. 386), was certainly mistaken in conceding that, at common law, a limitation, with a trustee named, for a definite purpose, was maintainable, although there was no ascertained beneficiary. It was a mere *dictum*, which would uphold almost all conceivable trusts, unnecessary to the decision of the case, not having the concurrence of the court, and without any authority cited in support of it, but in opposition to the whole current of authority. There can be no valid trust unless there be a certain donee or beneficiary whom the law will recognize; and if there be, the use will not be defeated, though no trustee be named, or the trustee named be, in law, incapable of taking. (Powell on Devises, 418; Webb's Case, 1 Roll. Abr. 609; Saunders on Uses, 58, 389; Wilmott's Opinions, 22; Sheppard's Touchstone, 589; Lewin on Trusts, 105; 2 Story's Eq. Jur. secs. 964, 976; Sonley v. Clockmaker's Co., 1 Brown's Ch. C. 81; Morice v. The Bishop of Durham, 9 Vesey,

being specifically executed by the authority of the court, although no certain beneficiary other than the public at large be designated. *Owens* v. *The Missionary Society, etc.*, 14 N. Y. 380.

The trustees of the Auburn Theological Seminary were declared, by the charter of that institution, capable of taking and holding real and personal estate and managing the same for the purpose of benefiting the funds of the institution, and applying the avails of such funds for the purpose of such institution, which is declared to be the education of pious young men for the gospel ministry, and such charter provided for the appointment of tutors and professors.

Construction:

The trustees could take a bequest for the purpose of endowing a professorship, and, being for pious uses, it is no objection that the bequest may create a perpetuity.

Trustees of the Theological Seminary of Auburn v. *Kellogg*, 16 N. Y. 83, digested, p. 414.

A devise to the trustees of G., when it should be incorporated as a village, though for charitable uses, was void for remoteness. *Leonard* v. *Burr*, 18 N. Y. 96, digested p. 415.

A gift to charity which is void at law for want of an ascertained beneficiary will be upheld by the courts of this state, if the thing given is certain, if there is a competent trustee to take the fund and administer it as directed, and if the charity itself be precise and definite.

In other respects charitable trusts are subject to the rules which appertain to trusts in general. The trust must be capable of execution by a judicial decree in affirmance of the gift as the donor made it. The *cy pres* power, as exercised in England in cases of charity, has no existence in the jurisprudence of this state.

A charitable gift of a sum which is left uncertain, or which is left to the discretion of executors who have renounced the trust, is void, and the next of kin are entitled to the fund. It seems that such a defect is incurable even by the *cy pres* power.

A gift to executors of money, to be applied in their discretion to the use of societies for the support of indigent and respectable females, without further designation of the beneficiaries, the executors having

400; Ommanney v. Butcher, 1 Turn. & Russ. 260; James v. Allen, 3 Merivale, 17; Vesey v. Jameson, 1 Sim. & St. 69; Fowler v. Garlike, 1 Russ. & Myl. 232; Ellis v. Selby, 1 Myl. & Craig, 286; Williams v. Williams [per Denio, J.], 4 Seld. 540; Dashiel v. The Attorney General, 5 Har. & John. 400.)" (From opinion in Levy v. Levy, 33 N. Y. 97, 102.)

renounced the trust, can not be upheld. *Beekman* v. *Bonsor*, 23 N. Y. 298.[1]

Charitable donations of a public nature, if contingent and executory, form no exception to the law against perpetuities.

The conferring of the naked legal title upon executors, does not prevent a bequest from being void for suspending the real ownership of the fund contrary to the statute.

The testator gave his executors the residue of his estate with directions, that, if a specific sum were contributed within five years from his death to establish a beneficent association he desired should be formed, the executors should pay over the residue to such association; but if the association were not formed, or the specific sum not contributed within that time, they were to pay the residue to other beneficiaries.

Construction:

The real ownership of the residue would thereby be suspended for a period which might be more than two lives, and therefore the primary bequest was void. *Rose* v. *Rose*, 4 Abb. Ct. App. Dec. 108 (1863).

Citing, Phelps v. Pond, 23 N. Y. 69; Leonard v. Burr, 18 id. 96; Yates v. Yates, 9 Barb. 324; Morgan v. Masterton, 4 Sandf. 442.

The question whether the doctrine of trusts for charitable uses in England, extended and strengthened by the prerogative of the crown, and the statute of 43 Elizabeth, are applicable in this state, discussed by Wright, J.

That peculiar system of English jurisprudence for supporting, regulating and enforcing public or charitable uses, void by the rules of common law, is not deemed to be in force in this state. Per Wright, J.

The cases of Williams v. Williams (8 N. Y. 525) and Owens v. The Missionary Society of the Methodist Episcopal Church (14 id. 380), examined by Wright, J. *Levy* v. *Levy*, 33 N. Y. 97.

From opinion.—"In my judgment, then, that peculiar system of English jurisprudence for supporting, regulating and enforcing public or charitable uses, void by the rules of law, is not the law of the state. If it ever was the law here, it has been abrogated or displaced by a system and policy of our own in respect to such uses. A system which allows the purpose of the charitable donation to be declared by the donor, and who, at his own will, may appropriate his property to any extent to promote such purpose, making the court of chancery his trustee and superintendent in administering the gift, has now no existence among us. I am aware that the question has been heretofore incidentally examined in this court, with great power and ability, and an opposite conclusion reached by a majority of its members. I should be as reluctant as any one to reexamine a question and disturb a decision deliberately

[1]The argument of the counsel in the above case is given in the appendix of vol. 23 N. Y. 574, where the authorities are reviewed.

made here; but when a decision is so far reaching in its consequences, and the court itself has not since adhered to the principle decided, it is not unbecoming or improper to reexamine the subject at large. Indeed, we should do so, if there is a probability that we erred, and when a particular class of trusts are to be sustained, if at all, by violating the rules of the common law, and the express statutes of the state. That there has not been an adherence by the court to the original decision, and the case of Williams v. Williams (4 Seld. 525) followed, is easily shown. In Williams v. Williams, it was *held*, that the English law of charitable uses was the law of the state; and, consequently, a bequest to three persons (naming them), and to their successors, to be appointed by themselves, in trust, 'for the education of the children of the poor, who shall be educated in the academy in the village of Huntington,' was upheld. Neither the trustees nor beneficiaries were legally ascertainable, nor had the trustees legal capacity to take and administer the gifts; but that made no difference, if the English doctrine of charitable uses was to be applied to the bequest. Three years afterwards, in Owens v. The Missionary Society of the M. E. Church (4 Kern. 380), the question again arose. The bequest there was of all the residue of the testator's estate 'to the Methodist General Missionary Society, appointed to preach the gospel to the poor L. C.' This was treated as a bequest, in trust, for charitable purposes; one in general void, as well in equity as in law, and only to be sustained by the doctrine of the English courts of equity in regard to charitable trusts. Judge Selden again examined the question of the introduction of the law of charity, as understood and enforced in England, into the law of the state, and reached directly the opposite conclusion to that enunciated in Williams v. Williams, holding that the law was not in force here, and as a consequence, the bequest could not be sustained. In this opinion a majority of the court concurred. Of course, there could be no pretense, that where there was uncertainty both in the trustee or administrator of the fund, and in the beneficiaries, there was a valid trust, or one ever sustained without the aid of the peculiar jurisdiction exercised by the English courts of equity over 'charities.' The judge, in his opinion, undertook to distinguish the case from Williams v. Williams, on the ground, that in the latter there were competent trustees to take the fund in the first instance, whereas, in the former, there were none. This was, as matter of fact, a misapprehension. There was not, in either case, any ascertained or competent trustee. In one, the bequest was in trust to a voluntary association of persons; in the other, to three persons named by the donor, and both equally unknown to the law. It was this misapprehended distinction, together with an erroneous *dictum* to be noticed, that probably induced the remark in Beekman v. Bonsor (23 N. Y. 298), that the diversity of views of the judges delivering opinions in the two cases on the question of the introduction of the law of charitable uses into the law of the state, led to no practical difference in conclusion or result. So, also, the judge appeared to think, that independent of the peculiar system of jurisprudence in regard to indefinite charitable gifts, if, in a devise or bequest, a trustee was named for a definite purpose, a legal and valid trust would be created, although there was no ascertained beneficiary. This was a mere *dictum*, not countenanced by his associates, and running counter to all authority prior to the case, although approved since by a former judge of this court. The proposition is false in both its branches. A trustee is not necessary to the validity of a trust, for a use being well declared, the law will find a trustee wherever it finds the legal estate; and the definiteness of the *purpose* of the trust does not make a good use if there is no definite object or beneficiary. The value of the decision consists in a deliberate protest, at the earliest time, against the conclusion so ably enunciated in Williams v. Williams, that the law of charitable uses, existing in England at the period of the American Revolution, is now the law of the state. In Downing v. Marshall (23 N. Y. 366), a gift to the American Home

Missionary Society, an unincorporated association, was held void. It was admitted that the society was a charitable organization, and the gift for charitable or pious purposes. It is true, that there was no competent trustee, or any ascertained beneficiary to take the gift, and in whom the equitable interest could vest, and hence, a valid common law trust was not created; but, if the 'law of charity' prevailed here, there would have been no difficulty in upholding and effectuating the bequest. Indeed, in Vermont, a gift to the same religious association was sustained as a charitable use. (Burr's Ex'rs v. Smith, 7 Vermont, 247.) It was immaterial under the peculiar system, whether the donor had designated the trustee or administrator of the fund or not; or whether such trustee, if pointed out, was legally competent to take. Chancery would be the donor's trustee, and execute his will. So that, in at least two cases in this court, since that of Williams v. Williams, has the principle that decided one of the bequests in the latter case to be valid, been disaffirmed.

"It being true, then, that trusts for 'charity' have no peculiar privilege in the courts of this state over other trusts of property, it follows that the one attempted to be created by the testator, in the present case, is invalid for want of a *cestui que trust* in whom the equitable title to the estate, devised and bequeathed, could vest. There is no ascertained beneficiary in whose favor performance may be enforced. The gift is for the use and benefit of an indefinite object."

It has been the settled policy of this state to encourage donations and endowments for educational, religious and charitable purposes, by providing for the administration of such funds through organized and responsible agencies, sanctioned by legislative authority, and subject to legislative regulation and control. Such gifts, if otherwise valid, are upheld in our courts, when made to institutions or societies having authority by charter to receive them, and when the purposes contemplated by the donors are within the range of the objects of such societies, and the scope of their general powers.

The English system of indefinite charitable uses has no existence in this state, and no place in our system of jurisprudence.

The authority which, prior to the statute of 43 Elizabeth was exercised by the English court of chancery in respect to pious and charitable uses, as distinguished from other uses and trusts, was not a part of its original and inherent judicial power as an equity tribunal, but a branch of the jurisdiction it assumed to exercise, in virtue of the royal prerogative and the *cy pres* power, with which the courts of this state have not been invested.

By the statute of 43 Elizabeth, various abuses of the previous system were remedied, and the law of indefinite charities was substantially codified; certain enumerated uses of this nature being sanctioned by parliamentary authority, and all not thus sanctioned being permitted to fail. The new abuse which grew up under this statute led to the adoption of further parliamentary restraints, in the mortmain act of 9 Geo. 11, ch. 36.

The design and effect of the repeal of the statute of Elizabeth and

the mortmain acts, by the legislature of 1788, was to abrogate in this state the English law of indefinite charitable uses; and our subsequent legislation has supplied a complete and harmonious system of charities, sanctioned by legislative authority subject to statutory regulation, and adapted to the condition of our people and the nature of our institutions.

There is nothing to withdraw gifts to mere private trustees, for indefinite charitable uses, from the operation of the provisions of the Revised Statutes in relation to uses and trusts, perpetuities and the limitation of future estates; and the prohibitions contained in these statutes are in direct contravention of the English law on this subject, as it existed at the time of the Revolution, when our first constitution was adopted. *Bascom* v. *Albertson*, 34 N. Y. 584.

The cases of Baptist Association v. Hart's Ex'rs, 4 Wheat. 1; Galleygob's Ex'rs v. Attorney Gen'l, 3 Leigh. 474; Ayres v. Methodist Episcopal Church, 3 Sandf. 357; Yates v. Yates, 9 Barb. 345; Fontain v. Ravenel, 17 How. (U. S.) 869, in accordance with these views, approved; the case of New York Protestant Episcopal School, 31 N. Y. 574, explained; and the cases of Shotwell v. Mott, 2 Sandf. Ch. 46, and Williams v. Williams, 4 Seld. 525, so far as they are inconsistent with these conclusions, overruled.

A bequest to trustees of personal estate to invest and reinvest, and pay over the income to an incorporate academy forever is void under the statute of perpetuities.

The only power in charitable and educational corporations to hold property in perpetuity, in trust, is by virtue of their charters and the acts of 1840 and 1841. *Adams* v. *Perry*, 43 N. Y. 487. Williams v. Williams, 4 Seld. 524, so far as it holds the contrary, overruled.

From opinion.—"In Williams v. Williams (4 Seld. 524) it was held in substance that the statutes prohibiting perpetuities did not apply to gifts to charitable or religious corporations. With all respect for the learned judge who, for the majority of the court, gave this opinion, I am unable to concur with it. It is true that all gifts to those corporations upon trust do suspend the power of alienation of real and the absolute ownership of personal property during the continuance of the trust. Such gifts are rarely or never so limited upon lives as to make them valid within the statutes under consideration. Such gifts are valid not because they are *per se* excepted from the operation of the statutes, but for the reason that, by their charters, they are authorized so to take and hold property, and thus exempted from their operation. Unless the charters confer this exemption, these corporations can no more take and hold property in violation of these statutes than individuals."

A corporation created for charity may take by bequest and hold personal property limited by the testator to any of the corporate uses of the legatee, and a direction of the testator that the principal shall be kept inviolate and the income only be expended will not invalidate the bequest, provided it is fixed and certain, and gives an immediate and vested interest. Such a bequest is not affected by the provisions of the statute against perpetuities. *Wetmore* v. *Parker*, 52 N. Y. 450.

Charitable uses as recognized in England prior to the Revolution have no existence in this state. *Holmes* v. *Mead*, 52 N. Y. 332, digested p. 426.

Devise and bequest of all estate to executors in trust with power to sell and from proceeds or income to pay wife specified annuity for life, the same to be "in lieu of all dower or thirds;" residuary estate, one-third to wife; one-third to R., and the balance to executors "to be divided by them among such Roman Catholic charities, institutions, schools or churches in the city of New York," as the majority of his executors should decide, and in such proportions as they should think proper.

Construction:

As there were organizations of the class specified capable of taking, and ascertainable, the provisions were valid.

There was an equitable conversion of the real estate into personalty.[1]

In case of failure to make selection, the court could order the execution of the trust.

Widow was entitled to one-third of the residuary estate, including one-third of the sum set apart to produce the annuity, as the two provisions made for her were not inconsistent.

When a testator authorizes a sale of the real estate by the executors and it is apparent from the will that he intended a sale, the doctrine of equitable conversion applies, although the power of sale is not in terms imperative. *Power* v. *Cassidy*, 79 N. Y. 602, aff'g 16 Hun, 294.

When a gift to a charitable use is so indefinite as to be incapable of being executed by a judicial decree it is invalid.

T., by will, gave to his executors, in trust, a sum to distribute the same "among such incorporated societies organized under the laws of the state of New York or the state of Maryland, having lawful authority to receive and hold funds upon permanent trusts for charitable or educational uses," as said executors or the survivors of them might select, and in such sums as they should determine.

Construction:

The clause was void, because of its indefiniteness and uncertainty in the designation of beneficiaries. *Prichard* v. *Thompson*, 95 N. Y. 76, rev'g 29 Hun, 295.

Citing, Williams v. Williams, 8 N. Y. 526; distinguishing, Power v. Cassidy, 79 id. 602: 35 Am. Rep. 550.

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[1]Norris v. Thompson's Ex'rs, 10 N. J. 307; Stubbs v. Sargon, 3 M. & C. 507; 2 Keen. 255; Morice v. Bishop of D., 10 Ves. 522; Ommanney v. Butcher, 1 T. & R. 260, distinguished.

Perpetual trust for the relief of poor and destitute persons residing in Malone village was void. *Horton* v. *Cantwell*, 108 N. Y. 255.

The absence of a defined beneficiary, entitled to enforce its execution is, as a general rule, a fatal objection to the validity of a testamentary trust.

A power given to executors to select the beneficiary does not obviate the objection, unless the persons or corporations from among whom the selection is to be made, are so defined and limited that a court of equity would have power to enforce the execution of the trust, or in default of a selection to decree an equal distribution among all the beneficiaries. It seems the fact that the trustee is competent and willing to execute the trust does not validate it; the validity or invalidity of a trust can not depend on the will of the trustee.

The existence of a valid trust, capable of enforcement, is essential to enable one claiming to hold as trustee to withhold the property from the legal representatives of the alleged donor.

The English doctrine of trusts for charitable uses, as distinguished from private trusts governed by the general rules of law and the doctrine of *cy pres*, do not prevail in this state, but the system established by the statute law of the state, of organizing corporate bodies with power to administer public charities, with the legal capacity to receive and hold property for that purpose, was intended to take its place. The nature and history of the English doctrine given and the authorities in this state upon the subject, collated and discussed.

The will of G. bequeathed his residuary estate, which consisted exclusively of personalty, to his executors, in trust, for the purposes expressed therein, as follows: "To be applied by them for the purpose of having prayers offered in a Roman Catholic church, to be by them selected, for the repose of my soul and the souls of my family, and also the souls of all others who may be in purgatory." *Held*, that the trust so attempted to be created was invalid; and that as to such residuary estate the testator died intestate, and the next of kin of the testator were entitled thereto, as there is no beneficiary in existence, or to come into existence, who is interested in or can demand the execution of the trust, that considering the trust is to pay over the fund to such Roman Catholic church as the executors might select (as to which *quære*), the objection of indefiniteness in the beneficiary would not be removed.

It seems that under the English statute of chauntries and other statutes prohibiting superstitious uses in force at the time, the trust in question would not have been recognized in that country as valid as a charity.

It seems, also, that the trust in question may not be impeached on the ground that the use to which the fund was attempted to be devoted was

a superstitious use, as the English statutes against superstitious uses have no effect here. (U. S. Const. Amendment, art. 1; State Const., art. 1, sec. 3.) *Holland* v. *Alcock*, 108 N. Y. 312, distinguishing.

Gilman v. McArdle (99 N. Y. 451); Power v. Cassidy (79 id. 602); Burrill v. Boardman (43 id. 254).

See, also, O'Conner v. Gifford, 117 N. Y. 275.

Charitable uses never became a part of our law. *Cottman* v. *Grace*, 112 N. Y. 299, digested p. 454.

The testator, by his will, bequeathed to his executor $500 to be expended in masses for the repose of his soul. The bequest was void. *O'Conner* v. *Gifford*, 117 N. Y. 275.

To constitute a valid testamentary trust, there must be a defined beneficiary either named or capable of being ascertained within the rules of law applicable in such case.

A bequest to a town, in trust, in perpetuity for the benefit of the poor of the town, not confined to those for whose support the town is under a statutory liability, is invalid for want of an ascertained beneficiary.

In the absence of a special grant of power by statute, a town can not act as trustee of property given for charitable purposes.

A testamentary gift to a town, in order to take effect as an absolute one, must be for some one or all of the purposes for which the corporation was created.

H., by his will, gave his residuary estate to trustees for the establishment and permanent endowment of an academy to be located in the town of Hempstead. The trustees were directed to procure the incorporation of the academy and to transfer the funds to the corporation. In case any of the trusts created by the will failed, the testator gave all his "estate and property affected by such failing trust or trusts," one-half to a church named and the other half to said town "to be kept as a fund for the support of the poor of said town, to be known as the Hewlett fund." The will contained directions to the trustees named therein to sell the real estate.

Construction:

The trust for the academy was void, as was also the gift to the town, and this without regard to the question as to whether there was an equitable conversion of the real estate into personalty; considered as a bequest, its language indicated that the testator, in specifying the object of his bounty, referred not simply to those persons who would answer the statutory definition of "poor," *i. e.*, those who were town charges, but to all persons who would be regarded as subjects of individual charity on account of their poverty; also, while the word "trust" was not used,

the language of the gift indicated it was not for the sole benefit of the town, but imported necessarily that the amount was to be perpetually kept as a fund in trust, the income to be expended for purposes, the performance of which was not otherwise obligatory on the town; and, conceding the town had the legal right to take gifts by bequests absolutely, or to take in trust, the income only to be applied to some named corporate or administrative purpose, as to which, *quœre*, the trust sought to be created was void.

The act of 1870 (Laws of 1870, ch. 591), providing for the custody of moneys arising from the sale by the town of Hempstead of its common lands, makes no distinction in its favor over other towns, as to the right to take gifts in trust. *Fosdick* v. *Town of Hempstead*, 125 N. Y. 581.

Distinguishing, Power v. Cassidy, 79 N. Y. 602; Williams v. Williams, 8 id. 525; Wetmore v. Parker, 52 id. 459; LeCouteulx v. City of Buffalo, 33 id. 333; Vail v. L. I. R. R. Co., 106 id. 283, and overruling Shotwell v. Mott, 2 Sandf. Ch. 46.

A clause in the will of I., after stating that she desired to leave some of her estate "to promote certain religious purposes," authorized and empowered her executor "to expend, through the agency of the Baptist church and its various societies * * * such sum as he may deem best, not to exceed $1,000," continuing as follows: "In order that my executor may be able to do so without hindrance, I give and bequeath to him said sum * * * to him and his heirs and assigns forever for the uses and purposes before stated, and I rely on him to carry out the wishes and purposes that I have hereinbefore indicated."

Construction:

This was not merely an unconditional gift to the executor, but the clause attempted to create a trust, which was void for uncertainty. *Matter of Ingersoll*, 131 N. Y. 573, rev'g 59 Hun, 571.

The English doctrine of *cy pres*, which upholds gifts for charitable purposes when no beneficiary is named, has no place in the jurisprudence of this state. *Tilden* v. *Green*, 130 N. Y. 29.

Citing, Holmes v. Mead, 52 N. Y. 336; Holland v. Alcock, 108 id. 312.

Legacy to a town for the benefit of the poor, valid in state of which testator was a citizen, is valid in New York. *Cross* v. *United States Trust Company*, 131 N. Y. 330.

The will of H. directed his executors to convert all his residuary estate into money as soon after his decease as they could conveniently do so, and to pay over the whole proceeds thereof to three trustees named, residing in Scotland, in trust for the founding, endowing and maintaining

of a charitable institution for sick and infirm persons in certain localities in Scotland of which said trustees and their successors were to be the governors and for the relief of such persons outside of the institution; they to be the sole judges as to who should be entitled to the benefits of the charity.

Construction:

Such a trust is valid under the laws of Scotland. *Hope* v. *Brewer*, 136 N. Y. 126, digested p. 1328.

The will of M. contained this clause: "If, after all the legacies are paid in full, there should be anything left of my estate, the same to be divided and paid to the Methodist Episcopal churches in the ninth ward of the city of New York, according to the number of members, to buy coal for the poor of said churches." In an action to construe said provision, it was conceded that the churches designated were duly incorporated, with power to take by bequest for the relief of the poor.

Construction:

The testator contemplated no trust, but simply made a bequest to the churches, and the same was valid. *Bird* v. *Merklee*, 144 N. Y. 544, rev'g 75 Hun, 74.

Distinguishing, Fosdick v. Town of Hempstead, 125 N. Y. 581.

From opinion.—"We have here a direct and simple gift made in terms that exclude any idea of trust. There is not even a direction to invest the principal and expend the income.

"It is admitted that the churches designated are duly incorporated and have the power to take.

"The validity of such a gift has not been legally open to question in this state since the case of Williams v. Williams (8 N. Y. 525), where a bequest to the trustees of the Presbyterian church and congregation in the village of Huntington, in trust for the support of a minister of that church, from the income of an invested fund, was sustained as a valid bequest.

"It was there held that the provisions of the Revised Statutes against perpetuities do not affect the property given in perpetuity to religious or charitable institutions.

"While this case has been disapproved as to another bequest involving the existence of the English system of charitable uses in this state, its decision sustaining the bequest referred to has not only never been questioned, but has been expressly approved in subsequent cases in this court. (*Vide*, Wetmore v. Parker, 52 N. Y. 457; Holland v. Alcock, 108 id. 337.)

"In Holland v. Alcock (108 N. Y. 337), Judge Rapallo, after commenting upon the present condition of the law on this subject, says: 'Under this system many doubtful and obscure questions disappear and give place to the more simple inquiry whether the grantor or devisor of a fund designed for charity is competent to give, and whether the organized body is endowed by law with capacity to receive and to hold and administer the gift.' * * * *

"The fact that the testator has designated the purpose for which this legacy must be used does not indicate a desire upon his part to create a trust. If it were necessary

in order to sustain the bequest these words of designation by the testator might be treated as merely precatory, but we think it was entirely competent for him to apply his bounty to the whole or any one or more of the various purposes for which the corporations are authorized to hold property. This is fully reasoned by Judge Denio in Williams v. Williams (8 N. Y. at bottom page 530).

"The fundamental error in this case, in the court below, and in cases that are frequently coming to the attention of this court, is the failure to recognize the fact that gifts to religious and charitable corporations to aid in carrying out the purposes for which they are organized, whether by expending the principal of a bequest, or the income of a bequest to be invested in perpetuity, do not create a trust in any legal sense, do not offend against the statutes of perpetuities, are not to be judged by any of the well-known rules pertaining to the law of trusts as applied to private individuals."

The testatrix, who died in 1882, by her will devised to one D. W. P. a portion of her estate in the following words: "This gift and devise is made upon the trust and confidence reposed in the said D. W. P. that he will dispose of the same property among the charitable and benevolent institutions or corporations in the city of Rochester as he shall choose, and such sums and proportions as he shall deem proper." *Held*, that the trust attempted to be created was unenforceable for the reason of a failure to designate a beneficiary, or to designate or describe a *class* or kind of beneficiary to whom distribution was practicable, or that can with reasonable certainty be identified and ascertained.. *People* v. *Powers*, 147 N. Y. 104, rev'g 83 Hun, 449.

From opinion.—"The system of charitable uses as recognized in England prior to the Revolution, together with the *cy-pres* doctrine available to give effect to charitable uses without any definite beneficiary, has no application in the law of this state. (Bascom v. Albertson, 34 N. Y. 584: Holmes v. Mead, 52 id. 332; Holland v. Alcock, 108 id. 312; Tilden v. Greene, 130 id. 29, 45, 67; Fosdick v. Town of Hempstead, 125 id. 581.) * * * In order to create a valid trust, there must be a beneficiary designated. It may not be necessary to name him. It will be sufficient if he is so designated or described that he can be identified. But where the gift to a charitable use is so indefinite as to be incapable of being executed by a judicial decree the gift is void. (Holland v. Alcock, 108 N. Y. 312; Holmes v. Mead, 52 id. 332; Prichard v. Thompson, 95 id. 76; Read v. Williams, 125 id. 560; Levy v. Levy, 33 id. 97.)"

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I. CODIFICATION OF THE LAW OF POWERS.

I. EFFECT OF ARTICLE FOUR OF THE REAL PROPERTY LAW.

Real Prop. L., sec. 110. "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,[1] to convey real property in the name and for the benefit of the owner."

1 R. S. 732, sec. 73, 738, sec. 134 (repealed by Real Prop. L., sec. 300), were substantially the same.

It was the intent of the legislature to make the article "of powers" a complete and exhaustive code on the subject. Sweeney v. Warren, 127 N. Y. 426, 433; Cutting v. Cutting, 86 id. 522; Hutton v. Benkard, 92 id. 295, 305.

The reason for abolishing powers is discussed in Jennings v. Conboy, 73 N. Y. 230, 233; Reviser's notes, 3 R. S. 588.

The article is applicable as well to powers concerning personalty, as to those affecting real estate. Cutting v. Cutting, 86 N. Y. 522; Hutton v. Benkard, 92 id. 295; see, *ante*, p. 567.

The statute does not define all the purposes for which a power over property may be created. Tilden v. Green, 130 N. Y. 29, 84; Read v. Williams, 125 id. 560, 569.

Section 146 (R. S. 112) does not apply to a third person, whose consent is required to the execution of a power, but the rules of the common law apply. Barber v. Cary, 11 N. Y. 397.

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[1]See, Myers v. Mutual Life Ins. Co., 99 N. Y. 1; Terwilliger v. Ontario, Carbondale & Scranton R. Co., 149 N. Y. 86 (see opinion).

II. DEFINITION AND DIVISION OF POWERS.

I. DEFINITION OF A POWER.

Real Prop. L., sec. 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."

1 R. S. 732, sec. 74 (repealed by Real Prop. L., sec. 300), omitted "or revocation." See Jennings v. Conboy, 73 N. Y. 230, 233; Matter of Stewart, 131 id. 274.

II. DEFINITIONS OF GRANTOR AND GRANTEE.

Real Prop. L., sec. 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 devise; and the word 'grantee'[1] is so used as designating the person in whom the power is vested, whether by grant, devise or reservation."

1 R. S. 738, sec. 135 (repealed by Real Prop. L., sec. 300), was practically the same.

III. DIVISION OF POWERS.

Real Prop. L., sec. 113. Division of powers.—"A power as authorized in this article, is either general or special, and either beneficial or in trust."

1 R. S. 732, sec. 76 (repealed by Real Prop. L., sec. 300), was practically the same.

IV. GENERAL POWER.

Real Prop. L., sec. 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."

1 R. S. 732, sec. 77 (repealed by Real Prop. L., sec. 77), used "alienation" instead of "transfer or encumbrance," and "alienee" for "grantee."

For illustrations of general powers, see, Genet v. Hunt, 113 N. Y. 158, 170; Cutting v. Cutting, 86 id. 522; Hume v. Randall, 141 id. 499, 503; See, Real Prop. L., secs. 129, 133, *post*, p. 955; Crooke v. County of Kings, 97 N. Y. 421; Syracuse Savings Bank v. Holden, 105 id. 415; Deegan v. Wade, 144 id. 573.

[1]The word "grantee" does not appear to be used in this sense in section 114.

V. SPECIAL POWER.

Real Prop. L., sec. 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."

1 R. S. 732, sec. 78 (repealed by Real Prop. L., sec. 300), used "alienation" instead of "transfer or encumbrance," and "a particular estate or interest" for "any estate."

The power is special where the class is designated contingently. Wright v. Tallmadge, 15 N. Y, 307, digested p. 888.

VI. BENEFICIAL POWER.

Real Prop. L., sec. 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."

1 R. S. 732, sec. 79 (repealed by Real Prop. L., sec. 300), contained the words "hereafter to be created" after "general or special" in the last sentence.

1 R. S. 733, sec. 92 (repealed by Real Prop. L. sec. 300), "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."

For illustrations of beneficial powers, see Cutting v. Cutting, 86 N. Y. 522, 531, *et seq.;* Hume v. Randall, 141 id. 499, 503; Jenning v. Conboy, 73 id. 230; Crooke v. County of Kings, 97 id. 421. See Sweeney v. Warren, 127 id. 426; Deegan v. Wade, 144 id. 573. See Real Prop. L., secs. 129–133, *post*, pp. 955–63.

VII. GENERAL POWER IN TRUST.

Real Prop. L., sec. 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."

1 R. S. 734, sec. 94 (repealed by Real Prop. L., sec. 300), had "the alienation of the lands according to the power" instead of the last two words, "its execution."

See Russell v. Russell, 36 N. Y. 581; Syracuse Savings Bank v. Holden, 105 id. 415; Ackerman v. Gorton, 67 id. 63.

VIII. SPECIAL POWER IN TRUST.

Real Prop. L., sec. 118. Special power in trust.—"A special power is in trust where either,

VIII. SPECIAL POWER IN TRUST.

"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 R. S. 734, sec. 95 (repealed by Real Prop. L., sec. 300), omitted the words "or charge" in the first subdivision. See, Wright v. Tallmadge, 15 N. Y. 307.

IX. WHETHER A BENEFICIAL POWER OR POWER IN TRUST IS CREATED.

A power is special where a class of persons to whom the disposition of lands under the power is to be made is designated contingently, upon the happening of a certain event, as well as if a class or person is designated absolutely.

A power is not beneficial, when any person other than the grantee has, by the terms of its creation, an interest in its execution upon a certain contingency.

The eightieth section of the article in relation to powers (1. R. S. 732), providing that "a general and beneficial power may be given to a married woman to dispose, during marriage and without the concurrence of her husband, of land conveyed or devised to her in fee," is an *enabling* and not a restrictive statute. It was designed to enable the grantor to give the fee to a married woman, with an absolute power of disposition during coverture. *Wright* v. *Tallmadge*, 15 N. Y. 307.

A power to an executor to sell, as shall be deemed "expedient" and for the best interests of certain legatees named, is a general power in trust. *Russell* v. *Russell*, 36 N. Y. 581, digested p. 984.

Power to life tenant to sell with the approval of remainderman is not beneficial. *Ackerman* v. *Gorton*, 67 N. Y. 63, digested p. 301.

To make a power beneficial it is not necessary that an interest in its execution be given expressly to the grantee; it is beneficial if no person other than the grantee has, by the terms of the instrument, such an interest. *Jennings* v. *Conboy*, 73 N. Y. 230, digested p. 1603.

See, also, Cutting v. Cutting, 86 N. Y. 522, digested p. 893.

A power to dispose by grant or devise is general and beneficial. *Crooke* v. *County of Kings*, 97 N. Y. 421, digested p. 444.

A beneficial power was not created. *Coleman* v. *Beach*, 97 N. Y. 545, digested p. 1008.

A general power in trust was created. *Syracuse Savings Bank* v. *Holden*, 105 N. Y. 415, aff'g 36 Hun, 168, digested p. 995.

Where a grantee of a life estate takes also by his deed a power to alien

IX. WHETHER A BENEFICIAL POWER OR POWER IN TRUST IS CREATED.

in fee to any person by means of a will, and no person other than the grantee of the power has, by the terms of its creation, any interest in its execution, the power is a general beneficial one. *Hume* v. *Randall*, 141 N. Y. 499, rev'g 65 Hun, 437.

Devise to son for life with power to devise but not to convey. Executor was directed to collect and receive rents and profits until devisee became of age, to apply net income to his support and education, and add surplus income to other moneys invested for him under other provisions of will and pay over the whole on his arrival of age.

Construction:

Devisee took an absolute fee. *Deegan* v. *Wade*, 144 N. Y. 573, digested p.

NOTE.—"In Hume v. Randall (141 N. Y. 499), we held that where a grantee of an estate for life takes also a power to alien in fee to any person by will, and no person other than the grantee of the power has, by the terms of its creation, any interest in its execution, the power is a general beneficial one (Cutting v. Cutting, 86 N. Y. 522), and, further, that the grantees of the life estate, with such a power, could convey in fee by deed, although the instrument creating the life estate and the power attempted to restrain and prohibit any conveyance by deed. *That case can not be distinguished in principle from this.*" (578.)

III. CREATION OF POWERS AND REVOCATION THEREOF.

I. CAPACITY TO GRANT A POWER.

Real Prop. L., sec. 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."

1 R. S. 732, sec. 75 (repealed by Real Prop. L., sec. 300), used "aliening" instead of "transferring" and inserted the words "in law" after "capable."

As to who are capable of "transferring an interest in property," see "Who may take and create estates," *ante*, p. 1.

II. HOW POWER MAY BE CREATED.

Real Prop. L., sec. 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."

1 R. S. 735, sec. 106 (repealed by Real Prop. L., sec. 300), used the words "a conveyance of some" instead of "an instrument sufficient to pass an" in the first subdivision, but the effect of that language was qualified by 1 R. S. 729, sec. 58. Fellows v. Heermans, 4 Lans. 230.

See, "How an express trust is created," *ante*, p. 649, *et seq.* also, Real Prop. L., sec. 207, "When written conveyance necessary," *ante*, p. 652.

1. WHEN A POWER IS IMPLIED.

A power to lease was implied from a power to sell or dispose of all or any part of the estate. *Leggett* v. *Perkins*, 2 N. Y. 297, digested p. 949.

A power to sell does not imply a power to mortgage. *Albany Fire Ins. Co.* v. *Bay*, 4 N. Y. 9, digested p. 949.

As to implied power to mortgage or lease, see, *post*, p. 949.

Where there is a direction in a will to sell land, but the donee of the power is not named, it is, by implication, given to the executor. *Meakings* v. *Cromwell*, 5 N. Y. 136, digested p. 923.

A power to executors to sell lands will not be implied from the fact that the lands are charged with payment of debts. *In re Fox*, 52 N. Y. 530.

See, Lupton v. Lupton, 2 J. Ch. 614; Jones v. Hughes, 6 Ex. Ch. 222; but see, Robinson v. Lowater, 17 Bea. 592; 5 DeG., M. & G. 271.

The will directed the executors to operate certain factories, which constituted a part of the residuum devised to them in trust, during the limitation, or so long within that period as in their discretion could be

II. HOW POWER MAY BE CREATED.

1. WHEN A POWER IS IMPLIED.

done without injury to the interests of the estate. This did not imply a power to sell before the expiration of the period limited, but only gave a discretion to suspend business. *Downing* v. *Marshall*, 1 Abb. Ct. App. Dec. 525.

Power to apply rents is implied from power to receive them. *Vernon* v. *Vernon*, 53 N. Y. 351.

No power of sale can be implied from the mere charge of the debts and legacies upon the devised land. *Dill* v. *Wisner*, 38 N. Y. 153, digested p. 628.

A power to lease carried with it a power to receive the rents, and, although there was no express direction as to the disposition to be made of them, the reasonable implication was that they were to go to the persons beneficially interested in the estate; and that, therefore, partition was properly denied. *Morse* v. *Morse*, 85 N. Y. 53.

A direction to invest property, consisting of both real and personal estate in bond and mortgage, may be carried out by a sale of the land, and fairly implies a power of sale for conversion, in the person to whom the direction is given. *Byrnes* v. *Baer*, 86 N. Y. 210, 220.

In the absence of an express direction to sell, one may not be implied, unless the design and purpose of the testator is unequivocal, and the implication so strong as to leave no substantial doubt; and so, unless the exercise of the power is rendered necessary and essential by the scope of the will, the authority is simply discretionary and does not work a conversion. *Scholle* v. *Scholle*, 113 N. Y. 261.

By necessary implication a beneficial power was conferred to dispose of real estate with limitation over in case of the death of the donee, without exercising the power. *Leggett* v. *Firth*, 132 N. Y. 7.

Although there was no express language extending a power to the executors to rent, so as to cover a life estate devised to the testator's widow, yet from the provisions of the will, and the situation of the property, it was implied that such was the intention of the testator. *Starr* v. *Starr*, 132 N. Y. 154, 158.

A *direction* to sell will be implied where the implication is sufficiently strong and the intention can not otherwise be carried out. *Matter of Gantert*, 136 N. Y. 106, digested p. 1002.

A general power to dispose includes power to devise unless a contrary intention appear expressly or by fair implication, which is not furnished by an "expectation and desire" after a gift of a general power of disposal. *Matter of Gardner*, 140 N. Y. 122, digested p. 897.

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1. WHEN A POWER IS IMPLIED.

The fact that a power is necessary to give full effect to a will has great weight in determining whether a power was intended, in case of obscure and ambiguous language. *Cahill* v. *Russell*, 140 N. Y. 402, digested p. 913.

On this subject see further, Power of sale, *post*, p. 901; Equitable conversion, *post*, p. 917; Execution of powers, *post*, p. 973.

See, further, Alkus v. Goettman, 60 Hun, 470.

2. POWERS IN TRUST ARISING UNDER SECTIONS SEVENTY-SEVEN AND SEVENTY-NINE.

The Real Prop. L., sec. 77, provides, "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."

Section 79 of the Real Prop. L., provides: "Where an express trust relating to real property is *created for any purpose not specified in the preceding sections* of this article,[1] 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."

An executor does not take, *by implication, an estate*, in the lands of the testator, when all the duties enjoined upon him by the will in regard to the lands, can be discharged under a power. Especially, where by construing the will to give the executor an estate, the devise will be void, on account of its suspending for too long a period the power of alienation.

The testator, after charging upon eight houses and lots, an annuity to his widow of $1,500, during her life or widowhood, devised four of the houses and lots to four grandchildren for life, with remainders over in fee, and the other four, to four children in fee; but directed that neither of the houses and lots should pass to the possession or use of the devisees until the expiration of one year after the death or marriage of his widow; and in the meantime authorized his executors to rent

[1]Article on Trusts, sec. 76, *ante*, p. 616.

the houses, collect the rents, make repairs, pay taxes, effect insurances, and to divide the surplus income among the four children.

Construction:

The executors took a mere power, and not a trust term in the houses and lots. *Tucker* v. *Tucker*, 5 N. Y. 408; see, 5 Barb. 99.

NOTE—"Taking the two clauses together, they are sufficient to vest the trust estate in the executors by implication, provided the trust is legal with respect to its duration. Leggett v. Perkins, 2 Comst. 305; Oates v. Cooke, 3 Burrow, 1685; Doe v. Humphrey, 6 Ad. & El. 206; Bradley v. Amidon, 10 Paige, 235; Fletcher on Trustees, 1 to 9; Brewster v. Striker, 2 Comst. 31." (416.)

The will attempted to devise real estate, used as a manufacturing establishment, to the executor in trust, to continue a factory in operation for two lives in being, and upon the death of the survivor of them, to sell the same; the income of the property, and the proceeds after its conversion, to be distributed to one unincorporated association and three corporations, for religious and charitable purposes. The provision failed as a trust to receive and apply the rents and profits of real estate, because the lives on which the trust depended, were those of persons having no interest in its performance, while the statute (1 R. S., p. 728, sec 55, sub. 3), requires it to be dependent upon the life of the beneficiary.

The trusts attempted to be created are valid as powers in trust, so far as the beneficiaries are competent to take by devise. *Downing* v. *Marshall*, 23 N. Y. 366.

In 1834 S., holding title to lands for the benefit of himself and others, conveyed one-half thereof to N., and S. and N. thereupon agreed to convey one-fourth of all lands to a railroad company, on condition that the company should within seven years build a railway to D., and in default thereof that they should divide the one-fourth part among themselves. In 1838 all parties interested, including the railway company, by deeds absolute on their face, conveyed all interests in the lands including the company's shares to N., who was to convey to such parties their respective portions of the land, except the share of the railway was to be conveyed to N. and K. in trust to convey to the company on performance of said condition, which was done, N. and K. giving company a declaration of trust setting forth the terms and conditions of conveyance to the company, or to divide proceeds amongst parties intended.

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Construction:

1. A valid trust was not created in respect to the company's share, but there was a valid power in trust vested in N. and K. by the conveyance.

2. After such conveyance S. had no interest subject to the lien of a judgment against him and to sale thereon.

3. Previous to the last conveyance named there was no arrangement between the parties interested in the land creating a trust.

4. S. did not, as the beneficiary of the power in trust, become, by virtue of section forty-seven of the statute of uses and trusts, vested with a legal estate in the land, upon the failure of the trust estate to vest in N. and K.

5. It was not until the declaration of trust in behalf of the respective owners took effect that S. was clothed with any interest whatever in the lands, or their proceeds. The interest he then acquired was an equitable title to enforce the execution of the power and the sale of the lands and for an account and distribution of the proceeds. *N. Y. Dry Dock Co.* v. *Stillman*, 30 N. Y. 174.

A trust, to "use and dispose" of real and personal estate for the benefit of *cestuis que trust*, was upheld as a power in trust. *Smith* v. *Bowen*, 35 N. Y. 83, 87, digested p. 983.

A power, in trust, given to executors, to sell real estate devised absolutely by the will, is valid. Such power is not inconsistent with the devise, but the estate vests in the devisees, subject to the execution of the power. *Crittenden* v. *Fairchild*, 41 N. Y. 289.

Distinguishing, Quinn v. Skinner, 49 Barb. 128.

When there was no direction for the application of the rents and profits during the time to be consumed in the appraisement and division of property, no trust to receive them during that time could be implied; and none having been expressly given, there was no trust, but the trust could be executed as a power. *Manice* v. *Manice*, 43 N. Y. 303, 363–4.

Devise of net income to mother for life, and upon her death direction that executor should sell all real estate, except one piece, and from proceeds pay a sum to sister J., and residue to sister A. Mother died in lifetime of testator, who left the two sisters and a brother, who, as heir at law, claimed one-third of the rents of the real estate before the actual conversion of the property.

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Construction:

There was an equitable conversion under the *absolute* direction to sell from the time the same was directed to be made, and plaintiff was not entitled. The plaintiff claimed that the title of one-third descended to him, subject to the execution of the power of sale. The executor took no title, but mere power, in trust, to sell. *Moncrief* v. *Ross*, 50 N. Y. 431.

Distinguishing, Germond v. Jones, 2 Hill, 569, and Campbell v. Johnson, 1 Sandf. Ch. 148.

NOTE.—Citing, Bogert v. Hertell, 4 Hill, 492; 1 Jarman on Wills, 525, 530; Manice v. Manice, 43 N. Y. 303; White v. Howard, 46 id. 144.

"To constitute a valid trust under the statute, the trust must be declared in the instrument creating it; but it is not necessary that the purpose of the trust should be stated in the words of the statute. It is sufficient that a purpose within the statute is clearly embraced in the language used, or that a power conferred in express terms includes a power over the estate, for the execution of which the trustee may be clothed with the legal title." *Vernon* v. *Vernon*, 53 N. Y. 351, 359.

Citing, Bradley v. Amidon, 10 Paige, 235; Savage v. Burnham, 17 N. Y. 561; Tobias v. Ketchum, 32 id. 319.

Intention to create a power, rather than a trust, is favored. The intention of the statute of uses and trusts was to restrict them to cases in which it was necessary, for the protection of those interested, that the title should pass; and when no such necessity existed, that the trust should be exercised as a power. *Heermans* v. *Robertson*, 64 N. Y. 332, digested p. 624.

Direction to executors to collect rents for four years, and then sell land and pay over to B. on certain trusts, was an attempt to create an active trust and invalid, as unduly suspending the power of alienation, and could not be maintained as a power in trust. *Garvey* v. *McDevitt*, 72 N. Y. 556, 562, digested p. 430.

From opinion.—"The trust failing, we ought not to uphold this as a power in trust under sections 58 and 59 (1 R. S. 729), because the testator's intention was to vest the title in his trustees. It was essential that they should hold the title to enable them adequately to exercise the powers conferred, and a power to receive the rents and accumulate them for the purposes mentioned, is invalid. (1 R. S. 726, secs. 37, 38.)"

A grant purporting to convey to the plaintiff, as trustee, certain land and personal estate with power to sell the land by retail, and meanwhile

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to rent, collect all debts owing to grantor and to execute deeds for all lands then under contract of sale, and to dispose of the avails of such estate in defraying the expenses of the trust and paying or appropriating the residue to the grantee during his life, and after his death, paying his debts, and distributing the residue as directed in a writing to be thereafter executed, or in default of such writing, to distribute to the grantor's heirs, did not create an express trust. As to whether the instrument created merely an agency for the management of the estate for the benefit of the grantor or a valid irrevocable power in trust, *quære*. *Heermans* v. *Burt*, 78 N. Y. 259.

Where the testator authorized his son to carry on the hotel business for five years, if he desired, in a hotel owned by the testator, and empowered his executors to sell his hotel property after the occupancy of his son had ceased, and divide the proceeds among his residuary legatees, it was held, that the executors took no interest in the land, but merely a power in trust to be executed simply for the purpose of distribution, and liable to be defeated by reconversion into realty of the property, which was converted by the will into personalty. *Prentice* v. *Janssen*, 79 N. Y. 478.

Where no trust was created in executors and would not be implied as it would be void, and executors could act under a power. *Bliven* v. *Seymour*, 88 N. Y. 469, digested p. 543.

"Under the statute of uses and trusts, where a trust estate, if held to result from the language and dispositions of a will, would render it illegal and void, the courts, for the purpose of sustaining the will, construe an authority and duty conferred or imposed upon executors, where it is possible to do so, as a mere power in trust, although the duty imposed, or the authority conferred, may require that the executors shall have control, possession, and actual management of the estate." *Robert* v. *Corning*, 89 N. Y. 225, 237.

Citing, Downing v. Marshall, 23 N. Y. 366; Post v. Hover, 33 id. 593; Tucker v. Tucker, 5 id. 408.

"There are many authorities tending to sustain the proposition, that a trust will be implied in executors, when the duties imposed are active, and render the possession of the legal estate in the executors, convenient and reasonably necessary, although it may not be absolutely essential to accomplish the purposes of the will, and when such implication would not defeat, but would sustain the dispositions of the will. (Craig v. Craig, 3 Barb. Ch. 76; Bradley v. Amidon, 10 Paige, 235; Tobias v. Ketchum, 32 N. Y. 329; Vernon v. Vernon, 53 id. 351; Morse v. Morse, 85 id. 53. See, also, Brewster v. Striker, 2 id. 19.)"

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2. POWERS IN TRUST ARISING UNDER SECTIONS SEVENTY-SEVEN AND SEVENTY-NINE.

P., by will, gave all his estate to his executors with power to receive the rents and profits, and to sell and convey the same, in their discretion, upon trust to divide the same or its proceeds, after payment of debts, among the testator's four children. The executors were removed by judgment, and a receiver appointed, with the powers of an administrator with the will annexed. On a motion to compel the receiver to sell the real estate, held, (1) The trust attempted to be created was unauthorized, no trust was vested in the executors, and the title passed to the beneficiaries named as devisees in fee. (1 R. S. 728, secs. 55, 58, 59.)

(2) The devise, although void as a trust, was valid as a power, but the receiver had no authority to execute the power.

(3) A trust to sell lands for the benefit of creditors, or of legatees, must be absolute and imperative, without discretion except as to the time and manner of doing the same.

(4) The trust was not valid as a trust to receive the rents and profits of land, under the statute of uses and trusts (1 R. S. 728, sec. 55, sub. 3), as there was no direction to apply them to the use of any person or for any period, and they were not distributable as such, but were incorporated into the mass of the estate, to be divided by the executor.

(5) A discretionary power of sale vested in executors can not be executed by an administrator with the will annexed.

(6) The power, although discretionary, could, after removal of the executors, be executed under the direction of the court by a trustee appointed for that purpose. *Cooke* v. *Platt*, 98 N. Y. 35.

From opinion.—"Nor can the trust be sustained as a trust to receive the rents and profits of land, under the third subdivision of section 55. There is no direction to apply them to the use of any person or for any period. When received they are distributable, not as rents and profits, but because incorporated into the mass of the estate, to be divided by the executors. (See, Heermans v. Burt, 78 N. Y. 259.)

The only remaining question relates to the authority of the receiver to execute the power of sale vested in the executors. The power of sale was a power in trust, which, although discretionary, could, on the death or removal of the executors, be executed under the direction of the court, by a trustee appointed for that purpose. (1 R. S. 731, secs. 71, 102; Leggett v. Hunter, 19 N. Y. 445, and cases cited; Roome v. Philips, 27 id. 357.) But we are of opinion that by the true construction of the judgment appointing the receiver, he was invested with no greater power than that of administrator with the will annexed. The point must now be deemed to be settled that an administrator with the will annexed can not execute a discretionary power of sale vested in executors. He succeeds to the power of sale given to the executor, only when the direction to sell is imperative. (Mott v. Ackerman, 92 N. Y. 540, and cases cited.)"

II. HOW POWER MAY BE CREATED.

2. POWERS IN TRUST ARISING UNDER SECTIONS SEVENTY-SEVEN AND SEVENTY-NINE.

Gift of residuary estate to executors to sell and divide proceeds equally between his wife and children was void as a trust and valid as a power. *Konvalinka* v. *Schlegel*, 104 N. Y. 125, digested, p. 188.

W., testator, died leaving a widow and no descendants. He gave to his widow absolutely certain real and personal estate and a life estate in four lots in the city of New York. Seventeen clauses, each devised land to his executors in trust, to pay the net income to a person named during life, which, on the death of any life beneficiary, was devised to his wife and heirs, or where there was no wife to his heirs or issue. Several of the clauses provided that the issue of such life beneficiaries as shall have died shall take the parents' share. He also devised a lot of land to P. in fee, and one to each of two servants of the testator, D. and C. By the twenty-fourth clause he gave the residue of his estate, real and personal, not "bequeathed in fee or upon trust," to his executors "to use the same as in their judgment they deem to be for the best interest" of the whole estate; and, to raise money for that purpose, he authorized them to mortgage "the piece or parcel of land being the residue and remainder" of his estate, and after paying taxes, etc., and such amounts as they might deem necessary for repairs, etc., "to divide and pay the remainder at any time within ten years to each and every of my legatees hereinbefore named," except D. and C., "in the proportion in which his, her or their specified legacies hereinbefore named and bequeathed bear to each other, the heirs of such legatee as may have died to take the share to which said legatee would, if living have been entitled." By the twenty-fifth clause, upon the termination of the real estate trusts where the fee was undisposed of, the testator gave "the fee of said real estate trust property" to his legatees, excepting D. and C., to be divided among them in the same proportions as specified in the twenty-fourth clause; he declared his meaning to be to regard each of his legatees except D. and C., a "legal heir" to his estate, "limited to the said trust property in the proportion named." The real estate referred to in the twenty-fourth and twenty-fifth clauses consisted of the four lots devised to the widow for life.

Action brought after the death of the widow for partition of the said real estate.

Construction:

Under the twenty-fifth clause said real estate was legally devised, the devisees being the seventeen persons named as beneficiaries in the

seventeen trusts, together with P.; the proceeds of sale should be divided among them, as to the seventeen life beneficiaries, in proportion to the value of the specific real estate from which they were respectively entitled to the income, and as to P., in proportion to the value of the fee of the land given to him; the only real estate trust attempted to be created by the twenty-fourth clause was to mortgage it, which trust was invalid because it was not for the benefit of legatees or for the purpose of satisfying any charge upon the land (1 R. S. 728, sec. 55); even if valid it vested no estate in the trustees (sec. 56) but was valid only as a power, and so in any event it did not suspend the power of alienation, or prevent the vesting of the estate in the devisees mentioned in the twenty-fifth clause.

Weeks v. *Cornwell*, 104 N. Y. 325.

Gift to executors of all property "for the payment of the bequests and legacies" and for the purpose of executing the trusts, was a power to sell the property of the estate and not a trust. *Chamberlain* v. *Taylor*, 105 N. Y. 185, digested p. 934.

Trust to partition, upheld as a power in trust. *Henderson* v. *Henderson*, 113 N. Y. 1.

See, also, Hawley v. James, 16 Wend. 60, 149.

The will of P., after directing the payment of his debts, and after certain specific bequests and legacies, by its terms gave the residuary estate, real and personal, to his daughter M.; then followed a clause giving all of his estate to his executors, in trust, for the payment of the debts and legacies. P. died insolvent, seized of certain real estate, the rents and profits of which M. received until the said real estate was sold under the power in trust contained in the will.

Action brought by a creditor of P. to compel M. to account for and pay over the rents and profits so received by her.

Construction:

The action was not maintainable; no trust was created by the will with respect to the real estate, but simply a power in trust (1 R. S. 729, sec. 56), and the executors or trustees were not entitled to receive the rents and profits; the title passed to M. on the death of the testator, subject to the execution of the power, and remained in her until divested by such execution, and until then she was entitled to the possession and lawfully received the rents and profits; the will did not charge the real estate with the payment of the debts; but, conceding there was such a

charge, the debts only became a lien enforceable in equity; there was no personal liability on the part of M. to pay the debts, and in the absence of such liability there was no element of trust by which she could be made liable to account.

There was no conversion of the real estate into personalty until the execution of the power of sale. *Clift* v. *Moses*, 116 N. Y. 144, aff'g 44 Hun, 312.

An attempted trust was valid as a power in trust. *Woerz* v. *Rademacher*, 120 N. Y. 63, 68, digested pp. 588, 637.

A merely passive trust may not be validated as a power in trust. But a trust to convey upon the happening of some event is active, and so may be validated as a power in trust.

In cases where a trust is created, which is not authorized by the 55th section of the statute, but is validated as a power in trust by the 58th section, no estate passes at all, and the title remains in the grantor, or descends to the persons otherwise entitled, as the case may be, the grantee being merely the trustee of a power. *Townshend* v. *Frommer*, 125 N. Y. 446.

Citing 2 R. S. 729, secs. 58, 59; N. Y. Dry Dock Co. v. Stillman, 30 N. Y. 174; Downing v. Marshall, 23 id. 266. See, also, Hawley v. James, 16 Wend. 60.

Powers in trust are favored. Devise, in terms to executors or trustees, to sell or mortgage, may be construed as a power; then the title descends to heirs or devisees. *Steinhardt* v. *Cunningham*, 130 N. Y. 292, digested p. 642.

An antenuptial trust deed, which conveys real property to a trustee, in trust, to receive the rents, or to permit the grantor to take, hold and use the same for her use and benefit at her election, and at her death to convey it to such persons as she shall appoint by her deed or will, is valid as a power, but has no further legal operation, and leaves the title to the property in the donor of the power. *Wainwright* v. *Low*, 57 Hun, 386, aff'd 132 N. Y. 313.

Where the testator gave one-third of his estate, real and personal, to his wife, and the residue to his eight children and a grandchild, to be paid over within a year after the youngest child became twenty-one, and further provided: "I give and devise all my real and personal estate, of what nature or kind so ever, to my wife, Rhoda, executrix * * * * in trust, for the payment of my just debts, and the legacies above specified, with power to sell and dispose of the same," it was *held*, that Rhoda took, not an express trust, but a trust power,

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which was invalid, however, on account of the unlawful suspension of the power of alienation. *Matter of Butterfield*, 133 N. Y. 473, aff'g Matter of Christie, 59 Hun, 153.

By his will, B. gave all his property to his executors, in trust, to receive the rents, etc., to sell, convey or otherwise dispose of it as they might deem best, and finally "to apply the said estate, * * * together with the proceeds of any part or portions sold," as thereafter provided. The testator then gave to each of his said executors two-sevenths of his estate in fee, and the remaining three-sevenths to be held by them, in trust, for certain beneficiaries named. B. had contracted to sell a portion of his real estate to P. Before the time fixed for the delivery of the deed, B. died. His executors executed a deed to P., and received from him the purchase money unpaid. P. subsequently conveyed to D., who conveyed to plaintiff's testator. In an action for a specific performance of a contract by defendant to purchase said premises, he objected to the title on the ground that the executors had no power to convey in performance of their testator's contract, and so their deed vested no title in P.

Construction:

Untenable; while the executors did not take any legal estate under the preliminary devise in trust of all the testator's property; the trust being an active one and enforceable as a power in trust, included every disposable interest, and gave to the executors power to convey a perfect legal title to the real estate in question, irrespective of the fact that the testator had by his contract to sell the same, changed in equity the character of his estate therein. *Holly* v. *Hirsch*, 135 N. Y. 590, rev'g 63 Hun, 241; Roome v. Phillips, 27 N. Y. 357; Lewis v. Smith, 9 id. 502, distinguished and limited.

NOTE 1.—"A devise in trust to receive rents, issues and profits, where there is no direction to apply to the use of any person for any period, and a power to sell property, which is not authorized for the benefit of creditors, or of legatees, or to satisfy a charge upon the same, can not be deemed to be among the express trusts enumerated in the section. (Downing v. Marshall, 23 N. Y. 366, 377; Cooke v. Platt, 98 id. 36; Henderson v. Henderson, 113 id. 1.)" (594.)

NOTE 2.—"Brett's executors did not take any legal estate under the preliminary devise in trust to them of all of testator's property; but the trust, being an active one and enforceable as a power in trust, comprehended and subjected to its execution every disposable or realizable interest in the testator's estate. The power in trust had all the character of a trust, and being designed for the purpose of effectuating a trust, it was imperative. (2 Sugden Powers, 158; 1 Perry Trusts, 248.)" (596.)

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Trust limitations given effect as powers in trust—as powers they are unlimited. *Reynolds* v. *Denslow*, 80 Hun, 359.

When executors do not take title to real estate but power in trust. *Matter of Spears*, 89 Hun, 49.

See further, Smith v. Chase, 90 Hun, 99; Connor v. Watson, 1 App. Div. 54; Trowbridge v. Metcalf, 5 id. 318; Arnold v. Gilbert, 3 Sandf. Ch. 531; 5 Barb. 190.

III. CAPACITY TO TAKE AND EXECUTE A POWER.

Real Prop. L., sec. 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." [1]

1 R. S. 735, sec. 109 (repealed by Real Prop. L., sec. 300), used the word "aliening" instead of "transferring," and made an exception of the case in the following section (1 R. S. 737, sec. 110), providing that "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." This section was repealed and omitted by the Real Property Law as were also 1 R. S. 735, sec. 111 and 1 R. S. 737, sec. 130, which are as follows:

Section 111. "No power vested in a married woman, during her infancy, can be exercised by her, until she attain her full age."

Section 130. "When a married woman, entitled to an estate in fee, shall be authorized by a power, to dispose of such estate during her marriage, she may, by virtue of such power, create any estate, which she might create if unmarried."

See Married women, p. 70.

Section one hundred and ten of the article aforesaid (1 R. S. 735) completely takes away the disability of coverture in respect to the execution of powers. A married woman may, without the concurrence of her husband, execute any power which may lawfully be conferred on any person unless its execution during coverture be expressly or impliedly prohibited by the terms of the power.

A power, general or special, beneficial, or in trust, may be reserved to a married woman by a marriage settlement, by which the entire legal estate is vested in trustees. *Wright* v. *Tallmadge*, 15 N. Y. 307, digested p. 874.

IV. CAPACITY OF MARRIED WOMAN TO TAKE POWER.

Real Prop. L., sec. 122. Capacity of married woman to take power.—"A general and beneficial power may be given to a married woman, to

[1] As to who may take and transfer real property see "Who may take and create estates," *ante*, p. 1

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dispose, during her marriage, and without concurrence of her husband, of real property conveyed or devised to her in fee." [1]

1 R. S. 732, sec. 80 (repealed by Real Prop. L., sec. 300), was the same.

1 R. S. 736, sec. 117 (repealed and not reenacted by the Real Prop. L.), was as follows:

"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."

1 R. S. 735, sec. 111, repealed as above stated.

1 R. S. sec. 80, 735, sec. 110 were construed not to apply to personalty. Wadhams v. American Home Miss. Soc'y, 12 N. Y. 415.

V. CAPACITY TO TAKE A SPECIAL AND BENEFICIAL POWER.

Real Prop. L., sec. 123. Capacity to take a special and beneficial power.—"A special and beneficial power may be granted,

"1. To 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."

1 R. S. 733, sec. 87 (repealed by Real Prop. L., sec. 300), omitted the last clause in subdivision 2.

See, Real Prop. L., sec. 135, "Power of life tenant to make leases," p. 962; sec. 136, "Effect of mortgage by grantee," p. 963.

VI. RESERVATION OF A POWER.

Real Prop. L., sec. 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."

1 R. S. 735, sec. 105 (repealed by Real Prop. L., sec. 300), was the same.

Where by a deed the grantor reserves a power to create a future estate in the land conveyed, the power, unless coupled with a trust, is not imperative, but its execution depends entirely upon the will of the grantor.

It is only when a power is in trust that a court of equity will decree its execution.

[1] See, Married women, p. 64.

VI. RESERVATION OF A POWER.

T., who was a widower, conveyed certain real estate to his children, reserving to himself a right to devise by a will a life estate in one-third thereof to "any hereafter taken wife." The grantor thereafter married, and died without executing the power. The widow was not entitled to any interest in the land; that the reservation at most created a mere power, and so, to be executed or not at the pleasure of the grantor.

As to whether the reservation can be treated as a power within the meaning of the Revised Statutes (1 R. S. 732, sec. 105), *quære*. *Towler* v. *Towler*, 142 N. Y. 371, aff'g 65 Hun, 457.

VII. EFFECT OF POWER TO REVOKE.

Real Prop. L., sec. 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."

1 R. S. 733, sec. 86 (repealed by Real Prop. L., sec. 300), was the same.

See, Real Prop. L., sec. 226, Conveyances with intent to defraud purchasers and encumbrancers void (2 R. S. 134, secs. 1, 2 repealed), sec. 227, Conveyances with intent to defraud creditors void (2 R. S. 137, sec. 1, not repealed); sec. 228, Conveyances void as to creditors, purchasers, and encumbrancers, void as to heirs and assigns (2 R. S. 137, sec. 3, not repealed); see, also, secs. 229, 230, 231, 232 and 273.

See, also Real Prop. L., sec. 128, *post*, p. 891.

The reservation by the settlor of a trust of a right in himself to revoke the trust does not work its destruction, where the rights of the settlor's creditors are not involved. *Von Hesse* v. *MacKaye*, 136 N. Y. 114, aff'g 62 Hun, 458.

VIII. POWER TO SELL IN A MORTGAGE.

Real Prop. L., sec. 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."

1 R. S. 737, sec. 133 (repealed by Real Prop. L., sec. 300), was practically the same.

IX. WHEN POWER IS A LIEN.

Real Prop. L., sec. 127. When a 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

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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."

1 R. S. 735, sec. 107 (repealed by Real Prop. L., sec. 300), omitted the word "encumbrancers."

X. WHEN POWER IS IRREVOCABLE.

Real Prop. L., sec. 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."

1 R. S. 725, sec. 108 (repealed by Real Prop. L., sec. 300), was the same.

A trust may be revoked where a power of revocation has been reserved, see Termination of express trusts, *ante*, p. 694.

The execution of a power contained in a will is revocable by the revocation of the will itself. *Austin* v. *Oakes*, 117 N. Y. 577.

Power in a will is revoked by the birth of a posthumous child entitled under the statute to take the land as heir at law. *Smith* v. *Robertson*, 89 N. Y. 555.

Will by an unmarried woman in execution of power is not revoked by her subsequent marriage. *McMahon* v. *Allen*, 4 E. D. Smith, 519.

IV. PURPOSES FOR WHICH POWERS MAY BE CREATED.

Powers may be created for any lawful purpose,[1] and to do any act which the grantor might himself do.[2] *Reynolds* v. *Denslow*, 80 Hun, 359.

See Real Prop. L., sec. 111.

Some of the more usual purposes for which powers are created are given below.

I. POWER OF DISPOSITION BY WILL.[3]

1. Power of apointment in default of issue.

Vernon v. Vernon, 53 N. Y. 531; Mott v. Ackerman, 92 id. 539.

2. Power to devise in case grantee married.

Low v. Harmony, 72 N. Y. 408.

3. Life tenant with power to alien by will.

Hume v. Randall, 141 N. Y. 499; see, also, *post*, p. 955.

4. Devise in trust for benefit of F. for life, with direction to trustee to make over remainder to F.'s appointees by will.

Cutting v. Cutting, 86 N. Y. 522; Mott v. Ackerman, 92 id. 359.

5. Gift by will to S. to be paid to such persons as she should by will appoint in case she died in the lifetime of the testator, which she did.

Matter of Piffard, 111 N. Y. 410.

6. Power of selection.

Tilden v. Green, 130 N. Y. 29; Drake v. Drake, 134 id. 220; Montignani v. Blade, 145 id. 111; see, also, *post*, p. 965.

7. Rights of objects of the power, in case of default in execution, and of no gift over.

Tilden v. Green, 130 N. Y. 29; Smith v. Floyd, 140 id. 337; Towler v. Towler, 142 id. 371.

8. General right of disposal includes disposal by will.

Matter of Gardner, 140 N. Y. 122.

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[1]For what is an unlawful purpose, see, *post*, p. 1016.

[2]In order to create a valid power, either beneficial or in trust, it is indispensable that the object or objects to be accomplished by its execution shall be specified in or clearly ascertainable from the instrument by which the power is attempted to be created. *Sweeney* v. *Warren*, 127 N. Y. 426; see, Jennings v. Conboy, 73 id. 230; Clapp v. Byrnes, 3 App. Div. 284; Beneficiary, p. 821; Charitable uses, p. 847.

[3]See, "V. The estate or interest taken by the grantee of the power" *post*, p. 955, where the effect of a power to devise is considered.

For power of disposition by will in addition to the cases here given, see Execution of powers, *post*, p. 975. . Kane v. Kane's Executors, 9 N. Y. 113, 114; White v. Hicks, 33 id. 383; Hutton v. Benkard, 92 id. 295; Crooke v. County of Kings, 97 id. 421; Austin v. Oakes, 117 id. 577; Dana v. Murray, 122 id. 604; N. Y. Life Ins. & Trust Co. v. Livingston, 133 id. 125; Hillen v. Iselin, 144 id. 365; Thomas v. Snyder, 43 Hun, 14; Lockwood v. Mildeberger, 5 App. Div. 459; Fargo v. Squiers, 6 id. 485; Stewart v. Keating, 15 Misc. 44; Metropolitan Trust Co. v. Seaver, 17 id. 466.

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Will gave all property, real and personal, to daughter C. except certain legacies enumerated, then this clause: "all my remaining property * * I give, devise and bequeath to my daughter C. for her support and comfort, to be held and controlled by her, and at her death to pass to her heirs, and if she have no heirs to be disposed of by her will" etc. C. took estate for life with power of appointment in default of issue. *Vernon* v. *Vernon*, 53 N. Y. 351, digested p. 96.

A power to devise, in case the grantee married, gave a conditional power of disposition. *Low* v. *Harmony*, 72 N. Y. 408, digested p. 1009.

The rule of the common law that where a person has a general power of appointment by will over property, and has exercised the power, the property forms a part of his assets and is subject to the claims of creditors, and that too in preference to those of a legatee, or of the gratuitous appointee, was abrogated by the provision of the Revised Statutes (1 R. S. 732, sec. 73) abolishing powers as then existing by law, and declaring that their creation should be thereafter governed by the provisions of the article "of powers." It was the legislative intent to make this article a complete and exclusive code on the subject.

The said article includes, and is applicable as well to powers concerning personalty as to those affecting real estate.

The will of G. gave certain estate, real and personal, to her executor, in trust,[1] to take the rents and profits during the life of F., her son, and apply them to his use, and upon his decease to make over the body of the estate to whomever he by his will appointed to receive it. F. made an appointment as prescribed.

Construction:

The will created a valid general and beneficial power within the provisions of the Revised Statutes (1 R. S. 732, secs. 74, *et seq.*); and the estate was not chargeable after the death of F. with a judgment obtained against him in his lifetime. *Cutting* v. *Cutting*, 86 N. Y. 522, rev'g, in part, 20 Hun, 360.

M. devised his real estate to his executors in trust, to hold one-third thereof for the benefit of each of his three daughters during life; upon the death of a daughter leaving a husband and lawful issue, the executor should stand seized of her third "from and immediately after her death, upon trust for the sole use and benefit of such issue;" in case of the death of a daughter single and unmarried "upon such trust, and for such purpose as she shall or may appoint by her last will;" in default of such appointment, "for the sole use and benefit of her next of kin."

[1]See this case distinguished in Hume v. Randall, 141 N. Y. 499.

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Construction :

The power of appointment related to the remainder in fee; in each event provided for, the trust in the executors upon the death of the daughter would be purely passive, the remainder vesting in the beneficiaries; the phrase in the clause giving such power of appointment "upon such trust" meant, not a trust to be created by the daughter and so limiting the power of disposition, but related to the trust in the executors.

The direction as to the daughter who was married at the time of the execution of the will that if she should give to her husband any part of her income from the estate or pay any of his debts, she should forfeit all right and interest in and to such income, did not show any intent to limit the power of appointment.

Same will:

One of the daughters died unmarried, leaving a will by which she gave all of her real and personal estate, after payment of debts, to her two sisters, who survived her, the survivor of them, and to the heirs and administrators of such survivor.

Construction:

This was a valid execution of the power of appointment and the title of one-third of the real estate passed under it. The limitation to the survivor did not unduly suspend the power of alienation (1 R. S. 724, sec. 24); the estate passed to the two sisters as tenants in common, each taking a fee, that of the one dying first being defeasible by such death, thereby vesting an absolute estate within or not beyond two lives.

The two sisters could convey an absolute fee in possession immediately upon the death of their testatrix.

Same will:

The two surviving sisters purchased and owned as tenants in common certain other real estate; one of them thereafter dying left a will by which she gave to her executors a power of sale, to be exercised during the life of her surviving sister with her concurrence, and "on the death of my said sister Maria, or as soon afterward as they may think advisable * * * and within three years from the proof of the will" the executors were empowered and directed to convert into money the real estate, etc. Maria lived more than three years after the probate of the will. Twelve years after the probate of the will the surviving execu-

tors contracted to sell the real estate to defendant, who refused to complete the purchase, claiming, among other things, that the power of sale could only be exercised within the three years.

Construction:

The power was imperative (1 R. S. 734, sec. 96), and neglect to sell during the time did not destroy the power.

A deed tendered by executor afterwards dying, could not, after such death, be delivered or treated as delivered so as to pass title; but the administrator with will annexed could make the conveyance. (2 R. S. 72, sec. 22.) *Mott* v. *Ackerman*, 92 N. Y. 539.

The will of P. gave to his daughter S. one-fifth of all his real and personal estate. By a codicil he directed that S. should have power by her will "heretofore or hereafter" executed, to dispose of the share devised and bequeathed to her, and to that end he directed that such share should be paid over by his executors to the executors or trustees named in her will in case of her death during his lifetime, but in case she survived, then that such share should be paid over to her. S. died before the testator, leaving a will.

Construction:

While the testator gave a power of appointment, which as a power the donee could not execute during the donor's lifetime, yet the further language of the codicil showed the testator's intent to be, in case of the happening of the contingency specified, to devise and bequeath by force of his own will the daughter's one-fifth to such person or persons and in such shares and proportions as she had directed or should direct in the disposition of her own property; the will of the daughter could be referred to, to define and make certain the persons to whom and the proportions in which the one-fifth should pass; the executors of the will of P. were properly required to pay over that share to the executors of the will of S. for the purposes of distribution. *Matter of Piffard*, 111 N. Y. 410, aff'g 42 Hun, 34.

"The Tilden Trust could take only through the power in the nature of that of appointment vested in the trustees; and the fact that the exercise of that power was discretionary and could not be enforced, produced no legal infirmity in the provision relating to that institution, its ability to take, and to the limitation to it dependent upon such appointment.[1]

[1] Chatteris v. Young, 6 Madd. 30; Lancashire v. Lancashire, 1 DeG. & Sm. 288; 2 Phillips, 657; Cole v. Wade, 16 Ves. 27; Perry on Trusts, sec. 508; Hill on Trustees, 490–492.

I. POWER OF DISPOSITION BY WILL.

"So far as the statute relates to the subject of the power of appointment, it provides that where under a power a disposition is directed to be made amongst several designated persons without specification of the share to be allotted to each, all of them shall be entitled in equal proportion. (1 R. S. 734, sec. 98; Real Prop. L., sec. 138.) But when the terms of the power import that the fund is to be distributed between them in such manner or proportions as the trustee may think proper, he may allot the whole to any one or more of such persons in exclusion of the other. (Id., sec. 99; Real Prop. L., sec. 138.) The trust power in such case does not cease to be imperative. (Id., sec. 97; Real Prop. L., sec. 137.) And if the trustee having such power shall die leaving it unexecuted, its execution shall be decreed in equity for the benefit equally of all the persons so designated. (Id., sec. 100; Real Prop. L., sec. 140.) These provisions of the statute are in that respect substantially declaratory of the common law.[1] It was there as it is by our statute, a trust power. And it is not important for the purposes of the question whether the designated persons are vested with the fund subject to the execution of the power, or take by reason of the power given. In the one case there is a gift expressed, and in the other implied which will be executed by decree of the court in default of execution of the power by the donee of it.[2]

"No such implication arises where there is a limitation over of the estate or fund to other objects in default of the execution of the power by the donee; and in that case the objects of the power take nothing as their beneficial interest, or the limitation to them is wholly dependent upon the execution of the power by them.[3] And although the power of appointment and selection rests in the discretion of the trustee, it is valid and may be effectually executed by him."[4] *Tilden* v. *Green*, 130 N. Y. 29; Opinion, pp. 79–81.

Where a power is given 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. *Drake* v. *Drake*, 134 N. Y. 220; s. c., 56 Hun, 590, digested p. 1001.

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[1] Swift v. Gregson, 1 T. R. 432.

[2] 1 Perry on Trusts, sec. 250; Walsh v. Wallinger, 2 Russ. & Myl. 78; Lees v. Whitely, L. R., 2 Eq. 143.

[3] Davidson v. Proctor, 19 L. J. (N. S. Ch.) 395; 14 Jur. 31; Pearce v. Vincent, 2 Myl. & K. 800; 2 Bing. (N. C.) 328, 2 Keen, 230; Goldring v. Inwood, 3 Giffard, 139.

[4] 2 Perry on Trusts, sec. 508; Brown v. Higgs, 8 Ves. 561.

I. POWER OF DISPOSITION BY WILL.

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. *Matter of Gardner*, 140 N. Y. 122, aff'g 69 Hun, 50.

S. died, leaving a will by which he gave his personal estate, after payment of certain bequests, to his daughter, with a provision that if it did not amount to a sum named his executors should sell enough of his other property to make up that amount, which legacy he desired her to keep for the benefit of her children. All of his real estate he devised to his son during life, "with the right and privilege of disposing of the same by will or devise to his children, if any he should have." In case the son died without children, the testator gave said real estate to the children of his daughter. The son died without having exercised the power given him to devise the property, and leaving children who were *in esse* at the time of the execution of the will. Action for the construction of the same.

Construction:

The authority so given to the son was a valid trust power (1 R. S. 678, sec. 95); such power was imperative (sec. 96); equity will regard that as done, which the trustee should have done, and so his children, the beneficiaries of the power, took the land in equal shares. *Smith* v. *Floyd*, 140 N. Y. 337.

From opinion.—"The eminent counsel for the appellant, however, contends that by the language employed in the creation of the power, the testator has expressly declared, or at least clearly indicated, that its execution or non-execution was to be dependent upon the will of the donee. It is insisted that the words 'right' and 'privilege' necessarily import a discretion. Such may be their signification generally, but not when used for the purpose of creating a trust power. If the testator had said that he authorized and empowered his son to devise the property to his children, it can not be doubted that an imperative trust power would have been created; but to hold that the power is only discretionary because he gave him the right and privilege to so dispose of it, would be to introduce a distinction which the difference in the form of expression does not warrant. The words are not the same, it is true, but their legal effect is. The right to do an act is the possession of the highest authority, and a privilege is a right or power specially conferred. In both cases, full and unrestricted authority is given to dispose of the testator's property for the benefit of others, and from the earliest times this has been deemed sufficient to impress the power with a trust which imposes upon the donee the duty of executing it.

There are forcible reasons why testamentary powers should be so construed. They are a part of the final act of the owner in ordering a distribution of his estate, which is not to be effectual until after his death. The testator's wish is his will, and expressions, which, in other instruments, might not be regarded as a demand, are, under such circumstances, obligatory. As was said by the learned judge who wrote in Dominick v. Sayre (3 Sandf. 555), and who was one of the framers of the statute

under consideration: 'Words of mere authority have the same efficacy in creating a trust as a positive direction. The words, in their ordinary acceptation, may be discretionary, but in a court of equity are mandatory.' In all such cases, the permission imports a power; the power implies a trust; and the trust imposes a duty. It is analogous to the rule of construction which has been applied where the legislature has by statute declared that a public officer 'may' do an act, which, if done, will result in a benefit to an individual or to the public. The authority thus conferred is mandatory and its exercise can be compelled, although the language is in form permissive and not imperative."

Where a grantee of a life estate takes also by his deed a power to alien in fee to any person by means of a will, and no person other than the grantee of the power has, by the terms of its creation, any interest in its execution, the power is a general beneficial one.

In an action by the vendor to enforce specific performance of a contract for the purchase and sale of land, plaintiff claimed title under a deed with covenant of warranty, which contained conditions substantially as follows: The grantee shall have an equal interest in the property, and shall control and direct the same after the death of the grantor; upon the death of one of the grantees the other to have such control during life; neither "shall have the right to convey by deed" without the consent of the grantor, but it may be arranged to be disposed of by will of the survivor, or by mutual will of the grantees, to take effect after the death of both. The *habendum* clause was to the grantees, "their heirs and assigns forever." The grantor was dead at the date of the deed from the grantees to plaintiff.

Construction:

Said grantees had power to alien their life estate after the death of the grantor; and so, their conveyance with warranty conveyed the fee. (1 R. S., 732–733, secs. 81–84.) *Hume* v. *Randall*, 141 N. Y. 499, rev'g 65 Hun, 437.

Distinguishing, Cutting v. Cutting, 86 N. Y. 522; Crooke v. County of Kings, 97 id. 421; Genet v. Hunt, 113 id. 158.

See, also, cases *post*, pp. 955–962.

NOTE 1.—"It is not disputed that under this deed the grantees took a power to alien in fee by means of a will to any alienee whatever, and that no person other than the grantees of this power had, by the terms of its creation, any interest in its execution. This constitutes what is termed a general beneficial power. (1 R. S., 732, secs. 77, 79; Cutting v. Cutting, 86 N. Y. 522, 531.)" (503.)

NOTE 2.—"The cases cited by defendant's counsel are Cutting v. Cutting (86 N. Y. 522); Crooke v. County of Kings (97 id. 421), and Genet v. Hunt (113 id. 158). These are cases where the legal title was in the trustee and they are the foundation for the claim that, where the tenant for life has no power to alien his life estate, the case does not come within the above statute, although the tenant may have a power to dis-

pose of the fee by will. The argument is founded upon the assumption that the life tenant has no power to alien his life interest. If he have that power the argument is inapplicable.

"Upon a careful examination of the language of this deed we are convinced that the grantees after the death of William S. Van Duzee had power to alien their life estate." (505.)

T., who was a widower, conveyed certain real estate to his children, reserving to himself a right to devise by will a life estate in one-third thereof to "any hereafter-taken wife." The grantor thereafter married, and died without executing the power. The widow was not entitled to any interest in the land; the reservation at most created a mere power, and so, to be executed or not at the pleasure of the grantor. *Towler* v. *Towler*, 142 N. Y. 371.

Persons were made arbitrators in case of any disagreement between the beneficiaries as to the actual division of the estate, or a sale and division of proceeds, but no power of appointment was conferred. *Montignani* v. *Blade*, 145 N. Y. 111, digested pp. 472–73.

In 1821, the owner in fee deeded certain lands to trustees, in trust, to pay Hettie H. the rents and profits, and to convey the premises to such persons as she might by will appoint, and in default of such appointment, then to all her lawful issue then living, as tenants in common. Hetty H. thereafter married one G., and in 1831 she and her husband brought an action in the court of chancery against their then living children and the trustees, in which it was decreed that the trustees might make leases of the premises for the term of twenty-one years, with covenants of renewal for successive terms, not exceeding three, of twenty-one years each, upon such conditions as the trustees should deem to the interest of Mrs. G. and her children. Thereupon the trustees, acting upon the authority of the decree, executed to one P., a lease for twenty-one years, in which Mrs. G. joined, with covenants for three renewals of twenty-one years each. In 1855, Mrs. G. died, leaving six children and a will, in which she exercised the power of appointment given by the trust deed, by directing the trustees to convey the premises to a trustee named, in trust, to pay the profits of a sixth part thereof to each of her children, and upon the death of each child to convey a fee to its heir at law. There were two renewals of the lease, the last of which expired in 1894, and the successors of P., the original lessee, demanded a third renewal, being the last provided for by the decree, and an action was brought to obtain an adjudication as to whether, as matter of law, they were entitled to such renewal, as against the estate of Mrs. G. *Held*, on demurrer to a complaint alleg-

ing the above facts, that the trust created by the deed being for the life of Mrs. G., terminated with her death, and the powers of the trustees were then at an end, except to convey the trust property as directed by the deed, and that they, therefore, had no power under the deed to renew leases, or in the leases executed by them to provide for the renewals of leases after her death; *but held further*, that under the deed the infant children of Mrs. G. were conditional remaindermen; that they took the fee subject to the power of appointment by Mrs. G., and at that time had an interest which they, if adults, had the power to lease; that being infants, the court of chancery could exercise that power for them (2 R. S. 194, secs. 170, 175), which it did by its decree, which decree showed that it was made in an action seeking leave to lease the real estate of infants, of the subject matter of which action the court of chancery had jurisdiction and in which action the proper parties were before it; that upon the execution by Mrs. G., in her will, of the power of appointment given by the deed, her children were deprived of their interest as remaindermen, but were given another and different interest in the premises, which they took under her will and subject to all the burdens imposed by her, including the leases, in the execution of which she had joined, and which became binding upon her and her estate; and, consequently, that the tenants were entitled to the third renewal. *Gomez* v. *Gomez*, 147 N. Y. 195; s. c., 81 Hun, 566.

By a marriage settlement made in 1841 property was conveyed to a trustee, the wife being empowered to limit, devise, order or appoint, either by her last will and testament in writing or by any other writing, the property held in trust to such persons as she might see fit. The wife died in 1875, leaving a will executed in 1874. *Held*, that though at the time of the execution of the settlement the law did not permit the wife to transfer the legal title to the land by a will, yet, that at the time of her death the law did authorize her so to do, and that a devise thereof by her to her executors vested the legal title in them. *Albrecht* v. *Pell*, 11 Hun, 127.

The right of one to have lands conveyed to his appointee descends to his heirs. *Hubbard* v. *Gilbert*, 25 Hun, 596.

A life estate, followed by a devise to "the heirs and assigns" of the life tenant, gives a power of appointment. *Goetz* v. *Ballou*, 64 Hun, 490.

Testamentary power of appointment—express trust—suspension of the power of alienation. *Maitland* v. *Baldwin*, 70 Hun, 267.

Will creating a trust estate—a power of appointment may be void without destroying the trust—a beneficiary thereunder may be seized of a vested remainder therein, without merger—a paper referred to in the will, though void as a testamentary disposition, considered to ascertain the testator's intent. *Martin* v. *Pine*, 79 Hun, 426.

II. POWER OF DISPOSITION, WHEN ABSOLUTE.

Sections one twenty-nine to one thirty-four relate to this subject, all of which, with pertinent decisions and references, will be found under

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"V. The estate or interest taken by the grantor of the power," *post*, p. 955.

III. POWER OF SELECTION AND ALLOTMENT.

This subject involves the Real Prop. L., secs. 137, 138, 140, 141, which are treated under "VI. The execution of powers," to which place reference is made for statutes and decisions bearing on the subject.

IV. POWER OF SALE.[1]

1. Power of trustee to sell and re-invest.
Belmont v. O'Brien, 12 N. Y. 394.

2. Legislative power to authorize a sale of the land of infants.
Leggett v. Hunter, 19 N. Y. 445.

3. Title vesting subject to the execution of the power.
Crittenden v. Fairchild, 41 N. Y. 289; Kinnier v. Rogers, 42 id. 531; Skinner v. Quinn, 43 id. 99; Van Vechten v. Keator, 63 id. 52; Fisher v. Banta, 66 id. 468; Ackerman v. Gorton, 67 id. 63; Van Axte v. Fisher, 117 id. 402; Dana v. Murray, 122 id. 604, 613.

4. Right to possession and to rents and profits pending the execution of the power.
Lent v. Howard, 89 N. Y. 169; Ogsbury v. Ogsbury, 115 id. 290.

5. Power in trust to convert into personalty for convenience in distribution, etc.
Kinnier v. Rogers, 42 N. Y. 531.

6. Power of sale carries no right to collect rents and profits.
Moncrief v. Ross, 50 N. Y. 431.

7. Power to sell to pay debts.
Van Vechten v. Keator, 63 N. Y. 52.

8. Lien of judgment against taker of fee is transferred to proceeds in case of sale under a power.
Ackerman v. Gorton, 67 N. Y. 63; Sayles v. Best, 140 id. 368.

9. Devise of proceeds of sale of land is a devise of land.
Byrnes v. Baer, 86 N. Y. 210.

10. Power of sale covers property acquired after execution of the will.
Byrnes v. Baer, 86 N. Y. 210.

11. Power to collect and pay over dividends of stock does not necessarily vest title in grantee of the power, but the title may be vested in another.
Onondaga Trust & Deposit Co. v. Price, 87 N. Y. 542.

12. Power of sale revoked by birth of posthumous child.
Smith v. Robertson, 89 N. Y. 555.

13. Direction for delay in executing.
Robert v. Corning, 89 N. Y. 225; see cases collected at pp. 373–74.

[1] See Equitable Conversion, p. 917. Execution of Powers, p. 973. Qualified Powers, p. 1009. Real Prop. L., sec. 131. "Power of appointment not preventing vesting," *ante*, p. 307.

IV. POWER OF SALE.

14. Duration of power of sale.
Phillips v. Davies, 92 N. Y. 199; Cotton v. Burkelman, 142 id. 160. See, also, *post*, p. 1012.

15. When trust and power are irreconcilable, trust must yield to power.
Crooke v. County of Kings, 97 N. Y. 421.

16. When power of disposition operated on the remainder.
Crooke v. County of Kings, 97 N. Y. 421.

17. Power of sale defeated by election of beneficiaries to take the land.
Armstrong v. McKelvey, 104 N. Y. 179; Mellen v. Mellen, 139 id. 210, and cases gathered in connection therewith; McDonald v. O'Hara, 144 id. 566.

18. Power of sale does not include power to pledge.
Brown v. Farmers' Loan & Trust Co., 117 N. Y. 266.

19. Power of sale subverting lien of judgment.
Rose v. Hatch, 125 N. Y. 427.

20. Power of sale to mortgagee.
Sanders v. Soutter, 126 N. Y. 193.

21. Power of sale—when presumed to be for the benefit of the estate and not for benefit of executors.
Sweeney v. Warren, 127 N. Y. 426; Forster v. Winfield, 142 id. 327–8.

22. Devise to sell construed as a power.
Matter of Tienken, 131 N. Y. 391.

23. Sale by person as donee of a power, and not as executrix—duty of donee of power as regards remainderman.
Matter of Blauvelt, 131 N. Y. 249. See *ante*, p. 151.

24. Land under contract of sale included under power of sale.
Holly v. Hirsch, 135 N. Y. 590.

25. Influence of fact that a power of sale is necessary in order to give full effect to the will in determining whether such power has been given.
Cahill v. Russell, 140 N. Y. 402.

26. Power of sale for general purposes of administration.
Cahill v. Russell, 140 N. Y. 402; Matter of Bolton, 146 id. 257.

27. When power of sale was for benefit of life tenant and remainderman.
Cotton v. Burkelman, 142 N. Y. 160.

In contemplation of marriage, lands were conveyed to trustees to receive the rents and profits and apply them to the separate use of the wife during life, and the trust deed contained a power to the trustees to sell the lands and reinvest the proceeds and hold them so reinvested to the same use.

Construction:

The power was valid, and a conveyance by the trustees passed a good title.

Such a power is not repugnant to the trust created by the deed; nor is the conveyance by the trustees in violation of the statute (1 R. S. 730,

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secs. 63, 65), prohibiting the alienation of trust estates. *Belmont* v. *O'Brien*, 12 N. Y. 394.

See, also, Miller v. Wright, 109 N. Y. 194.

The legislature, in the exercise of its tutelary power over the persons and property of infants and others under disability, may provide, by public or private acts, for converting real estate, in which they have vested or contingent interests, into personal property or securities, when necessary for their benefit, and may exercise this power as well in respect to the rights of persons *in esse* as to the contingent interests of persons yet to be born.

Accordingly, an act of the legislature (ch. 442 of 1853) is constitutional, authorizing the supreme court, upon the petition of the *cestuis que trust*, to direct the sale of any part or parts of the trust estate from time to time, as might be judged calculated to promote the interests of the infants, whether yet in being or not; providing that the proceeds should be applied by the trustees in paying taxes and incumbrances upon the trust property, or in repairing and improving the unsold portions or invested for the benefit of those who might become interested under the will; and all conveyances under the act, if executed by the trustee, should vest in the grantee a fee simple absolute against all persons, whether in being or not, who might have or acquire any interest under the will.

The trustee's conveyance under the act conveys an indefeasible title against any body who might otherwise at any time claim an interest under the will, irrespective of the power of sale conferred on him by that instrument. *Leggett* v. *Hunter*, 19 N. Y. 445.

Powers v. Bergen (2 Seld. 358), considered and distinguished. See Brevoort v. Grace, 53 N. Y. 245, 256; Smith v. Bowen, 35 id. 83: Russell v. Russell, 36 id. 581.

An insurance company transferred to the plaintiffs, as trustees, a promissory note as a security for the liabilities of persons who had lent their credit to the company, with power to sell the note, at public or private sale, without notice: *Held*, that this power of sale did not take away the power which the trustees took by the mere transfer of the note to sue upon it in their own names, without joining the *cestuis que trust*. *Nelson* v. *Eaton*, 26 N. Y. 410.

Gift by will of one-fifth of residue of property, real and personal, to children and grandchildren of husband (grandchildren to take parents' share) and also one-fifth to each of their brothers (naming them) and one-fifth to the children of deceased sister, and power of sale to executors.

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Construction:

(1) Title vested in devisees subject to execution of the power.[1]

(2) There was no repugnancy between devise and power of sale. *Crittenden* v. *Fairchild*, 41 N. Y. 289.

This is the general rule, Smith v. Bowen, 35 N. Y. 83; Vernon v. Vernon, 53 id. 351; Chamberlin v. Taylor, 105 id. 185; Harvey v. Brisbin, 143 id. 151; Mellen v. Mellen, 139 id. 210; Clift v. Moses, 116 id. 144; Drake v. Paige, 127 id. 562; Henderson v. Henderson, 113 id. 1, 14.

Devise, after directing payment of debts, and making various bequests, and special devise of "all the rest, residue and remainder of my estate, both real and personal" to children and authorization to executors "to sell all or any part of my real estate at any time, in their discretion and to execute valid deeds and conveyances of same to purchasers."

Construction:

(1) The authority to executors was a power in trust to convert into personalty for convenience in distribution to avoid delay, etc., and was valid.

(2) The power thus given was not repugnant to the previous devise to the children.[2]

(3) Such power of sale did not charge the real estate embraced in the residuary clause with payments of debts and bequests. *Kinnier* v. *Rogers*, 42 N. Y. 531.

Gift to executor *in trust* to pay and apply net income equally to use and support of B., mother, and C., wife, during B.'s life and also to invest a sum and apply income to support of certain legatees, and gift of rest of, and remainder of his estate to C. and authorization to execute, to sell and convey real estate after B.'s death and pay over proceeds to C.

Construction:

(1) Power to sell was valid as a power in trust and not repugnant to residuary devise.[3] *Skinner* v. *Quinn*, 43 N. Y. 99.

M., by his will, devised the net income arising from his real estate to his mother during her life, and upon her death directed his executor to sell all his real estate with the exception of one piece, and out of the proceeds to pay his sister J. $20,000 and the residue to his sister A.

[1]Downing v. Marshall, 23 N. Y. 379, 380; 1 R. S. 729, sec. 56; 4 Kent, 321, 322, 8th ed. 338, 339.

[2]See Reynolds v. Reynolds, 16 N. Y. 261; Tracy v. Tracy, 15 Barb. 503; Brudenell v. Boughton, 2 Atkins, 268.

[3]1 R. S. 728, sec. 55; 2 N. Y. 297; 42 id. 531.

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The mother died during the lifetime of the testator. The testator died, leaving plaintiff (his brother) and the two sisters his only heirs. After his death the executor received the rents of the real estate. Plaintiff claimed one-third thereof, and asked for an accounting. The will gave the executor no title to the real estate, or right to receive the rents and profits; but as the sale was directed to be made immediately after the death of the mother, and the direction was absolute, by this power the land was equitably converted into money, and would be so regarded, and the entire proceeds belonged to the sisters. *Moncrief* v. *Ross*, 50 N. Y. 431.

Germond v. Jones (2 Hill, 569), and Campbell v. Johnson (1 Sandf. Ch. 148), distinguished.

(1) Real estate was charged with payment of debts and power was given to executors to sell sufficient for that purpose.

(2) There was a bequest of personalty to B.

(3) Devise of all real estate to executors in trust for benefit of B. and her husband for their lives, and remainder over to their children.

Construction:

The devise was subject to power in trust by first clause vested in executors.

So much of land as was needed to pay debts for which resort could be had to executors was converted into personalty; but real estate could not be sold to pay mortgage thereon. *Van Vechten* v. *Keator*, 63 N. Y. 52.

Citing on question of mortgages, 1 R. S. 749, sec. 4; Johnson v. Corbett, 11 Paige, 265; House v. House, 10 id. 158.

NOTE.—It is only when different clauses of a will are irreconcilable upon any reasonable interpretation, that the latest clause is preferred. Van Nostrand v. Moore, 52 N. Y. 12.

Land passed to heirs subject to power of sale. *Fisher* v. *Banta*, 66 N. Y. 468, digested p. 928.

Estate vested subject to execution of a power. Lien of a judgment against the taker of a fee was subject to power of sale and transferred to the proceeds in case of sale. *Ackerman* v. *Gorton*, 67 N. Y. 63, digested p. 301.

A devise of the proceeds of land directed to be sold by the executors is a devise of land within the statute, although the naked title remains in the heirs until sale.

The will of J., after a gift to his wife of his household furniture and of the use of his dwelling-house during her life, directed his executors

to invest "all the rest, residue and remainder" of his estate in bonds and mortgages; and after direction as to the disposition of the income therefrom during the lives of his wife and a daughter, upon the death of both, gave the principal to the children of the daughter, etc. The testator acquired certain lands after the execution of the will.

Construction:

The direction applied to all the real estate of the testator; it fairly implied a power of sale for conversion in the executors; and said lands passed under the will. *Byrnes* v. *Baer*, 86 N. Y. 210.

Power given by will to executors to collect and pay over dividends on the stock of an incorporated company, does not necessarily vest in them title to the stock; but the title may be lodged in another person.

Codicil, in lieu of a trust created by will for benefit of L., granddaughter, gave her $2,000 of the stock of an incorporated company "to draw the income arising therefrom during her lifetime, and at her death to dispose of the same as she shall see fit."

The executors were directed to pay over to her the dividends paid on the stock. The executors set apart certificates of the stock to the amount specified, which one of them afterwards delivered and caused to be transferred on the books of the company to defendant in payment of an individual debt. The action was brought by a receiver appointed *pendente lite* in action to remove said executor for conversion of stock.

Construction:

The action was not maintainable, at least without making L. a party.

The codicil gave directly to L. the title to the stock, subject to the power in the executors to collect and pay over the dividends.

The executors had no power of disposition without consent of L.; her title could not be extinguished by a proceeding to which she was not a party. *Onondaga Trust & Deposit Co.* v. *Price*, 87 N. Y. 542.

NOTE 1. Cases relating to real estate have no application. (547.)

NOTE 2. When trust could be executed without such an estate it has been held to be a mere power of management and not to give the legal title to the trustee. (547.) Post v. Hover, 33 N. Y. 593.

Where a testator, whose will authorized his executor to sell all his real and personal estate, and dispose of the proceeds, after the making thereof, had a child born, and thereafter died leaving said child his only heir at law, and "unprovided for by any settlement, and neither provided for nor in any way mentioned in his will," held, that under

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the statute (2 R. S. 65, sec. 49), the whole estate descended to the child the same as if the father had died intestate; that he did not take under the will or subject to any of its provisions; and that where the executor sold the real estate, the remedy of the child was not confined to a pursuit of proceeds of sale, but that she could maintain ejectment to recover the same.

Where, however, it appeared that the real estate was at the time of the testator's death subject to a mortgage which the grantee paid, held, that the judgment should be without prejudice to his right to a lien for the amount so paid, or to be subrogated to the rights of the mortgage. *Smith* v. *Robertson*, 89 N. Y. 555.

Statute against perpetuities is not violated, when the directions for division or conversion of property do not involve delay. *Robert* v. *Corning*, 89 N. Y. 225, digested p. 437.

Where a will contains no specific devise of the testator's real estate, but a bare power of sale is given to the executors and the title descends to the heirs of the testator, subject to the execution of the power, the right of possession follows the title and the heirs are entitled at law to the intermediate rents and profits.

If, however, the power of sale operates as an immediate conversion of the land into personalty, accompanied with a gift of the proceeds, in equity the intermediate rents and profits go with and are deemed to be a part of the converted fund; the heir may be compelled to account therefor to the executor, and the latter to the beneficiary, for so much thereof as is received by him, as well as for the proceeds of sales. *Lent* v. *Howard*, 89 N. Y. 169.

See Moncrief v. Ross, 50 N. Y. 431; Harper v. Chatham Nat. Bank, 17 Misc. 221; Campbell v. Johnson, 1 Sandf. Ch. 148; Clift v. Moses, 116 N. Y. 144.

M., at the time of making her will, and of her death, owned a large amount of real estate but only a small amount of personal property. By her will, after providing for the payment of debts, she first gave her estate, real and personal, to her executors in trust, to rent, etc., and apply the rents, income, etc., to the use of her husband during his life. Then followed ten clauses purporting to create separate and independent trusts; also numerous legacies, all of which would substantially fail in the absence of a trust estate, or power in trust vested in the executors, by force of which the real estate could be sold and converted into money. Certain real estate was also specifically devised, and the executors were directed to pay off incumbrances thereon, which, in the absence of such power, could not be done. The clause appointing executors contained the following: "and during the lifetime of my

said husband and my said executors, and such and whichever of them as shall act, are authorized and empowered, by and with the consent of my said husband, to sell and dispose of any part of my estate, real and personal, not specifically bequeathed." Action for a construction of the will.

Construction:

(1) Said clause was to be construed as conferring upon her executors a power of sale which, during the life of her husband, was to be exercised only with his consent, but thereafter continuing to exist; (2) therefore, the executors had power to sell after the death of the husband, and convert into money so much of the real estate as was not specifically devised. *Phillips* v. *Davies*, 92 N. Y. 199.

When trust and power are irreconcilable, trust must yield to the power. Trust for benefit of daughter for her life, and declaration that devise was on the condition "subject to the power and authority of daughter to dispose of the estate, both real and personal, by grant or devise." The power operated on the remainder, and trust related to life estate and both were valid. *Crooke* v. *County of Kings*, 97 N. Y. 421, digested p. 444.

The will of S. directed his executors to sell his real and personal estate, and, after paying his debts, funeral expenses and certain legacies, to divide the balance among the defendants herein. The executor sold and conveyed the real estate to B. Defendants thereupon brought an action against the executors and B. to set aside the conveyance. The judgment therein granted the relief sought, and also decided that the land descended to the devisees, subject to the execution of the power, as the time for the execution thereof had expired, and that they were entitled to the possession as rightful owners, freed from the trusts. In an action under the Code of Civil Procedure (sec. 1843), to charge defendants as such devisees with a debt of the testator. *Held*, it was to be assumed that the provision, above referred to, was inserted in said judgment at the request and by the procurement of the defendants and when they took possession under the judgment this established their election to avoid a sale and take their legacies in the land itself instead of the proceeds; that they had the right to do this, no other rights intervening, or being prejudiced; that it might be, while this reconversion changed the legatees to devisees, it did not divest the heirs at law of their legal title, yet such legal title was purely formal, and the effect of defendants' election was, at least, to vest in them the equitable owner-

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ship and the entire beneficial interest, and therefore the action was maintainable. *Armstrong* v. *McKelvey*, 104 N. Y. 179, aff'g 39 Hun, 213.

The will of O. contained a direction to the executrix to sell the testator's real estate within five years of his decease for the purpose of paying debts and legacies. By a subsequent clause she was authorized to sell in lots or parcels, or altogether, in her discretion. The rents and profits of the land were given to her in her individual right so long as it remained unsold.

There was no equitable conversion by the will of the land into personalty at the death, as plaintiff was entitled to possession and the rents and profits until a sale. *Ogsbury* v. *Ogsbury*, 115 N. Y. 290.

Power of sale—when it does not include power to pledge. *Brown* v. *Farmers' Loan and Trust Co.*, 117 N. Y. 266.

See, Power to mortgage, lease or pledge, *post*, p. 951.

Estate was given subject to power of sale. *Van Axte* v. *Fisher*, 117 N. Y. 401.

"Where the power, under the express provision of the statute, is imperative and its execution will be compelled by the court, it operates to suspend the vesting of the fee until the power is executed or the estate is terminated. (Delafield v. Shipman, 103 N. Y. 463; Delaney v. McCormack, 88 id. 174.)" *Dana* v. *Murray*, 122 id. 604, 613.

A power of sale to pay debts subverted the lien of judgment against donee of power as an individual, although the motive for the sale was wrongful. *Rose* v. *Hatch*, 125 N. Y. 427.

Under, and by an instrument which is in legal effect a mortgage, a power may be vested in the mortgagee to sell and convey an absolute title to the mortgaged property. *Sanders* v. *Soutter*, 126 N. Y. 193.

When a power is conferred upon executors by virtue of the office, and not upon them as individuals, in the absence of evidence that it was intended to be beneficial to them, the presumption is that it was given for the purpose of being executed in the interest of the estate, and not for their own benefit. *Sweeney* v. *Warren*, 127 N. Y. 426.

Devise in terms to executors or trustees to sell or mortgage, may be construed as a power, and the title descends to heirs and devisees. *Steinhardt* v. *Cunningham*, 130 N. Y. 292.

Power of sale was discretionary, if given solely for convenience of division, and did not enlarge life estates in trustees. *Matter of Tienken*, 131 N. Y. 391.

The will of B. gave to his widow the use of all his estate during widowhood, and authorized her to sell any of the real estate as to her

should seem just. She and the testator's two daughters were made executrices. She and one of the daughters qualified. The widow sold several pieces of real estate, and for loss in reinvesting the proceeds, which were received by her, she and the other executrix were charged on settlement of their accounts as executrices.

Construction:

Error; while the widow took but a life estate and the proceeds of the sales were to be used by her as life tenant only, the sales were made by her, not as executrix, but as donee of the power of sale; she was entitled to sell without notice to her coexecutrix, and to receive the proceeds, and her coexecutrix was not guilty of negligence in permitting her to so receive them. Croft v. Williams, 88 N. Y. 384; Paulding v. Sharkey, id. 432; Bruen v. Gillet, 115 id. 10.

The widow could not be held liable for the losses, in the proceeding for an accounting.

It seems, the remaindermen would have had the right, before the purchase money was paid over, to ask a court of equity to make some condition in the way of securing the safety of the fund before the life tenant should be permitted to enjoy its possession, if there were doubts as to her solvency.

It seems, also, the remaindermen may take proceedings to compel security to be given by the life tenant for the safety of the fund and its forthcoming at the proper time. *Matter of Blauvelt*, 131 N. Y. 249, rev'g 60 Hun, 394.

Power of sale included land under contract of sale made by the testator. *Holly* v. *Hirsch*, 135 N. Y. 590, digested p. 887.

It seems, that when by will, land is directed to be sold by the executor and the proceeds divided among designated beneficiaries, the parties beneficially interested, provided they are competent and of full age, and the gift is immediate and not in trust, may, before a sale has been made, elect to take the land, and when they have so elected and the election has been made known, the power of the executor to sell ceases, and he may not thereafter proceed to execute it.

It seems, also, in such a case an action will lie in behalf of the parties interested to enjoin the executor from a threatened execution of the power. (See Butler v. Johnson, 111 N. Y. 204.)

An election, however, by one of the parties, without the concurrence of the others, will not defeat the power. *Mellen* v. *Mellen*, 139 N. Y. 210, aff'g 60 Hun, 151.

See, Hetzel v. Barber, 69 N. Y. 1; Prentice v. Janssen, 79 id. 478, digested p. 929.

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McDonald v. O'Hara, 144 id. 566; Savage v. Sherman, 24 Hun, 307; 87 N. Y. 277; Armstrong v. McKelvey, 104 id. 179; Morse v. Morse, 85 id. 53; Underwood v. Curtis, 127 id. 523.

From opinion.—"The doctrine referred to has been considered and applied by this court in several cases. (Hetzel v. Barber, 69 N. Y. 1; Prentice v. Janssen, 79 id. 478.) Jarman says (1 Jar. 599), that the expressions or acts declaratory of an intention to make an election, though it is said they may be slight, 'must be unequivocal,' and in Prentice v. Janssen the rule stated in Leigh and Dalzell on Equitable Conversions, 'that a slight expression of intention will be considered sufficient,' is quoted with approval. * * * * *

"But we are of opinion that the complaint is insufficient to sustain this cause of action for the reason that it is neither directly alleged that the plaintiff and the other persons interested and deriving title as original devisees of Abner Mellen, or under them, had elected to take the land in its unconverted state, freed from the power of sale, nor are any facts averred from which an election can be legally inferred. The allegation that the devisees took possession of and occupied and controlled the land devised as owners, and appropriated the rents and profits, is not inconsistent with an outstanding power of sale in the executor. The devisees had the legal title to the land as tenants in common, and as such had the right to the possession and to the rents and profits. They may, nevertheless, have desired that the power of sale should continue in the executor, for convenience in passing the title upon a sale, or for other reasons. The commencement of the partition action by the plaintiff naturally signified her election, and if all the other parties interested had joined in asking a partition this would, I think, have amounted to an election that the power of sale in the executor should not be exercised. It would show an intention by all the parties interested to sever the tenancy in common and take their respective shares of the land in severalty. But the other parties interested resisted the partition, and an election by one of the parties, without the concurrence of the others, would not defeat the power. A long lapse of time, during which a power of sale remained unexecuted, where there was no obstacle to its execution, might alone, or with other circumstances, affect the presumption of an election. In Kirkman v. Miles (13 Ves. 338), Sir William Grant was of opinion that two years was too short a time to presume an election (see, also, Brown v. Brown, 33 Beav. 399), and Jarman says (vol. 1, p. 600): 'But possession for two or three years by tenants in common (without more), has been held insufficient.' In the present case less than three years had elapsed between the death of the testator and the advertisement of sale by the executor. The renewal of the lease of some of the property, in March, 1890, by the parties owning the land, for the period of a year, would be a significant and probably a decisive fact showing an election, if the act was inconsistent with the continued existence of the power of sale. Great weight was given by Lord Hardwicke in Crabtree v. Bramble (3 Atk. 680), to the circumstance that the parties beneficially entitled, under a will had executed a lease of the premises for a term, upon the point of an election. But in that case the trustee for sale took under the English law title to the estate as trustee, and the lease was in hostility to his right, and the lessors had bound themselves to make good the lease. The act was inconsistent with the continuation of the power of sale, and was significant of an intention on the part of the lessors to take the land and not the proceeds. The lease, in the present case, bound the land, and was made by the legal owners, and was not in hostility to the power of sale. A purchaser under the power would take subject to the lease.

"There is no repugnancy between a devise in fee and a subsequent power of sale given to the executor for the benefit of the devisees. This is a common incident of

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testamentary dispositions. The title to the lands vested in the widow and children of Abner Mellen under the devise, and was a fee, subject to the power of sale given to the executor. In case of a sale under the power, the title of the devisees in the land would be divested and an interest in the proceeds substituted. Crittenden v. Fairchild, 41 N. Y. 289." (219-220.)

Where a power to sell real estate is given to executors after the expiration of a life estate, or when the youngest child becomes of age, with a direction to divide the proceeds equally among the testator's legal heirs, the heirs take the fee of the remainder subject to the execution of the power of sale; and upon the recovery of a judgment against one of them before the time arrives when the power can be executed, the judgment creditor acquires a lien upon the heir's interest in the land, which follows and attaches to his interest in the proceeds, when a sale is had under the power. *Sayles* v. *Best*, 140 N. Y. 368.

See Ackerman v. Gorton, 67 N. Y. 63.

Where words are used in a will fairly expressive of an intent that the executors shall sell real estate, but the import thereof is uncertain or equivocal, in determining whether a power of sale was intended, the fact that a sale is necessary in order to give full effect to the will may properly be permitted to have great weight in the construction of the instrument.

Formal words are not necessary to create a power, and if it appears by a will that a power of sale was intended, a sale will be supported, however obscurely the intention may be expressed.

B., by the first clause of her will, gave to a sister a legacy, and in the next clause gave to her the use of a portion of certain premises, "until the sale and conveyance of said premises" by the executor as thereinafter provided. The will then gave various legacies, including one to the only heir at law of the testatrix, an infant grandson. There was no residuary clause. An executor was appointed, but no power of sale was conferred upon him in express terms. In a codicil executed after the death of the sister, the testatrix revoked the legacy to her, but did not change the second clause. By other codicils she revoked various legacies, and the last contained a clause giving the residue of her estate, real and personal, to her grandson. The legacies not revoked amounted to $13,500. The net personal estate of the testatrix at her death did not exceed $3,000. The said premises were valued at $12,000 and the testatrix owned an equitable interest in other real estate worth $2,000. Action for the construction of the will.

Construction:

A power to sell said premises was intended to be and was given to the executor, in order to convert the same into personalty and render it

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available for the general purposes of administration.[1] *Cahill* v. *Russell*, 140 N. Y. 402.

Before a gift to executors *eo nomine* can be held to vest in them individually, the intention that it should so vest must be plainly manifest.

The will of F. empowered his executors, two in number, to sell any of the real estate of which he died seized, and out of the proceeds "which they are to receive as trustees and in trust to pay any debts;" the net residue after payment of all debts he gave to the "executors and the survivor of them as joint tenants." Then followed this clause: "I have entire confidence that they will make such disposition of such residue as under the circumstances, were I alive and to be consulted, they know would meet my approval." But one of the executors qualified; they both, as individuals, contracted to sell to defendant a portion of the lands of which the testator died seized. *Held*, that plaintiffs did not take title to the real estate as individuals, and as such could not convey title. *Forster* v. *Winfield*, 142 N. Y. 327–8.

The will of C. gave to his wife all of his property during life, charging upon it the support of his mother. The wife was made sole executrix with full power to sell and dispose of any part of the real estate in her discretion and to invest the proceeds as she might deem best for the benefit of M., their adopted daughter, to whom the remainder in fee was given. M. died after the death of the testator, leaving a son surviving. Thereafter the executrix contracted to sell and convey a portion of the real estate of which C. died seized. In an action to compel specific performance of the contract, *held*, that the power of sale was not given for the benefit of the remaindermen simply, but its chief purpose was the benefit and safety of the life tenant; and so, that the power was not extinguished by the death of M. and the deed of the executrix was sufficient to carry the fee. *Cotton* v. *Burkelman*, 142 N. Y. 160.

Sweeney v. Warren, 127 N. Y. 434, distinguished.

While, where a will contains an imperative direction to the executors to sell the real estate and divide the proceeds, the persons who are exclusively entitled to the fund arising from the sale may, if they so elect prior to a sale, take the real estate in its unconverted form,[2] there must be a concurrence of all the beneficiaries in the election in order to take the real estate out of the operation of the power of sale.

[1] Erwin v. Loper, 43 N. Y. 521; Matter of Hood, 85 id. 561; Glacius v. Fogel, 88 id. 434; Matter of Powers, 124 id. 361; In re Gantert, 136 id. 109.

[2] Story's Eq. sec. 793; Hetzel v. Barber, 69 N. Y. 1–11; Prentice v. Janssen, 79 id. 478–485; Mellen v. Mellen, 139 id. 210–220.

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The will of J. directed his executors to sell his residuary real estate, divide the same in seven equal parts and pay one part to each of the testator's six sisters and the other to the children of a deceased brother. The testator died seized of certain real estate which the sole surviving executor advertised for sale. In an action brought by one of the sisters to restrain the sale, it appeared that all of the beneficiaries, except one of the sisters and one of the children of the deceased brother, who was a minor, joined with the plaintiff in the request not to sell, and that an injunction restraining the sale issue.

Construction:

The direction to sell contained in the will was imperative and operated to convert the realty into personalty;[1] assuming the request amounted to an election to take the land as such, the election was incomplete because not made by all of the beneficiaries; and so, an application to continue a temporary injunction was properly denied. *McDonald* v. *O'Hara*, 144 N. Y. 566.

See Mellen v. Mellen, 139 N. Y. 210, digested *ante*.

By the will of B. his executors were empowered to sell any and all of his real estate when in their judgment they might deem it for the best interest of the estate. The executors sold the real estate; they paid, in discharge of the testator's debts, a sum in excess of that realized from the personalty. Proceedings for the final accounting by the executors.

Construction:

Before distributing the proceeds of the sale among the residuary devisees, they were entitled to reimburse themselves therefrom for the sum so paid in excess of personalty, and were entitled to a credit for that sum, and this, without regard to the question as to whether the power of sale was given for the purpose of paying debts.[2] *Matter of Bolton*, 146 N. Y. 257.

The testator authorized his executors to sell his real estate whenever they and his wife (his executrix), unanimously thought that such sale would be advantageous to her estate. After the decease of his wife, his surviving executors were authorized to sell the real property. *House* v. *Raymond*, 3 Hun, 44.

Power of sale contained in will, not to be exercised during continuance of two lives in being—when valid—power in trust—when created. *Blanchard* v. *Blanchard*, 4 Hun, 287, aff'd 70 N. Y. 615.

[1] Delafield v. Barlow, 107 N. Y. 535.

[2] Erwin v. Loper, 43 N. Y. 521; Hood v. Hood, 85 id. 561; Glacius v. Fogel, 88 id. 434; Matter of Powers, 124 id. 361; Matter of Gantert, 136 id. 109; Cahill v. Russell, 140 id. 402.

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Power of sale—title to real estate subject to, is in heirs until sale. *People* v. *Scott*, 8 Hun, 566.

Title to real estate vested in devisees subject to power of sale—right of the administrator with the will annexed to exercise a power of sale. *Bingham* v. *Jones*, 25 Hun, 6.

Power of sale—dedication of land to use of public street by an executor. *Bloomfield* v. *Ketcham*, 25 Hun, 218, rev'd 95 N. Y. 657.

When the executors must sell the real estate—how far the court will control the discretion vested in them by the testator—right of the owner of the life interest to compel the trustee to account. *Hancox* v. *Wall*, 28 Hun, 214.

Right of an executrix to sell under a general beneficial power. *Leonard* v. *American Bap. Home Mis. Society*, 35 Hun, 290.

When a power to sell real estate will be implied—restrictions on the time of sale. *Stewart* v. *Hamilton*, 38 Hun, 19.

Construction of a power to dispose of property by will—when it will be deemed executed by the use of general language in the will of the devisee of the power. *Thomas* v. *Snyder*, 43 Hun, 14.

When no trust is created—when lands descend to the testator's heirs subject to a power of sale—when an action for partition may be maintained, although the power of sale is given to the executors of the testator. *Purdy* v. *Wright*, 44 Hun, 239.

Plaintiffs, claiming as remaindermen under the will of one Legern, to recover for waste by a tenant for life. The will, after directing the payment of debts and specifying certain bequests and devises, among which was an estate for life in certain real estate, gave the residue of his estate, real and personal, to his "heirs, to be equally divided between them, share and share alike, including my wife," and by a subsequent clause gave all his real and personal estate, of whatever nature or kind, to his executors in trust for the payment of the debts and legacies, with power to sell and dispose of the same at public or private sale, at such time or times, and upon such terms and in such manner as to them should seem meet. A motion to dismiss the complaint was granted upon the ground that the plaintiffs had not shown either title or possession of the premises and could not maintain the action.

Construction:

(1) Error. (2) The trust to pay debts and legacies vested no estate in the trustees, as they were not authorized to receive the rents and profits, nor entitled to the possession of the real estate. (3) Until the execution of the power, the fee was in the heirs subject to the estate of the tenant for life.

It seems, that if this were a case in equity the judgment appealed from might have been sustained upon the doctrine of equitable conversion, as the gift of the use of the land to tenant for life was accompanied by an imperative direction that upon his death such land should be sold by the executors, or the survivor of them, and be divided equally among the heirs. *Bouton* v. *Thomas*, 46 Hun, 6.

Power of sale—construction of the provisions of a will conferring a power of sale upon the executors. *Knapp* v. *Knapp*, 46 Hun, 190.

Power of sale—where no donee of the power is designated in the will, the power is vested in the executor. *Officer* v. *Board of Home Missions*, 47 Hun, 352.

Life estate to a widow, one of the executors, with power to direct a sale of the property, does not give purchaser, to whom she has executed a deed of a part designated, power to compel a deed from the other executor: she can not fix the price. *Steves* v. *Weaver*, 49 Hun, 267.

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Will—construction of, as to a power being given by implication to a trustee to sell real estate included in the residue of the estate devised in trust. *Bijur* v. *Bijur*, 49 Hun, 235.

Powers of sale to executors—what facts appearing of record show that a sale thereunder was not made in good faith and is invalid. *McPherson* v. *Smith*, 49 Hun, 254.

Power of sale in an executrix—is not a bar to an action for partition by a party succeeding to an interest in the land covered by the power. *Duffy* v. *Duffy*, 50 Hun, 266, aff'd 130 N. Y. 654.

Power of sale does not give title. *Matter of McCaffrey*, 50 Hun, 371.

What provisions confer, by implication, a power)of sale upon the executor. *Van Winkle* v. *Fowler*, 52 Hun, 355.

Power of sale, when it survives the death of the life tenant. *Millspaugh* v. *Van Zandt*, 55 Hun, 463.

Power of sale of land—to be exercised as "deemed expedient and for the best interest of all my legatees"—not properly exercised where there is sufficient personal property to pay all the legacies—title required thereunder. *Hovey* v. *Chisholm*, 56 Hun, 328.

Will—widow's support—power of sale given to executors for that purpose—failure to exercise it—equitable relief after the widow's death. *Allport* v. *Jerrett*, 61 Hun, 447.

Will—implied power of sale—when it passes to an admiuistrator with the will annexed—when the power survives—equitable conversion. *Wood* v. *Nesbitt*, 62 Hun, 445.

Will—disposition of real property situated in a foreign state—equitable conversion—discretionary power to sell given to executors—a failure to reinvest the proceeds—*lex loci rei sitæ*—money representing sales of land in foreign states. *Butler* v. *Green*, 65 Hun, 99.

Sale of a decedent's real estate on a creditor's application—express charge of debts upon realty—effect of a discretionary power of sale to executors. *Matter of Heroy*, 67 Hun, 13.

Will—suspension of the power of alienation during minority—power of sale to executors, one of whom is a tenant in common of testator's real estate. *Stehlin* v. *Stehlin*, 67 Hun, 110.

Deed by the grantee of a power—1 R. S. 737, sec. 124—testamentary power of sale—not frustrated by a deed purporting to be under an unauthorized sale—will proved in another state—power of sale to an executor in his personal capacity—power of sale—in case of a will proved in another state. *Pollock* v. *Hooley*, 67 Hun, 370.

Incumbrance imposed by a life tenant on land held by her subject to a testamentary power of sale given to her as executrix—removed by a sale under the power. *Haas* v. *Kuhn*, 67 Hun, 435.

The right of testamentary trustees of residuary real estate, charged with legacies, to enjoin an executrix and legatee from leasing the same and collecting rents. *Stevens* v. *Stevens*, 69 Hun, 332.

Power of sale after a definite term—not a suspension of the power of alienation. *Buchanan* v. *Tebbetts*, 69 Hun, 81.

Vested remainder—acceleration of the execution of a power of sale—conversion of realty into personalty. *Matter of Accounts of Collins*, 70 Hun, 273, aff'd 144 N. Y. 522.

Power of sale—action for partition between devisees—sale of the land by executors—payment of the proceeds into court. *Myers* v. *Bolton*, 70 Hun, 367.

Action for partition—construction of a will—lands devised in fee and power of sale

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thereof given to executors—equitable conversion—reconversion into realty—power of sale not a bar to the action for partition—*quære*, whether repugnant to the devise—assertion that a sale is against interest—legal right to a partition—valid exercise of a power of sale. *Mellen* v. *Banning*, 72 Hun, 176.

Action to determine the validity of a probated will—injunction *pendente lite*, restraining the executors from selling land pending action by him to have will declared void under Code, 2653a. *Hawke* v. *Hawke*, 74 Hun, 370.

Power of sale—when it does not cover property devised specifically and absolutely. *Landon* v. *Walmuth*, 76 Hun, 271.

Scope of a power of sale of realty contained in a will—extended to the payment of debts and legacies. *Matter of Bolton*, 83 Hun, 259, aff'd 146 N. Y. 257.

Power of sale contained in a will—when it is immaterial that a trust created by the will is invalid. *McCready* v. *Met. Life Ins. Co.*, 83 Hun, 526, aff'd 148 N. Y. 761.

Direction in a trust deed to convey—title taken by the trustees—when the remainder vests—power of sale defeated by a conveyance by the beneficiary. *Roberts* v. *Cary*, 84 Hun, 328.

Reasonable time to make a sale of real estate directed by a will. *Matter of Travis*, 85 Hun, 420.

Power of sale in a will—when it ends—right of a testator to limit the exercise of power granted by him. *Herriott* v. *Prime*, 87 Hun, 95.

Power of a beneficiary under a will when substituted as trustee under 1 R. S. 730, sec. 68—power of sale. *Mulry* v. *Mulry*, 89 Hun, 531.

A provision giving discretion to the executor to dispose of testator's estate with power to sell or hold as long as he deemed fit created a power in trust and not a trust. *Matter of Spears*, 89 Hun, 49.

Unlimited power to sell real estate—executors may exercise it for purposes of distribution. *Lindo* v. *Murray*, 91 Hun, 335.

A part of a will gave an estate to P. and by another part thereof, unless P. gave up certain vices, made such provision void, provided that P.'s estate be held in trust for him during three years and unless he before then reformed that the trustees give it to certain others instead. The latter part of the will as to the power in trust was void and P. took the estate given to him by the former part. *Moore* v. *Moore*, 47 Barb. 257, digested p.

Power to sell lands and distribute the proceeds among those to whom the land is devised is not the purpose for which an express trust may be created. The sale is for the benefit of devisees and not of legatees. *Lange* v. *Ropke*, 5 Sandf. 363.

1. EQUITABLE CONVERSION.

1. On what principle the doctrine rests.

Manice v. Manice, 43 N. Y. 305.

2. Doctrine will not be resorted to, where the interests are the same, whether the property is regarded as land or personalty.

Matter of Tienken, 131 N. Y. 391.

3. When executor is required to account for rents and profits.

Stagg v. Jackson, 1 N. Y. 206; Hood v. Hood, 85 id. 561; Lent v. Howard, 89 id. 169.

4. Accounting by executor in case of equitable conversion.

Stagg v. Jackson, 1 N. Y. 206; Hood v. Hood, 85 id. 561; Matter of McComb, 117 id. 378; Haberman v. Baker, 128 id. 253.

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1. EQUITABLE CONVERSION.

5. Conversion with reference to aliens.

Meakings v. Cromwell, 5 N. Y. 136; Parker v. Linden, 113 id. 28; Anstice v. Brown, 6 Paige, 448.

6. Character of proceeds of sale of lands of infants sold under order of the court.

Forman v. Marsh, 11 N. Y. 544; Wells v. Seeley, 47 Hun, 109.

7. Doctrine of equitable conversion as affecting rights of infant to will.

Horton v. McCoy, 47 N. Y. 21.

8. When purpose fails, land retains its original character.

Gourley v. Campbell, 66 N. Y. 169; Read v. Williams, 125 id. 560; Sweeney v. Warren, 127 id. 426.

9. Lien of judgment against land transferred to proceeds of sale.

Ackerman v. Gorton, 67 N. Y. 63.

10. Lands under contract of sale—when proceeds go to representatives.

Denham v. Cornell, 67 N. Y. 556.

11. Devise of proceeds of lands is a devise of lands.

Byrnes v. Baer, 86 N. Y. 210.

12. Equitable conversion does not change rule applicable to the transfer of real estate.

Wilder v. Ranney, 95 N. Y. 7, 12.

13. Property retains its original character, except for the purposes for which conversion is directed and required.

Henderson v. Henderson, 113 N. Y. 1; Parker v. Linden, id. 28; Wood v. Cone, 7 Paige, 471.

14. When proceeds of sale retain nature of realty.

Henderson v. Henderson, 113 N. Y. 1; Ford v. Livingston, 140 id. 162; Smith v. Kearney, 2 Barb. Ch. 533.

15. Invalidity of gift of lands attaches to proceeds.

Haynes v. Sherman, 117 N. Y. 433.

16. Effect of failure to exercise power of sale.

Matter of Bingham, 127 N. Y. 296; Sweeney v. Warren, id. 426.

17. Character of proceeds of sale of interest in land belonging to a lunatic in judicial proceeding.

Ford v. Livingston, 140 N. Y. 162.

18. When land will be distributed as such.

Matter of Mahan, 32 Hun, 73; aff'd 98 N. Y. 372.

19. Partial conversion.

Matter of Dodge, 40 Hun, 443.

20. Rights of parties not altered by conversion.

People v. Am. Loan & Trust Co., 2 App. Div. 143.

21. Doctrine of conversion—its effect on future limitations.

Burrill v. Sheil, 2 Barb. 457; DeBarante v. Gott, 6 id. 492.

22. Substitution of proceeds for land.

Smith v. Post, 2 Edw. Ch. 523.

23. Gift of land or price of land to devisee.

Marsh v. Wheeler, 2 Edw. Ch. 156.

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24. Power of sale limited so as not to work equitable conversion
Allen v. DeWitt, 3 N. Y. 276.

25. Real estate directed to be converted into money is regarded as personal property.
Bramhall v. Ferris, 14 N. Y. 41; Kinnier v. Rogers, 42 id. 531; Hatch v. Bassett, 52 id. 359; Matter of McGraw, 111 id. 66; Cottman v. Grace, 112 id. 299; Underwood v. Curtis, 127 id. 523.

26. When conversion takes place, although power of sale is not in terms imperative.
Dodge v. Pond, 23 N. Y. 69; Power v. Cassidy, 79 id. 602; Lent v. Howard, 89 d. 169; Shipman v. Rollins, 98 id. 326.

27. Absolute and immediate power of sale effected conversion.
Moncrief v. Ross, 50 N. Y. 431.

28. To constitute conversion it must be the duty of the executors to sell in any event.
Gourley v. Campbell, 66 N. Y. 169; Newell v. Nichols, 75 id. 78; Hobson v. Hale, 95 id. 588; Chamberlain v. Taylor, 105 id. 185; Henderson v. Henderson, 113 id. 1; Underwood v. Curtis, 127 id. 523; Fraser v. McNaughton, 58 Hun, 30; Fowler v. Depau, 26 Barb. 224; Wright v. Meth. E. Ch., 1 Hoff. Ch. 201. See Shipman v. Rollins, 98 N. Y. 311.

29 No conversion when not imperatively directed and not necessary.
Chamberlain v. Taylor, 105 N. Y. 185; Scholle v. Scholle, 113 id. 261.

30. Imperative power to convert inferred from the whole will.
Delafield v. Barlow, 107 N. Y. 535.

31. Necessity of conversion when it effects conversion.
Asche v. Asche, 113 N. Y. 232; Fraser v. Trustees, etc., 124 id. 479; Haxtun v. Corse. 2 Barb. Ch. 506.

32. When conversion is deemed to take place.
Ross v. Roberts. 2 Hun. 90, aff'd 63 N. Y. 652; Shumway v. Harmon, 4 Hun, 411

32a. Intent governs.
Matter of Cobb, 14 Misc. 409.

33. When power of sale without direction to sell does not work conversion.
Harris v. Clark, 7 N. Y. 242; Newell v. Nichols, 75 id. 78; Scholle v. Scholle, 113 id. 261; but see Delafield v. Barlow, 107 id. 535.

34. When discretionary power of sale does not effect conversion, until exercised.
White v. Howard, 46 N. Y. 144; Newell v. Nichols, 75 id. 78; Matter of Rochester, 110 id. 159; Henderson v. Henderson, 113 id. 1; Scholle v. Scholle, id. 261; but see Delafield v. Barlow, 107 id. 535.

35. Discretion as to time and manner of sale.
Tillman v. Davis, 95 N. Y. 17; Matter of McGraw, 111 id. 159; Ogsbury v. Ogsbury, 115 id. 290.

36. Power to sell given in terms of discretion.
Delafield v. Barlow, 107 N. Y. 535; Matter of Rochester, 110 id. 159.

37. Power to sell without necessity of exercising.
Matter of Clark, 62 Hun, 275.

38. Discretionary power of sale does not effect conversion.
Butler v. Green, 65 Hun, 99.

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39. Permission to sell no conversion.
Palmer v. Marshall, 81 Hun, 15.

40. Discretionary power.
Trowbridge v. Metcalf, 5 App. Div. 318; Smith v. Kearney, 2 Barb. Ch. 533.

41. Power to sell not implied from charge to pay debts.
Matter of Fox, 52 N. Y. 530.

42. Power to sell to pay debts charged on land.
VanVechten v. Keator, 63 N. Y. 52.

43. Power of sale for purposes of division.
Fisher v. Banta, 66 N. Y. 468.

44. Conversion for purposes of administration.
Tillman v. Davis, 95 N. Y. 17.

45. Conversion to pay legacies.
Chamberlain v. Taylor, 105 N. Y. 185; Delafield v. Barlow, 107 id. 535; Cottman v. Grace, 112 id. 299; Smith v. Kearney, 2 Barb. Ch. 533.

46. Power to sell for benefit of devisees, does not effect conversion to pay debts.
Matter of McComb, 117 N. Y. 378.

47. Devise of proceeds of sale worked conversion.
Hope v. Brewer, 136 N. Y. 128.

48. Direction to sell for purposes of division.
Miller v. Gilbert, 144 N. Y. 68.

49. Assets insufficient to pay legacies and worked power of sale.
Matter of Cobb, 14 Misc. 409.

50. Antenuptial contract working equitable conversion.
De Barante v. Gott, 6 Barb. 492.

51. Power of sale to pay legacies—effect of.
Betts v. Betts, 4 Abb. N. C. 317.

52. Direction to convert at termination of life estate.
Vincent v. Newhouse, 83 N. Y. 505; Tillman v. Davis, 95 id. 17; Smith v. Kearney, 2 Barb. Ch. 533.

53. Conversion taking effect at death of life tenant.
Tillman v. Davis, 95 N. Y. 17; Vincent v. Newhouse, 83 id. 505.

54. Conversion for payment of legacies with payment deferred.
Finley v. Bent, 95 N. Y. 364.

55. Conversion to be effected as soon as it can be, having in view the best interests of the estate.
Matter of McGraw, 111 N. Y. 66.

56. Conversion taking place at death of testator.
Cottman v. Grace, 112 N. Y. 299; Underwood v. Curtis, 127 id. 523; Matter of Cobb, 14 Misc. 409; Matter of Bennett, 16 id. 199; VanVechten v. VanVeghten, 8 Paige, 104.

57. Discretion as to manner and terms of sale.
Graham v. Livingston, 7 Hun, 11.

58. Conversion not to take place until a definite time.
Gano v. McCunn, 56 How. Pr. 337.

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59. Conversion resulting from sale on foreclosure.
Haberman v. Baker, 128 N. Y. 253; Yonkers Savings Bank v. Kinsley, 78 Hun, 186.

60. Proceeds of sale resulting from judicial procedure.
Ford v. Livingston, 140 N. Y. 162; Matter of Thomas, 1 Hun, 473 (Partition).

61. Application of doctrine in connection with statute of perpetuities and accumulations.
Wetmore v. Parker, 52 N. Y. 450; Cruikshank v. Home, etc., 113 id. 337; Underwood v. Curtis, 127 id. 523; Hope v. Brewer, 136 id. 126.

62. Doctrine as applied to the statutes of distribution and descent.
Gourley v. Campbell, 63 N. Y. 169; Denham v. Cornell, 67 id. 556; Delaney v. McCormack, 88 id. 174; Haberman v. Baker, 128 id. 253; Matter of Wangner, 74 Hun, 352; Valentine v. Wetherill, 31 Barb. 655; Wood v. Cone, 7 Paige, 471; Marsh v. Wheeler, 2 Edw. Ch. 156.

63. Equitable conversion with reference to the application of the law of trusts.
Savage v. Burnham, 17 N. Y. 561; Bramhall v. Ferris, 14 id. 41; Graham v. Read, 57 id. 681; Wells v. Wells, 88 id. 323; Underwood v. Curtis, 127 id. 523; Arnold v Gilbert, 3 Sandf. Ch. 531.

64. Election of beneficiaries to reconvert the property.
Prentice v. Janssen, 79 N. Y. 478; Morse v. Morse, 85 id. 53; Armstrong v. McKelvey, 104 id. 179.

65. Reconversion.
Yonkers Savings Bank v. Kinsley, 78 Hun, 186.

66. Rents and profits.
Lent v. Howard, 89 N. Y. 169; Cruikshank v. Home, etc., 113 id. 337; Ogsbury v. Ogsbury, 115 id. 290; Smith v. Kearney, 2 Barb. Ch. 533.

67. Effect of conversion upon action for partition.
Underwood v. Curtis, 127 N. Y. 523.

68. When corporations not authorized to take land can take proceeds thereof under direction for conversion.
Downing v. Marshall, 23 N. Y. 366; Hope v. Brewer, 136 id. 126.

69. Bearing of the doctrine on foreign wills.
White v. Howard, 46 N. Y. 144.

70. Conflict of laws.
Hope v. Brewer, 136 N. Y. 126.

71. Action to construe will in case of equitable conversion
Underwood v. Curtis, 127 N. Y. 523.

72. Doctrine applied in case of contracts for sale of land.
Williams v. Haddock, 145 N. Y. 144.

73. When proceeds are in hands of executors for all purposes of administration.
Matter of Bolton, 146 N. Y. 257.

74. Failure to invest proceeds.
Butler v. Green, 65 Hun, 99.

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A testator devised and bequeathed all his real and personal estate to his executors, in trust, to sell the same whenever they should see fit; also with authority to lease the same, and directed the executors to divide the whole trust estate into nine equal parts, and pay over and convey one of said parts to each of his four children who were of age, and to hold the remaining five parts until his minor children should respectively become of age, and to pay over and convey to them their shares as they should become of age.

Construction:

The executor could be compelled to account before the surrogate, not only for the personal estate bequeathed to him, but also for the rents and profits of the real estate, and for the proceeds of such real estate as he had sold pursuant to the directions contained in the will.

It seems, upon the doctrine of equitable conversion, that under such a will the whole estate is to be considered as personal estate from the death of the testator, so that the rents and profits of the real estate received by the executor, and the proceeds of a sale thereof made by him, become legal assets in his hands, for which he is bound to account as personal estate. *Stagg* v. *Jackson*, 1 N. Y. 206.

NOTE.—"The intent and direction of the testator to sell the land was absolute, or 'out and out,' for all purposes. The discretion of the executor in respect to the sale related merely to the time when, etc. (Bogert v. Hertell, 4 Hill, 492; Ram on Assets, 206; Leigh & Dalzell on Con. of Prop. ch. 1, 2, 3; Smith v. Claxton, 4 Mad. 484; Marsh v. Wheeler, 2 Eden. Ch. R. 157; Doughty v. Bull, 2 P. Wms. 320; Deg v. Deg, id. 415; 1 Jarman on Wills, ch. 19.)" (212.)

When power of sale is so limited as not to work a conversion of realty into personalty. *Allen* v. *De Witt*, 3 N. Y. 276, digested p. 979.

A testator by his will gave to his wife for life the rents of certain lands, and directed that after her death the lands should be sold, and the proceeds divided among three persons, named in the will.

Construction:

This was a gift of *money* and not of *lands* and was valid though the beneficiaries were aliens.

The will being silent as to the person who should sell the lands, a power was given by implication to the executors to make the sale; and such power was well executed by a deed from one executor, the others not having qualified.

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Same case:

The deed given on the sale, was objected to on the trial, on the grounds, *first*, that the executors had no power of sale; and *second*, that the power was not well executed, because all the executors did not join in the deed.

Construction:

The objection could not be made, on appeal, that the power was not well executed, because the deed on its face showed that only a nominal consideration was received for the lands. That ground, if relied upon, should have been taken on the trial. *Meakings* v. *Cromwell*, 5 N. Y. 136; see 2 Sandf. Sup. Ct. Rep. 512.

A devise of real estate to executors with power to sell, but without directing a sale, does not effect a conversion of the real into personal estate. *Harris* v. *Clark*, 7 N. Y. 242, digested p. 410.

The object of the statute (2 R. S. 195, sec. 180) which declares that the proceeds of an infant's lands sold by order of the court of chancery, shall be deemed real estate, was to preserve during his minority the character of the property in reference to the statutes regulating descents and distributions.

The character impressed upon the proceeds by the statute ceases on the infant's attaining his majority and obtaining possession thereof.

The real estate of an infant was sold under the direction of the court, and a bond and mortgage thereon was executed to his special guardian to secure the purchase money; and the infant, after his majority, settled the guardian's account touching the trust and discharged him therefrom, took from him individually a receipt for the bond and mortgage and constituted him his attorney to collect and reinvest the amount secured thereby in his discretion, and before payment of any part of the amount died intestate.

Construction:

The bond and mortgage and the moneys secured thereby were personal estate, and to be distributed as such. *Forman* v. *Marsh*, 11 N. Y. 544.

Citing, Pultney v. Darlington, 1 Bro. C. C. 223; 7 Bro. P. C. 530; Rashleigh v. Master, 1 Ves. Jr. 201; Wheldale v. Patridge, 8 id. 227; Earls of Winchelsea v. Norcliffe, 1 Vern. 435; Witter v. Witter, 3 P. Wms. 101; Peirson v. Shore, 1 Atk. 480; Oxenden v. Lord Compton, 2 Ves. Jr. 69; s. c., Bro. Ch. C. 231; Ashburton v. Ashburton, 6 Ves. 6; Ware v. Polhill, 11 id. 257, 278; Exparte Philips, 19 id. 122, 123, also see 147 N. Y. 570.

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In equity real estate which by a will is directed to be converted into money, is regarded as personal property.

Testator, with a view to provide for the support of a son and his family, divided and bequeathed his real and personal estate to his executors and directed them to sell it and invest the proceeds, and gave the use and income thereof to the son for life, and the principal over to others on his decease.

Construction:

A valid trust was created. *Bramhall* v. *Ferris*, 14 N. Y. 41.

Citing, Bogert v. Hertell, 4 Hill, 492; Stagg v. Jackson, 1 Comst. 206.

The law in respect to trusts of personal property has no application until the period arrives when the equitable conversion can take place under the terms of the trust. Until then, it is governed by the law of trusts in lands. *Savage* v. *Burnham*, 17 N. Y. 561.

Where a testator authorizes his executors to sell real estate, and it is apparent from the general provisions of the will that he intended such estate to be sold, the doctrine of equitable conversion applies, although the power of sale is not, in terms, imperative. *Dodge* v. *Pond*, 23 N.Y. 69.

The prohibition in the statute of devises to corporations not expressly authorized to take by the legislature, renders void the power so far as it would operate to give the rents and profits of land for the benefit of the corporations not thus authorized. They can take no interest in land under a power created by will.

As to such corporations, however, the power to sell the land is valid. They are free to take money or personal property by testamentary gift, though it is to be raised by the conversion of land. *Downing* v. *Marshall*, 23 N. Y. 366.

The testator, by his will, after directing payment of his debts and making various bequests and a devise of his interest in certain designated real estate, gave "all the rest, residue and remainder of my estate, both real and personal," to his children. He then proceeded to name executors and authorized them "to sell all or any part of my real estate at any time, in their discretion, and to execute valid deeds of conveyance for the same to the purchasers."

Construction:

This power of sale did not charge the real estate, embraced in the residuary clause, with the payment of the debts and bequests, but was a

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valid power in trust to convert it into personalty, for convenience of distribution, to avoid the expense and delay of partition or other legal proceedings, thus beneficial to those interested in the residuary estate; and the executors could convey good title. *Kinnier* v. *Rogers*, 42 N. Y. 531.

Acts lawfully directed to be done are regarded as done at the time directed. On this principle rests the doctrine of equitable conversion. *Manice* v. *Manice*, 43 N. Y. 305, 372.

Citing 1 Story's Eq. Jur. sec. 64g; 2 id. secs. 790, 1212, 1214; Lorillard v. Coster, 5 Paige, 218; Bunce v. Vandergrift, 8 id. 37, 40; Craig v. Leslie, 3 Wheat. 577; 1 Fonblanque's Eq. 419, 420, bk. 1, ch. 6, sec. 9, 4th Am. ed.; Fletcher v. Ashburner, 1 White & Tudor's Leading Cases in Eq., 3d Am. ed. notes p. 808; Kane v. Gott, 24 Wend. 660; Sugden on Vendors, ch. 4, sec. 1; ch. 16, sec. 1; Lewin on Trusts, 793.

W. B., a resident of the state of Connecticut, died seized of real estate situate in that state and in New York, and leaving a last will and testament, which, after providing for certain legacies, etc., gave all the residue of his estate, real and personal, to his executors, and the survivor of them, as joint tenants upon certain specified trusts. By another clause, he authorized said trustees to sell the real estate in Connecticut, and to invest the proceeds in real estate, loans, bonds and stocks located in the New England states or in the state of New York.

Construction:

1st. The will gave the trustees no power to sell the real estate, of which testator died seized, situate in New York.

2d. The power of sale, if any was conferred, is discretionary, and until exercised by an actual sale, did not effect a constructive or equitable conversion of the realty into personalty.

3d. The real estate situate in New York, both that of which the testator died seized and that purchased by the trustees, must be regarded as realty, and the validity of the testamentary disposition thereof, and the rights of those claiming it by descent, must be determined by the laws of this state. *White* v. *Howard*, 46 N. Y. 144; s. c., 52 Barb. 294.

Citing Wright v. Trustees, 1 Hoff. Ch. 202; Stagg v. Jackson, 1 Comst. 206.

The title to a greater portion of the real estate of which the testatrix died seized, vested in her heirs upon her death, subject to the execution of a power of sale by the executors, and said executors were directed to sell and convey said real estate in pursuance of a contract made by them. This was accordingly done and the proceeds paid over to the county treasurer. Subsequently one of the heirs, an infant over eighteen years

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of age, died, leaving a will whereby she devised and bequeathed all of her property to her husband, who petitioned to have the share of his wife in the fund paid over to him.

Held, that the proceeds of the sale were to be regarded as personal property, and that the portion of the infant heir could be disposed of by, and passed under her will.

Where real estate owned by tenants in common, of whom an infant is one, is sold under and in pursuance of a judgment in a partition suit, instituted by others of the tenants in common, the portion of the proceeds belonging to the infant remains impressed with the character of real estate, and as such does not pass under the infant's will. *Horton* v. *McCoy*, 47 N. Y. 21.

An absolute and immediate power of sale operated to equitably convert the real estate into personalty. *Moncrief* v. *Ross*, 50 N. Y. 431, digested p. 881.

A will provided, "after my death my executors * * * shall sell at public or private sale, as they deem best, all my personal and real estate." This was an equitable conversion of the real estate into personalty. *Hatch* v. *Bassett*, 52 N. Y. 359.

As to the conversion of realty into personalty in connection with the statute of perpetuities and accumulations, see *Wetmore* v. *Parker*, 52 N. Y. 450.

A power in executors to sell lands will not be implied from the fact that the lands are charged with the payment of debts. *Matter of Fox*, 52 N. Y. 530.

Citing, Lupton v. Lupton, 2 J. Ch. 614; Jones v. Hughes, 6 Exch. 222; Robinson v. Lowater, 17 Beav. 592; 5 De G., M. & G. 271; Bourne v. Bourne, 2 Hare, 35; Stagg v. Jackson, 1 Comst. 206; Harris v. Clark, 7 N. Y. 242; Savage v. Burnham, 17 id. 561; Clark v. Riddle, 11 S. & R. 311.

The will of V., by its first clause, gave all his estate to his trustees and executors, to be disposed of as thereinafter directed; following this was a clause giving certain premises to his wife; also, power was given to his executors to sell said premises for not less than a sum specified, and to invest the proceeds for her benefit during life.

Construction :

The executors took no title to said premises as the interest of the wife was not limited to a use only, and as the power of sale was contingent, not absolute, no such implication arose, from the direction as to the investment of the proceeds in case of sale, as would cut down her

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interest to a life estate, and she took a fee subject to the power of sale. *Vernon* v. *Vernon*, 53 N. Y. 351.

Citing, Boynton v. Hoyt, 1 Denio, 54.

When land is intended to be converted into money, it will be regarded as such, in reference to the law relating to trusts. *Graham* v. *Read*, 57 N. Y. 681–683.

A., by will, charged her real estate with the payment of debts and empowered her executors to sell so much thereof as should be necessary for that purpose. A sale in pursuance of such power operated as a conversion of the realty to personalty of so much thereof as should be sold for that purpose. *Van Vechten* v. *Keator*, 63 N. Y. 52, digested p. 905.

Will directed executors to close his business, place the proceeds thereof and all his property, both real and personal, at interest on bond and mortgage, or otherwise, as in their judgment they may deem best, and to use "the proceeds, *rents*, income or interest" for the support and maintenance of the testator's wife and children; he then devised and bequeathed all his estate, both real and personal, to his children, to be divided upon the death of his wife. The three children all died unmarried and intestate prior to the widow, but after testator.

No part of the real estate was sold. After the death of the widow her next of kin claimed that the real estate had been converted and that she was entitled to some portion thereof. The defendants are heirs of testator.

Construction:

There was no intent to convert absolutely the real estate into money and no conversion was made.

The personal estate being amply sufficient for the support and maintenance of the testator's widow and children, and no necessity existing for the sale thereof for that purpose, the purpose failed to this extent, and the land retained its original character and descended to the heirs at law. *Gourley* v. *Campbell*, 66 N. Y. 169, 6 Hun, 218.

Citing, Chitty v. Parker, 2 Ves. Jr. 271.

NOTE.—To constitute a conversion of realty into personalty it must be made the duty of the executors to sell in any event. White v. Howard, 46 N. Y. 162; see, 23 id. 69; Wright v. Trustees, 1 Hoff. Ch. 218; Slocum v. Slocum, 4 Edw. Ch. 613; Jackson v. Jansen, 6 J. R. 73; Robinson v. Taylor, 2 Browns' Ch. Cas. 595.

Direction to executrix, B., to divide real estate equally between his two sons C. and D. after the youngest arrived at the age of twenty-three·

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in codicil, direction that executrix sell all the real estate. Both sons survived the testator.

Construction:

The fair inference was, in absence of expression in the will, that the purpose of the sale was for division, and that as sons survived testator, the purpose had not failed; that the direction to sell converted real estate into personalty upon the death of the testator, and that the sons took their interests as legatees.[1]

C. having died before actual sale, his interest passed to his personal representatives.

The conversion was not prevented because legal estate was not given in trust to executrix, or because the land was not devised to sons, as land passed by descent to sons.[2] *Fisher* v. *Banta*, 66 N. Y. 468.

When the interests in proceeds of sale of land are the same as in the land, the right of judgment creditors in the estate of a life tenant is subject to a power of sale vested in him, and liable to be cut off by a sale in pursuance thereof. The lien in such event would be transferred from the land and attach to the interest of the judgment debtor in the proceeds. *Ackerman* v. *Gorton*, 67 N. Y. 63, 67, digested p. 301.

Where one having an interest in lands dies intestate after the sale thereof, his interest in the money realized from the sale is personal estate and goes to the administrators, not to the heirs at law. *Denham* v. *Cornell*, 67 N. Y. 556, aff'g 7 Hun, 662.

When a power to sell is discretionary, there is no equitable conversion. *Newell* v. *Nichols*, 75 N. Y. 78, digested p. 1065.

Where a will directs real estate to be converted into money, and the proceeds distributed, the parties entitled thereto may, if of lawful age, and if the rights of others will not be affected, elect to take the lands and prevent the actual conversion thereof into personalty.

No distinct or positive act is required, a slight expression of intent will be considered sufficient to show an election.

The court has power, in an equitable action for partition, where the parties are tenants in common of real or personal estate, to direct the sale of the whole in one parcel, where the interests of the parties will be promoted by such sale.

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[1] Fletcher v. Ashburner, 1 Bro. Ch. Cas. 497; Leslie v. Craig, 3 Wheat. 587; Bogart v. Hertell, 4 Hill, 492; Stagg v. Jackson, 1 Comst. 206.

[2] 1 Jar. 465; Post v. Hover, 33 N. Y. 593; Bogert v. Hertell, 4 Hill, 492.

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The will of B. authorized his son F. to carry on the hotel business for five years, if he so desired, in a certain hotel owned by the testator; and empowered his executors to sell the hotel property, after the occupancy of his son had ceased, and divide the proceeds among his residuary legatees. F. died before the testator; no action was ever taken by the executors to sell the property. Three of the four legatees, or their successors in interest, conveyed their interests to plaintiff. Defendant M., the other legatee, joined with the plaintiff in making leases of the property; and large sums were expended by them in making improvements. In an action for partition, the only surviving executor was made a party defendant, as the husband of M.; he did not, by his answer, claim any rights as executor, or that he was a proper party as such.

Construction:

(1) The executors took no interest in the lands, but merely a power in trust, to be executed simply for the purpose of distribution, liable to be defeated by a reconversion into realty of the property which was converted by the will into personalty; (2) the parties beneficially interested had a right to elect to make such a reconversion, and their acts showed such an election; (3) the power of sale thereby became extinguished, and the parties became owners as tenants in common, and so a partition was proper; (4) the surviving executor had no title, interest, or lien upon the property which rendered him a necessary party to the action as such executor; (5) the provision of the Revised Statutes (1 R. S. 735, sec. 107), which makes a power of sale a lien or charge upon land, had no application, as the power had ceased to exist; (6) equity would not interpose to compel the execution of the power (1 R. S. 734, sec. 96), as the purpose had been accomplished without its exercise. *Prentice* v. *Janssen*, 79 N. Y. 478.

Citing, Hetzel v. Barber, 69 N. Y. 1, 11; Garvey v. McDevitt, 72 id. 563; Crittenden v. Fairchild, 41 id. 289, 292; see, Power of sale, p. 910.

When a conversion of realty into personalty will be effected, although the power of sale is not, in terms, imperative. *Power* v. *Cassidy*, 79 N. Y. 602. digested p. 861.

The doctrine of equitable conversion, of realty into personalty, did not exist in the law of New Netherlands in 1663. *Van Geissen* v. *Bridgford*, 83 N. Y. 348.

Devise to wife for life, and directing that at her death the lands should be sold by the executor and "the proceeds be equally divided between

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my daughters S., H. and J., and the children and heirs of my sons B. and S., and of my daugter C., share and share alike, and if either of the heirs above mentioned and intended shall die after the date of this will and before the said sums are paid them, the share of the one so dying without issue shall be equally divided among the other heirs above mentioned."

Testator left him surviving a widow and six children. H. and J. died leaving no children, B. died leaving a son and grandson, and S., son, died leaving seven children. Then the widow died, and thereafter C. died without issue.

Construction:

A conversion of the land into money was intended, the actual conversion not to take place until the termination of the life estate; and by the provision the land was equitably converted into money from the time the sale was directed to be made. The remainder vested upon the death of the widow. H. and J. having died before that time, and C. after that time without issue, the proceeds were to be divided between S., daughter, the children of S., son and child and grandchild of B., *per stirpes* and not *per capita*. *Vincent* v. *Newhouse*, 83 N. Y. 505.

Citing, on time of vesting, Teed v. Morton, 60 N. Y. 502; Hoghton v. Whitgreave, 1 Jac. & Walker Ch. Rep. 145.

There was no reconversion into realty by the election of parties representing the whole beneficial interest. *Morse* v. *Morse*, 85 N. Y. 53, digested p. 627.

See Power of sale, p. 910.

When, under doctrine of equitable conversion, the real estate is to be considered personalty, the proceeds of sale, when received by executor, becomes assets in the hands of the executor as such, for which he must account before the surrogate, as well as for the rents and profits. *Hood* v. *Hood*, 85 N. Y. 561, rev'g 19 Hun, 300.

Citing, Stagg v. Jackson, 1 N. Y. 206. See, Dill v. Wisner, 88 id. 153.

A devise of the proceeds of lands directed to be sold by the executors is a devise of the land within the statute, although the naked title remains in heirs until sale. *Byrnes* v. *Baer*, 86 N. Y. 210.

The will of W. gave all of his real estate to his son J. for life, and in fee in case his son married and had issue. If he died without having had lawful issue the will directed the executor or executors then surviving, to sell said real estate and distribute the proceeds among the testator's "next of kin as personal estate according to the laws of the

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state of New York, for the distribution of intestate personal estate." The executors named were J. and two others; at the testator's death he left J., four nieces and a nephew, surviving. J. died without having had lawful issue, the other two executors were then dead, the four nieces also died during the lifetime of J., leaving children. Action brought by the nephew for the construction of the will and the appointment of a trustee to carry out its unexecuted provisions.

Construction:

(1) The will created a general power in trust, the execution whereof was imperative (1 R. S. 732, secs. 74, 77; 734, secs. 94, 96); (2) upon the death of the surviving trustee his powers and duties became vested in the court, and might be exercised by some person appointed by it for that purpose (1 R. S. 734, sec. 102; id. 730, sec. 68); (3) as the gift was money and the direction for conversion absolute, the "next of kin," to whom the proceeds of the real estate were to be distributed, were those who were such at the time of distribution, *i. e.*, at the death of J.; and therefore plaintiff was entitled to all of said proceeds. *Delaney* v. *McCormack*, 88 N. Y. 174.

Citing, Dominick v. Sayre, 3 Sandf. 555; Cotton v. Taylor, 42 Barb. 578; Teed v. Morton, 60 N. Y. 506; Vincent v. Newhouse, 83 id. 511.

Direction by testator to convert his estate, real and personal, into money, invest the proceeds as specified, and apply the same as directed. Under the doctrine of equitable conversion the trust was one of personal property. *Wells* v. *Wells*, 88 N. Y. 323, digested p. 435

Where a will contains no specific devise of the testator's real estate, but a bare power of sale is given to the executors and the title descends to the heirs of the testator, subject to the execution of the power, the right of possession follows the title and the heirs are entitled at law to the intermediate rents and profits.

If, however, the power of sale operates as an immediate conversion of the land into personalty, accompanied with a gift of the proceeds, in equity the intermediate rents and profits go with and are deemed to be a part of the converted fund; the heir may be compelled to account therefor to the executor, and the latter to the beneficiary, for so much thereof as is received by him, as well as for the proceeds of sales.

Where the general scheme of the will requires a conversion, the power of sale, although not in terms imperative, operates as a conversion, and this will be deemed to be immediate, although the donee of

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the power is vested, for the benefit of the estate, with a discretion as to the time of sale.

The will of L., after giving various legacies, contained a clause authorizing his executors to sell all of his real estate, except his homestead farm, at such times and prices as to them should seem best for the interest of the estate, and after carrying out the foregoing provisions to invest the balance of the estate in their hands in bonds and mortgages or in state stocks. One-half of such balance the testator gave to his daughter L., to be paid to her when she arrived of age; in case of her death, before the testator's wife, without lawful issue, the same to be paid to the wife. The other half he gave to his wife, to be paid to her ten years after his decease. In case of her death before the daughter, said one-half to be paid to the daughter. The homestead farm was devised to the wife for life. The executors received the rents and profits of the real estate. Action for an accounting.

Construction:

By said clause there was a conversion of testator's real estate, with the exception specified, into personalty, as of the time of his death, and a gift of the converted fund together with the intermediate income to the wife and daughter with cross-remainders; and the rents and profits received by the executors, and the proceeds of sales were properly brought into the accounting. *Lent* v. *Howard*, 89 N. Y. 169.

See same case, *ante*, p. 907.

Where by a will the title to real estate is vested in two executors in trust, with power to sell, one of the executors can not, without the assent of the other, enter into a contract to convey, which will be valid and binding upon the other.

It seems, that as to personal property the rule is otherwise.

The fact, however, that by and under the terms of the will, there is an equitable conversion for certain purposes of the real estate into personalty, does not change the rule as to it; until actual conversion it may only be conveyed as real estate, and the rules of law governing such conveyances remain applicable. *Wilder* v. *Ranney*, 95 N. Y. 7, 12.

The will of G. gave her residuary estate to her executors in trust, with power to receive the rents and profits of the real estate, and to sell the same when and in such manner as in their discretion might seem expedient; also to convert and collect the personalty, to invest the pro-

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ceeds of both, and, after setting apart out of the estate or the proceeds a sum specified, to receive the rents and income of the remainder, and apply the same to the use of the testator's husband during life. After his decease, and after the deduction of certain legacies given out of the fund, she directed the residue to be divided into certain shares or parts, each of which she gave to a beneficiary named, one part being given to D., etc. Action to determine, among other things the interests of the parties under the will of G.

Construction:

By the terms of the will all of the real estate of the testatrix was, upon the death of her husband, to be converted into money for the purpose of distribution, and hence the whole estate at that time was to be considered as personalty. *Tillman* v. *Davis*, 95 N. Y. 17.

The will of B. gave his residuary estate to his executors in trust, with directions to sell all of his real estate, and after investing a sum specified for the benefit of the testator's wife, to divide without delay, after his decease, the remainder of the residue into three shares, one for each of his three children, each share to be invested and the income to be paid to the beneficiary. After deducting previous payments of installments from the principal the balance of each share was directed to be paid to the beneficiary at the expiration of five years after the testator's death. The will then provided that in case of the death of either of his children "before the full payment of the whole of his or her share," so much thereof as remained unpaid should be paid to the lawful issue of the one so dying, if any, etc. A., one of the testator's said children, died more than five years after the death of the testator, leaving one child. At the time of her death a considerable portion of the testator's real estate remained undisposed of, and she had not received her share.

Construction:

The direction to sell operated as a conversion of the real estate into personalty; the shares given to the children vested at once upon the death of the testator, subject to be divested as to so much of each share as within the meaning of the will remained unpaid in case of the death of the beneficiary; the words "die before full payment" mean, not before actual payment, but before the share becomes actually payable; and therefore the share of A. was not divested, but passed as part of her

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personal estate to her legal representatives, not to her child. *Finley* v. *Bent*, 95 N. Y. 364.

For this class of cases, see *ante*, pp. 258, 269.

There must be an explicit direction to convert to invoke the doctrine of equitable conversion of real estate into personalty. *Hobson* v. *Hale*, 95 N. Y. 588, digested p. 442.

Although the direction to sell was not imperative, as it is apparent, from the general provisions of the will, that the testator intended such real estate to be *sold*, the doctrine of equitable conversion will apply. *Shipman* v. *Rollins*, 98 N. Y. 311, 326.

Citing, Power v. Cassidy, 79 N. Y. 602.

Reconversion of property by election of beneficiaries, to take land itself rather than proceeds, directed to be sold by testator. *Armstrong* v. *McKelvey*, 104 N. Y. 179, digested p. 909.

See, Power of sale, *ante*, p. 910.

Conversion does not take place when not necessary for purposes of valid provision of will and when no imperative direction is given therefor. Undoubtedly a strong implication arises from the use of the word "paid" in directing the satisfaction of the legacies, that it was intended by the testator that the real estate should be converted into money, and thus handed over to the legatees, but there is no imperative direction given to sell the lands, neither do the purposes of the will require such a sale, and a legal performance of the duties enjoined upon the executors could have been effected by a distribution of the property in specie, to the legatees. *Chamberlain* v. *Taylor*, 105 N. Y. 185.

S. died, leaving his wife and four daughters surviving him. By his will he directed his executors to divide one-half of his residuary estate, real and personal, into four equal parts, which he gave to said executors in trust to receive and apply the rents and profits to the use of the testator's wife during her life; after her death the rents and profits of one of said parts to the use of each of his said children during life, and upon her death "to pay over, transfer and deliver the principal of said one-fourth part, together with any arrears of income" to her heirs, or to such person or uses as said daughter "may by her will appoint." The other half he directed his executors also to divide into four parts and to give one to each of the testator's said children. The will also provided that any moneys advanced to either of said children and charged in the testator's books of account against her share in the estate, should be deducted "from the sum bequeathed to such daughter in

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this section." The will also empowered the executors "for the purpose of carrying into effect" the will and the trusts therein created, to sell "in their discretion" any and all of the real estate. Action for partition of certain real estate of an interest in which the testator died, seized, and which was included in said residuary clause.

Construction:

An infant child of one of the daughters was not a necessary or proper party defendant under the Code of Civil Procedure (sec. 1538); she never could take the real estate, and had no title thereto or interest therein as realty, but the whole title vested in the executors and trustees; construing all of the provisions of the will together, the direction to sell the real estate was imperative and there was, therefore, an equitable conversion thereof into personalty. *Delafield* v. *Barlow*, 107 N. Y. 535

Citing, Morse v. Morse, 85 N. Y. 53.

No equitable conversion was worked of the real estate into personalty by the power of sale to the executor and trustee; for it was not obligatory upon him, and a merely discretionary power of selling produces no such result. *Matter of City of Rochester*, 110 N. Y. 159, 167.

When a will directs that the estate shall be converted into money or available securities by the executor as soon as it can be done, having in view the best interests of the estate, the direction operates as an equitable conversion. *Matter of McGraw*, 111 N. Y. 66, 113.

The direction to the executor to convert the real and personal estate, except the library, into money for the purposes of the will, viz., the payment of debts, the investment of a fund for the payment of annuities, and the residuary gift (which, in terms, is of the proceeds of the sale), operated as an equitable conversion of the real estate into personalty as of the time of the death of the testator. *Cottman* v. *Grace*, 112 N. Y. 299, 305.

Citing, Fisher v. Banta, 66 N. Y. 468; Lent v. Howard, 89 id. 169.

The interest in the lands of the testator vested in the children upon the testator's death, subject to the power in the executor to partition them, and subject to being divested by a sale under the power. There was no equitable conversion worked of the realty into personalty, for the power of sale was not absolute. If the real estate was converted into money by a sale, under the power, the proceeds would still partake of the nature of realty. *Henderson* v. *Henderson*, 113 N. Y. 1, 14.

L. died leaving a widow and no children. His will, after a devise of

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his residuary real estate to three persons named, his next of kin and heirs, who were nonresident aliens, contained a direction that said real estate be sold at auction by a referee appointed by the supreme court, the net proceeds to be deposited in court "in the same manner as money belonging to nonresidents," for the use and benefit of the devisees, "subject to the further order of the court." In an action for the construction of the will it appeared that two of the devisees died before the testator; the court found that the gifts to them lapsed, and as to their portions the testator died intestate. The court below also found that the direction for a sale worked an equitable conversion of the real estate into personalty, and the portion so undisposed of was to be distributed as such; that is, to the widow one-half and $2,000 in addition.

Construction:

Error; the direction for a conversion was simply for the purposes of the will, and while as to the nonresident aliens the doctrine of conversion would, if necessary, apply in their favor (Lewin on Trusts, 7th ed., 812), if not required for that purpose, a conversion would not be presumed (Chamberlain v. Taylor, 105 N. Y. 185); and, so far as the widow was concerned, the property undisposed of, whether a sale was necessary or not, devolved according to its original character (Gourley v. Campbell, 66 N. Y. 169). *Parker* v. *Linden*, 113 N. Y. 28, rev'g 44 Hun, 518.

NOTE 1.—Except as to the state, the alien brother and sister could take the real estate as such. (Laws 1875, ch. 38.)

NOTE 2.—If a sale is necessary, the residue of the proceeds of the land will belong to the heirs. If unnecessary for any purpose directed by the will, they are entitled to it in its present form, and a sale against their objection should not be decreed. They have a right to that, and "the notional conversion" will subsist only until the *cestui que trust*, who is competent to elect, intimates his intention to take the property in its original character. (Seeley v. Jago, 1 P. Wms. 389.)

The necessity of a conversion of realty into personalty, to accomplish the purposes expressed in a will, is equivalent to an imperative direction to convert, and effects an equitable conversion. *Asche* v. *Asche*, 113 N. Y. 232, 233.

Citing, Hobson v. Hale, 95 N. Y. 588; Chamberlain v. Taylor, 105 id. 185.

In proceedings to compel a purchaser at a partition sale to complete his purchase, it appeared that R. formerly owned an undivided seven-tenths of the land in question; he conveyed two-tenths, and thereafter executed a deed which purported to convey his remaining interest, and

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under this deed the parties claimed title to one-half. It appeared, however, that the intent was to convey but two-tenths.

Construction:

As the deed was liable to be reformed as against all the parties, it was to be assumed that the reformation might occur, and, therefore, in this respect the title was defective.

Same case:

The will of R., after giving certain specific legacies, gave to his executors his residuary estate in trust, with power to receive the rents and profits, sell and convey the property, invest both the rents and profits and proceeds of sale "and to divide and apply the same and income thereof" as directed, *i. e.*, to apply the income of two-sixths of "said residue and remainder" to the use of his wife for life, with remainder over to his children, and to apply the income of one-sixth to each of his four children during life, with remainder over to the issue of such child, and with authority to advance to each child a specified sum out of the principal, if the executor should deem best. In the gift of the legacies the testator used the words "give and bequeath," in those of the residuary estate the words were "devise and bequeath."

Construction:

The final and ultimate division did not require a conversion of the land into money, nor was such a conversion required as respects the intermediate income; therefore, the remaindermen took a vested interest in the lands; and the interests of the grandchildren were not cut off by a foreclosure suit, to which they were not made parties.

Where only a power of sale is given to executors by a will, without explicit and imperative direction for its exercise, and the intention of the testator can be carried out although no conversion is adjudged, the land will pass as such and not be changed into personalty. In the absence of an express direction to sell one may not be implied unless the design and purpose of the testator is unequivocal and the implication so strong as to leave no substantial doubt; and so, unless the exercise of the power is rendered necessary and essential by the scope of the will, the authority is simply discretionary and does not work a conversion. Mut. Life Ins. Co. v. Wood, 51 Hun, 640, distinguished.

Same will:

Where the mortgage which was foreclosed was assigned to S., the

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plaintiff in the foreclosure suit, R. guaranteed the payment of one-half thereof. After R.'s death S. presented a claim to his executrix, who alone qualified and acted, for one-half, which was disputed. S. then began the foreclosure; the executrix was made a defendant and answered. Pursuant to an arrangement between her and S. she withdrew her answer and executed a deed to S. of R.'s entire interest. S. in return withdrew his claim against the estate, and on the foreclosure sale bid in the property for the full amount of the mortgage.

Construction:

The deed was not a good execution of the power of sale and was invalid, as there was no sale such as the will contemplated, but an appropriation of the land to pay a debt, chargeable primarily upon the personal property, without an order of the surrogate, or proof that the personalty was insufficient to pay debts; and so, the surrogate was powerless to appropriate the land to the payment of debts except in the statutory method.[1]

The title proffered was defective and the purchaser was not bound to complete his purchase. *Scholle* v. *Scholle*, 113 N. Y. 261, aff'g 23 J. & S. 474.

NOTE.—"There is in the will no imperative direction for the sale of the real estate. Indeed, there is no direction to sell at all. A power or authority to sell is given, but unless the exercise of that power is rendered necessary and essential by the scope of the will and its declared purposes, the authority is to be deemed discretionary, to be exercised or not, as the judgment of the executrix may dictate, and so an equitable conversion will not be decreed. (White v. Howard, 46 N. Y. 162.) To justify such a conversion there must be a positive direction to convert which, although not expressed, may be implied; but in the latter case, only when the design and purpose of the testator is unequivocal and the implication so strong as to leave no substantial doubt. (Hobson v. Hale, 95 N. Y. 598.) Where, however, only a power of sale is given without explicit and imperative direction for its exercise and the intention of the testator in the disposition of his estate can be carried out, although no conversion is adjudged, the land will pass as such and not be changed into personalty. Chamberlain v. Taylor, 105 N. Y. 194."

When rents and profits of land imperatively directed to be converted into personalty fall into the residue. *Cruikshank* v. *Home for the Friendless*, 113 N. Y. 337, digested p. 457.

NOTE.—"Nor does it help the situation to say that there was an equitable conversion resulting from the power of sale which, though discretionary, was claimed to be essential to the scope and plan of the will; and that the property treated as personal

[1] Allen v. DeWitt, 3 N. Y. 276; Briggs v. Davis, 20 id. 15; Roome v. Philips, 27 id. 357; Russell v. Russell, 36 id. 581.

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was not within the statute regulating trusts, as was held in Gilman v. McArdle (99 N. Y. 451). That doctrine does not reach or affect the prohibition of the statute against a suspension of the absolute ownership of personal property for more than two lives; and a power of sale does not avoid the statute when the resultant proceeds wear the same fetters as restrained the alienation of the land." See 2 R. S. 57, sec. 5.

The will of O. contained a direction to the executrix to sell the testator's real estate within five years of his decease for the purpose of paying debts and legacies. By a subsequent clause she was authorized to sell in lots or parcels, or altogether, in her discretion. The rents and profits of the land were given to her in her individual right so long as it remained unsold. There was no equitable conversion by the will of the land into personalty at the death, as plaintiff was entitled to possession and the rents and profits until a sale. *Ogsbury* v. *Ogsbury*, 115 N. Y. 290, 294.

A gift to an executor in trust with power of direction to sell and distribute as specified constitutes an equitable conversion of the realty into personalty. *Greenland* v. *Waddell*, 116 N. Y. 234, digested p. 457.

A discretionary power of sale of real estate given to executors for the benefit of devisees, with a direction to apply the proceeds to their use, may not be converted into a power of sale to pay debts; the doctrine of equitable conversion is not applicable to such a case.

Nor where a sale is made under such a power does the provision of the Code of Civil Procedure (sec. 2724, sub. 4), giving to surrogates jurisdiction to compel a judicial settlement of the accounts of an executor where he "has sold or otherwise disposed of any of the decedent's real property * * * pursuant to a power contained in the decedent's will," authorize an accounting and disposition of the proceeds as personalty. No power is given to divert the trust fund from the purpose of its creation and the directions of the will.

The will of S., after devising his real estate in specific parcels, giving life estates in each parcel to various devisees and the remainder to others, gave to his executors a power to sell any of the parcels devised, with certain exceptions, the proceeds to "be invested and the income and principal applied * * * for the use and benefit of the same persons to whom the said lands and the income therefrom respectively were specifically devised and bequeathed. The personal estate paid all the debts of the testator except one owing to B. The executors sold portions of the real estate, and on settlement of their accounts, the surrogate ordered the debt of B. to be paid out of the unexpended proceeds of the real estate so sold.

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Construction:

Error; the proceeds never became legal assets, but equitably remained lands and were to be accounted for only as required by the will, until some proceeding paramount thereto called for an accounting under its authority and for its purposes. *Matter of McComb*, 117 N. Y. 378.

Distinguishing, Glacius v. Fogel, 88 N. Y. 444; Hood v. Hood, 85 id. 561; Erwin v. Loper, 43 id. 531; Kinnier v. Rogers, 42 id. 531; Russell v. Russell, 36 id. 581.

Invalidity of gift of land, directed to be converted into personalty, attaches to the proceeds on such sale. *Haynes* v. *Sherman*, 117 N. Y. 433, digested p. 460.

Where a will expressly confers power upon the executor to convert real estate into money, and it is evident that the testator contemplated that it must be done for the purpose of carrying the will into effect, and it appears that in no other way can the intent of the testator be effectuated, the realty will be deemed to have been converted into personalty.[1]

McN. died leaving a will disposing of both real and personal estate; the latter was insufficient at the time the will was executed and at the time of the testator's death, to pay his debts, the expenses of administration and the legacies given. The will gave to his widow the use of the testator's house and lot during life; it gave to the executors a sum to be held in trust for her benefit during her life, and they were authorized to sell the house and lot as soon as convenient, but within three years after the death of the life tenant; it also authorized them to sell his other real estate within three years after his death, and, until such sale, empowered them to take charge of it and its avails, and the balance of his personal property which remained after payment of debts, expenses and legacies, and to divide the residue of his estate between certain beneficiaries, as provided.

Construction:

A conversion of realty into personalty being necessary to carry out the testator's purpose, it must be held to have been his intention that such a conversion should take place; and, therefore, the realty should be considered as personalty, to be disposed of in accordance with the terms of the will. (Scholle v. Scholle, 113 N. Y. 261, distinguished.) *Fraser* v. *Trustees, etc., of the United Presbyterian Church*, 124 N. Y. 479, aff'g 48 Hun, 30.

[1]Hood v. Hood, 85 N. Y. 561; Lent v. Howard, 89 id. 169; Moncrief v. Ross, 50 id. 431; Fisher v. Banta, 66 id. 468; Clift v. Moses, 116 id. 144.

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A power of sale in a will, however peremptory in form, if it can be seen that it was inserted in aid of a particular purpose of the testator, or to accomplish his general scheme of distribution, does not, *ipso facto*, operate as a conversion where the scheme or purpose fails by reason of illegality, lapse or other cause. *Read* v. *Williams*, 125 N. Y. 560.

Conversion of realty into personalty under a power to executors to sell property and convert it into money and make distribution; on failure to exercise the power the persons entitled to the land would take it as heirs. *Matter of Bingham*, 127 N. Y. 296, digested p. 766.

When a testator authorizes his executors to sell and convert into money all or a part of his realty for a specific purpose, which fails, or is accomplished without a conversion, the power is extinguished, and the land can not be sold by virtue of it or treated as money, but it descends to the heir unless it is devised. *Sweeney* v. *Warren*, 127 N. Y. 426, 431.

Citing, Wood v. Keyes, 8 Paige, 365; McCarty v. Terry, 7 Lans. 236; Jackson v. Jansen, 6 Johns. 73; Sharpsteen v. Tillou, 3 Cow. 651; Bogert v. Hertell, 4 Hill, 492; Hetzel v. Barber, 69 N. Y. 1; Read v. Williams, 125 id. 560; Hill v. Cook, 1 Ves. & B. 175; Chitty v. Parker, 2 Ves. 271; Taylor v. Taylor, 3 DeG., M. & G. 190; Leigh & D. Conv. 93; Lewin on Trusts (8th ed.), 149, 953.

Where executors are clothed with the power and it is made their imperative duty to sell a testator's real estate and distribute the proceeds in a manner provided by the will, the real estate will be deemed converted into personalty.[1]

Where the time of sale is not necessarily postponed to a specified future time, or until the happening of a designated event, the conversion takes place at the testator's death, the distributees taking their interests as money, not land.[2]

The will of C., as modified by a codicil thereto, after certain specified bequests, directed that his executrices should take possession of the residuary estate, real and personal, and convert the real estate into money at such time as they might deem proper, during a period not exceeding ten years after the death of the testator's widow; that during the lifetime of the widow and until the real estate should be sold, the executrices, two daughters of the testator, should collect the income of the estate and apply the same to the use of the widow and to their own use or the survivor of them, and after her death, if the real estate was not

[1] Everitt v. Everitt, 29 N. Y. 39; Power v. Cassidy, 79 id. 602.

[2] Pomeroy's Eq. Juris. vol. 3, sec. 1162; Fisher v. Banta, 66 N. Y. 468; Moncrief v. Ross, 50 id. 431; Robert v. Corning, 89 id. 225–239.

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then sold, to their own use or the survivor of them until such sale; that immediately thereafter the estate should be divided into four equal shares, one of which each of the executrices should receive personally, the remaining two shares to be retained by them in trust, the income of one share to be paid to U. during her life, at her death the principal to go to her heirs, the income of the other share to be paid to B. during her life, at her death the principal to go to her heirs. Action brought by U. and B. who were also daughters of the testator, to procure the partition of the real estate of which C. died seized, or in lieu thereof to obtain a construction of the will and codicil.

Construction:

The real estate was on the death of the testator converted into personalty, the legal title to which was vested in the executrices in trust; during the continuance of the trust the absolute ownership was suspended; as the trust attempted to be created for the benefit of the testator's daughters was not limited by lives in being, but upon the life of the widow and an indefinite period thereafter, which might be of ten years' duration, it was violative of the statute of perpetuities, and so, void.

But, as the trust created for the life of the widow was separable from the others, their invalidity did not affect it, and the trust for her benefit should be permitted to stand; and except as to the estate created for her life, the testator died intestate.

As the real estate was converted into personalty and was vested in the trustees during the life of the widow, and until her death a division of the property could not be claimed, the action of partition could not be maintained.

Considering the property as personalty, as complete relief could in due time be had in surrogate's court, the court was authorized on that ground in the exercise of its discretion to refuse to entertain the action as one for the construction of the will, and so, a demurrer to the complaint was properly sustained. *Underwood* v. *Curtis*, 127 N. Y. 523.

Distinguishing, Savage v. Burnham, 17 N. Y. 561; Moncrief v. Ross, 50 id. 431; Robert v. Corning, 89 id. 225; Manice v. Manice, 43 id. 303.

NOTE 1. "Respondent cites Chipman v. Montgomery (63 N. Y. 221) as an authority for the assertion that the plaintiffs can not maintain an action to construe the will because they claim in hostility to it asserting its invalidity.

"As testator's estate became personalty at the time of his death, Chipman's case may not be applicable to the situation presented, for courts of equity will often take jurisdiction to construe a will involving the disposition of personalty, where they would refuse if a judicial construction was sought for the mere purpose of determining title

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to real estate. (Wager v. Wager, 89 N. Y. 161.) The reason for it is found in the fact that an executor is regarded as a trustee of the personalty which he holds in trust for the legatees or beneficiaries, so far as it is disposed of by will and as to the residue for those entitled to it under the statute of distributions. (Bowers v. Smith, 10 Paige, 193.) And courts of equity have ever regarded the supervision of trusts and trustees as peculiarly objects of equitable cognizance." (543.)

It seems that where, upon foreclosure of a mortgage belonging to the estate of a decedent, the mortgaged premises are bought in by the personal representatives, they take on the character of the mortgage indebtedness, and so are as personalty in his hands, which he may dispose of, and for which he is liable to account as such; and this is so although the decedent left a will which confers no power upon his executors to sell real estate.

The heirs of the decedent, therefore, or his residuary devisees, take no direct interest therein, and it is not essential, in order to convey a good title, for them to join in a conveyance of the premises. *Haberman* v. *Baker*, 128 N. Y. 253.

The fiction of equitable conversion is adopted only when it is a needed element to determine ownership, and will not be resorted to where the same right devolves upon the same persons, whether the property be treated as money or land, and where no rights of third persons are affected. *Matter of Tienken*, 131 N. Y. 391, digested p. 714.

Devise of proceeds of realty to trustees to found, endow and maintain a charitable institution for sick and infirm persons and for relief of such persons outside of such institution in Scotland, worked a conversion and was valid. *Hope* v. *Brewer*, 136 N. Y. 126, digested p. 865.

In 1888 O., as committee of P., a lunatic, commenced an action against an elevated railroad company to restrain it from operating its road upon a street in front of real estate belonging to P. Judgment was rendered therein granting the relief sought, unless the company should tender the committee $4,000, and receive a deed of release of the easements in the street. An order of the court having been obtained on application of O., authorizing him to execute the conveyance, he did so, and received the money. Thereafter P. died intestate, unmarried and leaving no descendants. Action was brought by the administrators of the estate of P. to determine as between the heirs at law and next of kin who were entitled to the money.

Construction:

The money retained the character of real estate, and so the heirs were entitled thereto. (Code Civ. Pro., sec. 2359.)

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Same case:

Plaintiffs claimed that the proceedings instituted by the committee for the sale were invalid.

Construction:

The plaintiffs were not in a position to raise the question; as the heirs, who were only interested, made no objection but claimed the proceeds, and thereby ratified the sale, and upon acceptance of the proceeds would be estopped from denying its validity; and in any event plaintiffs had no interest in the fund, or right to interfere. *Ford* v. *Livingston*, 140 N. Y. 162, aff'g 70 Hun, 128.

Where there was a direction to sell for purposes of division there was no conversion. *Miller* v. *Gilbert*, 144 N. Y. 68, digested p. 304.

As a general rule the owner of real estate, from the time of the execution by him of a valid contract for the sale thereof, is to be treated as the owner of the purchase money and the vendee as equitable owner of the land.

Provisions in such contract making performance on the part of the vendee of his contract to pay a portion of the purchase money and to secure the balance by mortgage on the premises a condition precedent to a conveyance by the vendor do not take the case out of the general rule.

It seems, that after a default in the performance of these conditions precedent the rule may not apply.

But prior to a default on the part of the vendee, even where, by the contract, time is of the essence thereof, there is an equitable conversion within said rule, subject to be converted upon the default happening. Contract for sale of land was made by vendor, who died thereafter and before time for performance; his executors extended the time for performance for some two and one-half months, when it was duly had.

Construction:

There was an equitable conversion of the real estate into personalty at the time of the execution of the contract, and there was no default; the executors, acting in good faith, had the right, prior to default, to extend the time of performance; and, therefore, the next of kin took the avails as personal property to the exclusion of those who were only heirs at law. *Williams* v. *Haddock*, 145 N. Y. 144, aff'g 78 Hun, 429.

Distinguishing Bostwick v. Frankfield, 74 N. Y. 215; Harvey v. Aston, 1 Atk. 361; Atty-Gen. v. Day, 1 Ves. Sr. 218; Scot v. Tyler, 2 Brown's Ch. 431; Wells v. Smith, 2 Edw. Ch. 78; Teneick v. Flagg, 29 N. J. Law, 25.

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NOTE.—"If the vendor die prior to the completion of the bargain, provided there have been no default, the heir of the vendor may be compelled to convey and the proceeds of the land will go to the executors as personal property. (Story's Eq Jur. secs. 790, 791, 1212; Sug. on Vend. (8th Am. ed.) pp. 270, 273, ch. 5; Baden v. Pembroke, 2 Vern. Ch. 213; Fletcher v. Ashburner, 1 Brown's Ch. 497; Eaton v. Sanxter, 6 Simons, 517; Farrar v. Earl of Winterton, 5 Beav. 1; Livingston v. Newkirk, 3 Johns. Ch. 312; Champion v. Brown, 6 id. 398; Craig v. Leslie, 3 Wheat. 563.

"The learned counsel for the infant defendant does not deny the existence of the general rule above stated, but he says this equitable conversion is not invariable and that it can not apply when the intention of the parties is clearly adverse to such a result. (Citing the case of Bostwick v. Frankfield, 74 N. Y. 215.) It may be assumed that the rule does not obtain under circumstances which show clearly that the parties never intended that it should, but in this case we think no such exception to the rule can properly be deduced from the contract itself." (150–1.)

By the will of B. the executors were empowered to sell any and all of his real estate when in their judgment they might deem it for the best interests of the estate. The executors sold the real estate: they paid, in discharge of the testator's debts a sum in excess of that realized from the personalty. In proceedings for a final accounting by the executors, held, that before distributing the proceeds of the sale among the residuary devisees, they were entitled to reimburse themselves therefrom for the sum so paid in excess of the personalty, and were entitled to a credit for that sum, and this, without regard to the question as to whether the power of sale was given for the purpose of paying debts. *Matter of Bolton*, 146 N. Y. 257.

From opinion—"The learned general term, reversing the surrogate, was of the opinion that it should be treated as a power of sale for the purpose of paying debts, upon the doctrine of the Gantert case (136 N. Y. 109). If it was necessary to establish that proposition there would be great difficulty in sustaining the judgment. But we think it is not material to determine the character of the power.

"It was certainly a general power, and conferred authority upon the executors to convey the land and receive the proceeds. That power has been actually executed. They have conveyed the land, have received the purchase price, and the same is in their hands. There is no other way in which creditors can now reach the land except by proceedings for an accounting. The realty has in fact been converted into personalty, and is in the hands of the executors for all purposes of administration. Before distributing this fund to the residuary devisees they may pay the balance of the testator's debts, or what is the same thing, reimburse themselves for the debts they have paid in excess of the personal estate that came to their hands Erwin v. Loper, 43 N. Y. 521; Hood v. Hood, 85 id. 561; Glacius v. Fogel, 88 id. 434; Matter of Powers, 124 id. 361; Matter of Gantert, 136 id. 109; Cahill v. Russell, 140 id. 402."

When the proceeds of the sale of real estate in partition will be considered as realty. Distinction between effect of sale under will and sale in partition. *In Matter of Thomas*, 1 Hun, 473.

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Rule of equitable conversion operates only from the time conversion is directed to take place. *Ross* v. *Roberts*, 2 Hun, 90, aff'd 63 N. Y. 652.

Realty will be regarded as personalty from the time it is directed to be converted. *Shumway* v. *Harmon*, 4 Hun, 411.

Conversion of real into personal estate is not rendered less imperative from the fact that discretion was given to executors as to the manner and terms of sale. *Graham* v. *Livingston*, 7 Hun, 11.

When an equitable conversion of real estate into personalty is authorized by law and the money paid into court. *Denham* v. *Cornell*, 7 Hun, 662.

The will of A. directed a sale of his real estate by his executor, and the investment of one-half of the proceeds thereof "in mortgage or in mortgages on real estate," and that after the education and support that were to be given to Norman "the principal sum and any interest" * * * *shall be paid* to him. The conversion was complete without any election on the part of the infant. *Hill* v. *Nye*, 17 Hun, 457, 459. Citing Stagg v. Jackson, 1 Comst. 206; Horton v. McCoy, 47 N. Y. 21.

When equitable conversion of realty takes place; when the intention of the testator is to regard the land as personalty it will be distributed as such. *Matter of Mahan*, 32 Hun, 73, aff'd 98 N. Y. 372.

Conversion of real estate into personal property—when not absolute but only partial. *Matter of Dodge*, 40 Hun, 443.

Devise to a wife, while unmarried, of a right to use and occupy a house—a sale made by an executor with her consent vests a good title in the purchaser—she has the same interest in the proceeds as in the land—the executor can not contract with the widow for a release of her interest in the fund—the statute of limitation does not run against a claim made by her to recover the net income of the fund. *Post* v. *Benchley*, 48 Hun, 83, appeal dismissed, 110 N. Y. 665.

The sale of an infant's real estate does not change the character of the infant's interest in the proceeds thereof which retains the character of realty—2 R. S. 195, secs. 175, 180. *Wells* v. *Seeley*, 47 Hun, 109.

There is no equitable conversion of real estate into personalty where it is not the *duty* of the executors to sell and convert. *Fraser* v. *McNaughton*, 58 Hun, 30.

Where there is an authority to executor to sell, but no necessity arising under the will for the exercise thereof, there is no conversion of realty into personalty. *Matter of Clark*, 62 Hun, 275, 283.

Where an equitable conversion of realty into personalty takes place so far as executors are concerned. *Wood* v. *Nesbitt*, 62 Hun, 445.

Discretionary power to sell does not create an equitable conversion. A failure to reinvest the proceeds of sale of realty does not change its nature. *Butler* v. *Green*, 65 Hun, 99.

Where a power of sale will not work a conversion of land into money. *Mellen* v. *Banning*, 72 Hun, 176.

Testamentary conversion of realty into personalty, for the purpose of the will—the portion undisposed of passes as realty, to the heir. *Matter of Wangner*, 74 Hun, 352.

Real estate converted into personal property—what is required to reconvert the same—land bought by executors on a foreclosure sale. *Yonkers Savings Bank* v. *Kinsley*, 78 Hun, 186.

If testator do not require executors to sell but only permit them so to do there is no equitable conversion of real estate into personalty. *Palmer* v. *Marshall*, 81 Hun, 15.

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Equitable conversion—substitution of money for stocks does not alter rights of parties. *Trustees People* v. *Am. Loan & Trust Co.*, 2 App. Div. 193.

Equitable conversion—no absolute direction to sell, the power being discretionary —sale not to be made till expiration of five years. *Trowbridge* v. *Metcalf*, 5 App. Div. 318, digested p. 480.

In determining whether there is an equitable conversion of realty under a will, it is the intent that governs and not the practical convenience or expedience of treating the decedent's estate in one form rather than another.

The mere fact that the assets, as shown by the inventory, are insufficient to pay all the legacies and trusts provided for in the will, and that a naked power of sale is given to the executors, is not sufficient to show an intent to create an equitable conversion, where a large portion of such legacies have lapsed and it appears that there has been a great depreciation in the value of the securities.

Even if the will works an equitable conversion, such conversion does not take place until after the death of the testator, and such realty is not taxable under the transfer act in a case where the realty as such is exempt under section 2 of the act. *Matter of Cobb*, 14 Misc. 409 (Sur. Ct.); citing, Briggs v. Carroll, 117 N. Y. 288; White v. Howard, 46 id. 144, 162; Hobson v. Hale, 95 id. 588, 605; Moncrief v. Ross, 50 id. 431; McDonald v. O'Hare, 144 id. 566; Dodge v. Pond, 23 id. 69; Power v. Cassidy, 79 id. 602; Lent v. Howard, 89 id. 169; Delafield v. Barlow, 107 id. 535; distinguishing, McCorn v. McCorn, 100 id. 511.

When real estate becomes personalty as of the time of testator's death. *Matter of Bennett*, 16 Misc. 199.

Where a will directs the real estate to be converted into personal property and gives the same to certain persons for life, with limitations over to others, it must be governed by the rules applicable to limitations of personal property. *Burrill* v. *Sheil*, 2 Barb. 457.

A stipulation in an antenuptial contract executed in France, that in case of the death of the wife without leaving children her surviving, the real estate of which she should die possessed in the United States should be immediately sold and the proceeds remitted to her husband, operated as a grant to husband, contingent upon the death of the wife, to which effect was to be given upon the principle of equitable conversion. *DeBarante* v. *Gott*, 6 Barb. 492.

To cause a conversion of real estate into personalty, the will should decisively and distinctly fix upon the land the quality of money. *Fowler* v. *Depau*, 26 Barb. 224.

The proceeds of land directed to be sold by order of the court vested in C. as heir at law not as personalty but as realty, the fund continuing to be real estate of the same nature as the property sold. *Valentine* v. *Wetherill*, 31 Barb. 655.

A testator, by will, directed his executors to sell all his real estate and with the proceeds to pay legacies. *Held*, that thereby the whole estate became equitably converted into money, subject to the appropriation in accord with the directions of the will. *Betts* v. *Betts*, 4 Abb. N. C. 317.

The equitable conversion of real into personal property was held not to operate until the time when the conversion was directed to take place, which was six years from the death of the testator. *Gano* v. *McCunn*, 56 How. Pr. 337.

To establish a conversion, the will must direct a sale absolutely, or out and out; for all the purposes, not merely those of the devise; irrespective of contingencies, and independent of all discretion. If the sale is to be made for the purposes of the

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will, and those fail, there is no conversion. *Wright* v. *Meth. Epis. Church*, 1 Hoffman's Ch. 201.

Where land is taken in payment of a debt due to an alien, and is conveyed to a trustee upon a valid trust to sell the same and convert it into personal estate, without any unreasonable delay, for the benefit of the *cestui que trust*, a court of equity, upon the principles of equitable conversion, will consider the land as personal estate belonging to the alien, and transmissible to his personal representatives as such; and if necessary will compel the trustee, who holds the legal estate, to sell the land and convert it into money.

If an agent for the collection of a debt due to an alien, takes a conveyance of land in his own name in payment of such debt, without authority from his principal, and without any written declaration of trust, a court of equity will not permit a resulting trust to be created in favor of the state by escheat; but will decree the land to be sold and converted into money, for the purpose of giving the alien the benefit thereof as personal estate. *Anstice* v. *Brown*, 6 Paige, 448.

Where the testator made his will and died previous to the adoption of the Revised Statutes, leaving a widow, and a married daughter, who was his only child and heir at law; and by his will directed that his executors should sell all his real and personal estate and put out the proceeds thereof at interest upon landed security, and should pay such interest to his widow for life, for her support, and a part of the principal of the fund also if it should be necessary for that purpose; and that immediately after her decease all the moneys then remaining should continue at interest, and that the interest thereof should be appropriated to the support of his daughter, in case she should be left a widow, and from that time for and during her natural life or until she should again marry; and that if the interest should not be sufficient for her support, she should then have so much of the principal of the fund annually as the executors should deem sufficient; and that immediately after the death or remarriage of his daughter, all the moneys then due and remaining should be paid to her children or the legal heirs of her body, as they should respectively become of age.

Upon the principles of equitable conversion, the proceeds of real estate directed by the testator to be sold, are only considered as converted into personalty for the purposes of the will. And if any estate or interest in the fund arising from the sale is not legally and effectually disposed of by the will, there is a resulting trust, as to such estate or interest, in favor of the heir at law. *Wood* v. *Cone*, 7 Paige, 471.

Where it is necessary to carry into effect the intention of the testator, under a power in trust to convert real estate into personalty or personal estate into realty, so as to produce no injustice between the different objects of his bounty, equity considers the conversion as having been made at the death of the testator or at least within one year thereafter.

A testator having by his will bequeathed to each of his three daughters who should marry, an outfit, of a specified value, two of the daughters subsequently married during the life of their father, who died a short time thereafter, without having given to either of them any marriage portion.

Each was entitled to her outfit, under the will, in the same manner as she would have been if she had married after the testator's death. *Van Vechten* v. *Van Veghten*, 8 Paige, 104; aff'd 1 Sandf. Ch. 395.

Real estate is considered in equity as converted into personalty when necessary to execute the will. *Haxtun* v. *Corse*, 2 Barb. Ch. 506.

But this principle of equitable retainer does not apply to a fund arising from the

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sale of real estate which descended to the debtor as one of the heirs at law of the testator; and which real estate has been converted into personalty by accident, or because the valid portions of the will could not be carried into effect in any other way than by a sale of the land.

The proceeds of real estate, thus converted into personalty, are still to be considered as real estate, and as in no way connected with the funds which come to the hands of the executor for the purposes of the will.

Where a power in trust, to an executor to sell the real estate of the testator, upon the death of the widow, for the benefit of legatees, is an imperative power, the estate is in equity to be considered as converted from the death of the widow; so as to give the legatees the same interest in the rents and profits, until the estate is actually sold, as they would have had in the interest of the proceeds of the sale if such sale had been made immediately upon the death of the widow. *Smith* v. *Kearney*, 2 Barb. Ch. 533.

Where there may be a substitution of proceeds for land sold. *Smith* v. *Post*, 2 Edw. Ch. 523.

A devisor may give to his devisee either land or the price of land, at his pleasure; and the devisee must receive it in the quality in which it is given, and can not intercept the purpose of the devisor. If it be the purpose to give land to the devisee, the land will descend to his heir, and if it be the purpose of the devisor to give the price of land to the devisee, it will, like other's money, be part of his personal estate.

If one of several devisees dies in the lifetime of the devisor, and the heir of the devisee stands in his place, the purpose of a sale, for the convenience of a division, still remains, and the share of the one dying will pass as money and not as land. But, in the event of all the devisees dying in the lifetime of the devisor, the purpose of a sale for the sake of a division, may no longer be applicable, and the heirs all take the whole interest as land. *Marsh* v. *Wheeler*, 2 Edw. Ch. 156.

When a provision for the widow of the testator will be regarded as a trust of the real estate at the death of the testator and not to be deemed as converted into personalty, see *Arnold* v. *Gilbert*, 3 Sandf. Ch. 531.

V. POWER TO MORTGAGE, LEASE OR PLEDGE.

The power to sell and make leases is included in a power given to executors to sell and dispose of all and any part of the testator's estate. *Leggett* v. *Perkins*, 2 N. Y. 297 (318).

See also Hedges v. Riker, 5 Johns. Ch. 163.

Where there is a power to sell lands, a power to mortgage will not be implied. Whether a trustee appointed by a will, with power to sell and dispose of lands in fee simple *or otherwise* may mortgage the lands, *quære*. *Albany Fire Ins. Co.* v. *Bay*, 4 N. Y. 9.

See also Cumming v. Williamson, 1 Sandf. Ch. 17; Bloomer v. Waldron, 3 Hill, 361; Coutant v. Servoss, 3 Barb, 128; Arnoux v. Phyfe, 6 App. Div. 605.

Power to mortgage was implied in a power to borrow. *Wetmore* v. *Holsman*, 14 Abb. Pr. 311.

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Power to lease carried power to collect rents. *Morse* v. *Morse*, 85 N. Y. 53, digested p. 627.

The will of S., after directing the payment of his debts and funeral expenses by his executrix, gave his residuary estate to E., his wife, who was appointed his sole executrix, so long as she should remain his widow, and upon her death or remarriage to his children. E. was authorized to make such "advances" out of said residue to any or either of his children as she should "deem best for the maintenance and support of any such child or children," and the amount so advanced to be deducted from the share of the child for whose benefit it was made, upon final division. E. was appointed guardian of the minor children, and was empowered "to mortgage, lease, sell or dispose" of the property as she should deem best for the purpose of carrying into effect the provisions of the will. E. remarried, and thereafter executed a mortgage on certain real estate, part of the residuary estate, to secure a loan. In an action to foreclose the mortgage it appeared that at the time of the execution of the will the children referred to were all minors, and four of them were still under age; that ever since the death of the testator E. had provided for their education and support, and all resided until after the execution of the mortgage upon the mortgaged premises. There had been no accounting or settlement by her as testamentary guardian and no division of the estate.

Construction:

The power of E. to make advances, and to mortgage the property for that purpose, did not cease upon her remarriage, but there remained in her a general power in trust (1 R. S. 732, sec. 77) the children taking an absolute fee, subject to the execution of the power; by the word "advances" was intended the sums expended for the maintenance and support of said children; and, in the absence of evidence that the money loaned for which the mortgage was given was not needed and was not used for the maintenance and support of the children, the mortgage was valid.

It seems that had the money been loaned for other purposes, with knowledge on the part of the mortgagee, this would have been a good defense to the action. *Mutual Life Insurance Company* v. *Shipman*, 108 N. Y. 19.

Citing, Kinnier v. Rogers, 42 N. Y. 531.

Power to lease—gave no power to sell. *Roe* v. *Vingut*, 117 N. Y. 204.

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The will of M. gave to A., her husband, the use of income and profits of all her estate during life, with power, at his pleasure, to sell any of the personal estate, to receive the proceeds and appropriate the same to his own use. M. owned, at the time of her death, certain bonds which A. thereafter pledged to defendant to secure a loan. When the loan became due A., not being able to pay, stated that fact to defendant, and proposed that it take the bonds for the loan, which proposition defendant accepted. No note or other written obligation had been given for the loan. Action to recover for the estate the proceeds of the bond.

Construction:

Conceding A. had no right under the will to pledge them, and, so, such pledge was void, he had the right to sell, and could sell, to his creditor and apply the proceeds to extinguish his debt; and the transaction was, in effect, such a sale. *Brown* v. *Farmers' Loan and Trust Company*, 117 N. Y. 266, aff'g 51 Hun, 386.

Power was given to executors to rent and pay one-third of income to the widow and out of remainder to pay all expenses. *Starr* v. *Starr*, 132 N. Y. 154, digested p. 144.

S. died leaving a widow and brothers and sisters surviving, but no descendants; by his will he gave all of his property to his wife "to have and to hold for her comfort and support * * if she need the same during her natural life." In a subsequent provision he gave to a church society $1,000 after the death of his wife, if there should be enough of the property left at that time. The widow remarried and executed to her husband a mortgage on the real estate of which S. died seized. She thereafter died.

Action brought by the heirs at law of S. to have the mortgage declared fraudulent and void and to have it canceled of record as a cloud on plaintiff's title.

Construction:

The widow took under the will a life estate with power to take and convert to her own use so much of the *corpus* of the estate as she should need for her comfort and support (Rose v. Hatch, 125 N. Y. 428), instead of selling the land she had the right to mortgage for the purposes specified, and the presumption would be that the mortgage was executed for such purpose; therefore, the mortgage was not void upon its face and could be enforced by the mortgagee without the disclosure of extrinsic facts rendering it invalid, and the burden of showing these

was upon those assailing it; and so, the jurisdiction of a court of equity was properly invoked to cancel the apparent cloud upon the title *Swarthout* v. *Ranier*, 143 N. Y. 199, aff'g 67 Hun, 241.

McC. died leaving a widow and four children, who were minors, him surviving. By his will he gave to a son, the oldest child, one-fourth of all his residuary estate after payment of debts, and after deducting the widow's dower right, the same to be paid to him in cash on his becoming of age. The residue was given to the widow for life, the remainder to the three younger children. The widow was appointed executrix with power to sell or mortgage any part of the estate "for the purpose of carrying out the provisions" of the will, or whenever in her judgment it might be for the best interest of the estate, "applying the proceeds to the benefit of * * * said estate." The real estate was all incumbered. The widow, acting under the power of sale, sold a lot to D. for $9,000, receiving $6,000 in cash and D.'s bond for the balance, secured by mortgage on the premises. The money was used in paying incumbrances on the real estate. Subsequently, under an arrangement between the widow and D., the latter deeded back the lot; his mortgage thereon was canceled and the widow executed a mortgage thereon to secure a loan made to pay the son his share, he having come of age. To secure D. the $6,000 paid by him, the widow executed her bond and to secure it a mortgage, as executrix, on another lot, which recited the power in the will, and that the bond was executed by her, as executrix, under the power. This mortgage was foreclosed and the purchaser on foreclosure sale refused to complete the purchase, claiming the title to be defective, on the ground that the bond was not signed by the executrix in her official capacity.

Construction:

Untenable. The widow, as executrix and individually, and the three infant children were made parties to the foreclosure suit, and the latter appeared by guardian. The complaint set forth the power of sale and alleged that the mortgage was executed in pursuance of the power.

Construction:

The judgment was conclusive as against all the defendants in that action; the mortgage was executed under and pursuant to the power, and it was a valid lien. *Roarty* v. *McDermott*, 146 N. Y. 296.

The will of Elizabeth J. Stanley conferred on her executor and trustee a power to sell the real estate devised, if deemed by him advisable so to do for the purpose of investment of the proceeds. It gave him no power

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to sell the lands for the payment of debts, or for any other than the specified purpose. It conferred no power to mortgage, and it is not claimed nor could it be reasonably contended that the mortgage in question can be sustained as an exercise of the power of sale contained in the will. *Losey* v. *Stanley*, 147 N. Y. 560, 568.

Citing Albany Fire Ins. Co. v. Bay, 4 N. Y. 9; Bloomer v. Waldron, 3 Hill, 361; Rogers v. Rogers, 111 N. Y. 228.

VI. POWER TO EXECUTORS TO CONTINUE TESTATOR'S BUSINESS.

See *ante*, p. 778.

The rule that a trust, failing as such, because not authorized by statute, may be valid as a power in trust, may have effect, although it gives the trustees the direction and management of a manufacturing establishment during the life of a beneficiary.

If a part of the beneficiaries designated by the testator, can not take, by reason of which the heirs succeed to their portions of the estate, the heirs must take, subject to the power to manage the property and apply and divide the proceeds between the beneficiaries who can take and the heirs. *Downing* v. *Marshall*, 4 Abb. Ct. App. Dec. 662.

The will of J. authorized his executors to continue his business for such time after his death as they should think advantageous to the estate, and directed as to the distribution of the profits. His residuary estate he gave to his executors in trust to collect rents and interest, and after paying therefrom necessary expenses and charges, to pay the "residue and net proceeds" to certain *cestui que trust*, during their lives.

Construction:

Losses by bad debts, and the cost of personal property purchased to replace similar articles worn out or used up in conducting the business by the executors; also expenditures for ordinary repairs on the real estate used therefor, were properly charged against and deducted from the income payable to the life tenants; the language of the will authorized the deduction of all losses and expenses necessarily incurred in managing the estate and conducting the business, including ordinary expenses for repairs or improvements, and it was not necessary that the specific items so to be deducted should be stated in the will.

It seems the same rule might not apply where a large and unusual expenditure has been incurred; as in the erection of additional buildings. *Matter of accounting of Jones*, 103 N. Y. 621.

The intention of a testator to confer on his executor power to con-

tinue a trade or business will not be deemed to have been conferred unless it is found in the direct, explicit and unequivocal language of the will.[1]

When the power *simpliciter* is conferred, it only authorizes the use of the fund invested in the business at the time of the testator's death; the general assets may not be used unless such an intent on the part of the testator is expressed in the will.[2]

When such an intent does not appear a creditor has no remedy except to pursue the assets embarked in the trade or business at the time of the death.

A testator may, however, bind his general assets for all of the debts; and where such an intent finds expression in his will, in case of the insolvency of the executor, the general assets may be made liable in equity for the debts. *Willis* v. *Sharp*, 113 N. Y. 586, aff'g 43 Hun, 434; 115 N. Y. 396.

NOTE.—"By the general rule the death of a trader puts an end to any trade in which he was engaged at the time of his death, and an executor or administrator has no authority *virtute officii* to continue it, except for the temporary purpose of converting the assets employed in the trade into money. (Barker v. Parker, 1 T. R. 287; 2 Williams on Exrs. [7th ed.] 791.) But a testator may authorize or direct his executor to continue a trade or to employ his assets in trade or business, and such authority or direction, if strictly pursued, will protect the executor from responsibility to those claiming under the will, in case of loss happening without his fault or negligence, and also entitle him to indemnity out of the estate, for any liability lawfully incurred within scope of the power. (Burwell v. Cawood, 2 How. U. S. 560; Liable v. Ferry, 32 N. J. Eq. 791; Scott v. Izon, 34 Beav. 434; Lucas v. Williams, 39 Gif. 150.) The courts, while they have sustained with substantial unanimity the validity of a direction of a testator in his will that his trade should be continued, whether his business was that of a sole trader or of a firm of which he was a member, have applied stringent rules of construction in ascertaining both the existence and extent of the authority of the executor." (589-90.)

See, further, Goebel v. Wolf, 113 N. Y. 405; see Stewart v. Robinson, 115 id. 328; Bell v. Hepworth, 134 id. 442; C. W. Co. v. Hodenpyl, 135 id. 430; The National Bank of Newburgh v. Bigler, 83 id. 51: Johnson v. Lawrence, 95 id. 154.

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[1]Burwell v. Cawood, 2 How. U. S. 560; Kirkman v. Booth, 11 Beav. 273.

[2]Ex parte Garland, 10 Ves. 119; Cutbush v. Cutbush, 1 Beav. 184; ex parte Richardson, 1 Buck. 202; M'Neillie v. Acton, 4 DeG., M. & G. 742.

V. THE ESTATE OR INTEREST TAKEN BY THE GRANTEE OF THE POWER.[1]

I. WHEN ESTATE FOR LIFE OR YEARS IS CHANGED INTO A FEE.

Real Prop. L., sec. 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."

1 R. S. 732, sec. 81 (repealed by Real Prop. L., sec. 300), omitted the word "encumbrancers."

Freeborn v. Wagner, 2 Abb. Ct. App. Dec. 175, dig. p. 94; Terry v. Wiggins, 47 N. Y. 512, dig. p. 95; Germond v. Jones, 2 Hill, 569, 574, dig. p. 103; American Bible Society v. Stark, 45 How. Pr. Rep. 166, dig p. 103.

See, further, *ante*, pp. 105-6.

II. CERTAIN POWERS CREATE A FEE.

Real Prop. L., sec. 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."

1 R. S. 732, sec. 82 (repealed by Real Prop. L., sec. 300) omitted the word "encumbrancers."

Kinnier v. Rogers, 42 N. Y. 534, dig. p. 94; Germond v. Jones, 2 Hill, 569, 574, dig. p. 103.

III. WHEN GRANTEE OF POWER HAS ABSOLUTE FEE.

Real Prop. L., sec. 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 R. S. 733, sec. 83 (repealed by Real Prop. L., sec. 300), was the same.

Kinnier v. Rogers, 42 N. Y. 534, dig p 94; Germond v. Jones, 2 Hill, 569, 574, dig. p. 103; American Bible Society v. Stark, 45 How. Pr. 166, dig. p. 103.

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[1] See Power of disposition by will, *ante*, p. 893.

IV. EFFECT OF POWER TO DEVISE IN CERTAIN CASES.

Real Prop. L., sec. 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."

1 R. S. 733, sec. 84 (repealed by Real Prop. L., sec. 300), was the same.

Freeborn v. Wagner, 2 Abb. Ct. App. Dec. 175, dig. p. 94; Livingston v. Murray, 68 N. Y. 485, dig. p. 97; Rose v. Hatch, 125 id. 427, dig. p. 100; Hume v. Randall, 141 id. 499, dig. p. 898; Deegan v. Wade, 144 id. 573, dig. p. 875; American Bible Society v. Stark, 45 How. Pr. 166, dig. p. 103.

V. WHEN POWER OF DISPOSITION ABSOLUTE.

Real Prop. L., sec. 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."

1 R. S. 733, sec. 85 (repealed by Real Prop. L., sec. 300), was the same.

Rose v. Hatch, 125 N. Y. 427, dig. p. 100; Cutting v. Cutting, 86 id. 522, dig. p. 893, Swarthout v. Ranier, 143 id. 499, dig. p. 952; Griswold v. Warner, 51 Hun, 12, dig. pp. 101-2; Germond v. Jones, 2 Hill, 569, 574, dig. p. 103.

See cases cited under section 132.

VI. POWER SUBJECT TO CONDITION.

Real Prop. L., sec. 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."

Vernon v. Vernon, 53 N. Y. 351, dig. p. 95; Smith v. Van Ostrand, 64 id. 278, dig. p. 96; Livingston v. Murray, 68 id. 485, dig. p. 97; Taggart v. Murray, 53 id. 233, dig. p. 116; Swarthout v. Ranier, 143 id. 499, dig. p. 952; see Qualified powers, *post*, p. 1009.

An absolute power of disposition is defined by section one hundred and thirty-three. It exists when there is given to a person a power to dispose, *in his lifetime, of the entire fee, for his own benefit.* Such a power must be exercised by an instrument operative in the lifetime of the grantee of the power.[1]

But section one hundred and thirty-two makes a general and beneficial power to devise the inheritance equivalent to an absolute power of disposition, when it is given to a tenant for life, or for years. Such

[1] Cutting v. Cutting, 86 N. Y. 534; Calvin v. Young, 81 Hun, 116; Real Prop. L., sec. 148.

NOTE TO SECTIONS 129–134.

a tenant with such a power is brought within the terms of section one hundred and thirty-three and may dispose of the fee in his lifetime by grant. Hume v. Randall, 141 N. Y. 499 (digested p. 898). And this is so, although the instrument creating the power should prohibit disposition during the lifetime of the grantee of the power.[1]

The effect of this absolute power of disposition is to create a fee in the grantee of the power in the cases provided in sections one hundred and twenty-nine to one hundred and thirty-one. This happens, when the power is not accompanied by a trust, and when the grantee of the power has a particular estate for life or years (section one hundred and twenty-nine) or when he has not such a particular estate (one hundred and thirty). The reading of the two sections, however, shows this distinction. Section one hundred and twenty-nine provides that the fee is subject to any future estates limited thereon, in case the power is not executed, and the property is not sold for the satisfaction of debts. This is equivalent to a statement that the future estates are *created in terms dependent* upon the non-exercise of the power, and the failure of the grantees' creditors to appropriate the property to the payment of his debts. Indeed to allow the application of the section, such future estates must necessarily be subject to the power of disposition; otherwise the grantee of the power would be unable to convey the entire fee as required by section one hundred and thirty-three, or if he could transfer the fee of the land, yet if the future estate continued in the proceeds, superior to the power, then the power of disposition would not be exercised for his own benefit. Hence when a future estate is created, to which the power is in terms made subject, the requisite conditions of one hundred and twenty-nine are not met. The reading of one hundred and thirty is somewhat different. It provides that, when a *like* power of disposition is given to a person to whom no particular estate is limited, such person shall *also* take a fee; but that the fee shall be subject to any future estates limited thereon, but absolute in respect to creditors, purchasers and encumbrancers. It will be noticed that this section does not provide for future estates limited on the fee "in case the power of absolute disposition is not exercised," etc; as provided in section one hundred and twenty-nine. There the future estate is created subject to the fee flowing from the power; here the fee is subject to the future estates, except as to creditors, etc. Nevertheless the practical result is the same, and necessarily so. For the fee is absolute as to creditors, purchasers and encumbrancers. Hence if the

[1]Deegan v. Wade, 144 N. Y. 573; Hume v. Randall, *supra*.

NOTE TO SECTIONS 129–134.

power of disposition is exercised, that is, if the grantee of the power sells or encumbers his fee, or his creditors take it, the land is freed from the future estates. Hence such estates can only continue in the land in default of the execution of the power, or the non-action of creditors, precisely as is provided in section one hundred and twenty-nine. But it may be said that the future estate would attach to the proceeds of sale, and the interest of the grantee of the power would be subject to them. In that case the power of disposition would not be for the benefit of the grantee of the power, but for the owner of the future estate, to whom the grantee of the power would stand in the relation of a trustee,[1] and the power would not be absolute within the meaning of section one hundred and thirty-three. It seems impossible, then, to conceive of a case where these sections apply, when a future estate can exist, except in default of the execution of the power, or in default of the beneficial use even to absolute consumption of the proceeds of disposition. A power can not be general, and beneficial, and at the same time in trust; and if the owner of future estates have any constraint upon either the power of disposition, or the proceeds or benefits of the disposition, the power is not beneficial but is in trust (see secs. 116–118). It is not to be supposed, however, that future estates can not be created under these sections to take in default of the exercise of the power, or for the enjoyment of what the grantee of the power, or his creditors, may see fit to leave undisposed of, or even to the subordination of the rights of the grantee, but in the first two classes of cases the grantee of the power has a fee conditioned upon his use of the power, and in the last case the sections can not be invoked. Sections one hundred and twenty-nine to one hundred and thirty-three seem to accomplish this; where a power, unaccompanied by a trust, but general and beneficial, is given to a person, the owner, or to one not the owner of an estate for life or years, not given in trust, so that the grantee can dispose of it by grant, or by will, such person takes a fee, which he can sell or encumber, and the proceeds of which he can consume or dispose of; and such a power is in harmony with future estates limited on the fee, to take effect in case the power is not exercised, or to take effect as to such portion of the property or the proceeds thereof, as the grantee or his creditors shall leave undisposed of. The sections seem to give some rights to the creditors superior to those conferred on the grantee of the power; but practically their rights are coincident, and, when the section applies the rights of both are in effect superior to those of future estates.

[1]Smith v. Van Ostrand, 64 N. Y. 278, dig., p. 111.

NOTE TO SECTIONS 129–134.

Under the various sections will be found illustrative decisions digested elsewhere, and below reference is made to digested cases, showing the course of decision on the various questions that have arisen, pertinent to the influence of powers upon the creation of estates, and on the question of the rights of persons to whom future estates are given in subjection, to, or in derogation of the power of disposition.

While the authorities have not been entirely harmonious the general tendency has been to hold as follows:

That an absolute beneficial power of disposition carries a fee.[1]

Cases have been construed to hold that the power of disposition was not intended to be absolute[2] and although it has been held that a power of absolute disposition for the benefit of the grantee of the power, carried a fee, and did not permit the limitation of futures estates thereon[3] yet the general trend of the later decisions is that a future estate may be created, in case the power be not exercised, or to carry over such part of the property as the grantee of the power should not use or consume.[4]

General power of disposal.

A general power to dispose of property includes the right to dispose of it by will to the exclusion of persons entitled to take any part that should remain or be undisposed of at death of the grantee of the power, unless the grant of the power contains words which expressly, or by fair implication, exclude disposition by will.

Matter of Gardner, 140 N. Y. 123, dig. p. 107.

An absolute power of disposition by grant does not give power to devise.

Cutting v. Cutting, 86 N. Y. 534.; Calvin v. Young, 81 Hun, 116. See Real Prop. L., sec. 148.

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[1]Freeborn v. Wagner, 2 Abb. Ct. of App. Dec. 175, dig. p. 94; Kinnier v. Rogers, 42 N. Y. 534, dig. p. 94; Campbell v. Beaumont, 91 id. 464, dig. p. 97; Van Horn v. Campbell, 100 id. 287, dig. p. 97.

[2]Trustees v. Kellogg, 16 N. Y. 83, dig. p. 94; Terry v. Wiggins, 47 id. 512, dig. p. 95, Vernon v. Vernon, 53 id. 351; dig. p. 96; Livingston v. Murray, 68 id. 485, dig. p. 97.

[3]Norris v. Beyea, 13 N. Y. 273, dig. p. 94; Campbell v. Beaumont, 91 id. 464, dig. p. 97; Van Horne v. Campbell, 100 id. 287, dig. p. 97.

[4]Smith v. VanOstrand, 64 N. Y. 278; Livingston v. Murray, 68 id. 485, dig. p. 97; Wagner v. Wagner, 96 id. 164, dig. p. 97; Matter of Cager, 111 id. 343, dig. p. 98; Crozier v. Bray; 120 id. 366, dig. p. 99; Rose v. Hatch, 125 id. 427, dig. 100; Leggett v. Firth, 132 id. 7, dig. p. 101.

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When power to devise carries a fee.

A general and beneficial power to owner of an estate for life or for years to devise the inheritance, gives power to dispose of the property by grant.

Hume v. Randall, 141 N. Y. 499; Deegan v. Wade, 144 id. 573. See cases under section 132, *supra*.

Remainder after power of disposal.

For valid future estates limited after the gift of a power of disposition.

See Terry v. Wiggins, 47 N. Y. 512, dig. p. 95; Matter of Cager, 111 id. 343, dig. p. 98; Haynes v. Sherman, 117 id. 433, 438, dig. p. 98; Crozier v. Bray, 120 id. 366, dig. p. 99; Rose v. Hatch, 125 id. 427, dig. p. 100; Leggett v. Firth, 132 id. 7, dig. p. 101; Greystone v. Clark, 41 Hun, 125, dig. p. 101; Matter of Blauvelt, 60 id. 394, dig. p. 102; 131 N. Y. 249; Thomas v. Wolford, 21 Abb. N. C. 231, dig. p. 231; Blanchard v. Blanchard, 4 Hun, 290, dig. p. 103. See, further, note additional decisions, *ante*, pp. 103–105, 105–106.

Repugnancy of gift over, to power of disposition.

Repugnancy of gift over to an absolute power of disposition.

See Norris v. Beyea, 13 N. Y. 273, dig. p. 94; Trustees v. Kellogg, 16 id. 83, dig. p. 94; Campbell v. Beaumont, 91 id. 464, dig. p. 97; Van Horne v. Campbell, 100 id. 287, dig. p. 97; Griswold v. Warner, 51 Hun, 12, dig. p. 102. See, further, *ante*, pp. 103–105.

Power of disposition accompanied by or subject to a trust.

A power of disposition, accompanied by or subject to a trust, does not give absolute power of disposition.

Kinnier v. Rogers, 42 N. Y. 534, dig. p. 94; Cutting v. Cutting, 86 id. 522, dig. p. 893; Crooke v. County of Kings, 97 id. 421, dig. p. 448; Asche v. Asche, 113 id. 232, dig. p. 192; Genet v. Hunt, 113 id. 158, dig. p. 456; Haynes v. Sherman, 117 id. 433, 438, dig. p. 98; Rose v. Hatch, 125 id. 427, dig. p. 100; Matter of Blauvelt, 131 id. 249, dig. p. 910; Hume v. Randall, 141 id. 499; Thomas v. Pardee, 12 Hun, 151, dig. p. 113; Germond v. Jones, 2 Hill, 569, 574, dig. p. 103.

Conditional power of disposition.

Conditional power of disposition.

Vernon v. Vernon, 53 N. Y. 351, dig. p. 96; Smith v. VanOstrand, 64 id. 278, dig. p. 96; Livingston v. Murray, 68 id. 485, dig. p. 97; Matter of Cager, 111 id. 343, dig. p. 98.

Enlargement of life estate by power of sale.

Life estate not enlarged by power of sale.

Ackerman v. Gorton, 67 N. Y. 62, dig. p. 96; Livingston v. Murray, 68 id. 485, dig. p. 97; Germond v. Jones, 2 Hill, 569, 574, dig. p. 103. See, further, *ante*, pp. 105–106.

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Remainder after power to consume corpus.

When power to consume the corpus is repugnant to and destructive of limitation over after death of the grantee of the power.

Livingston v. Murray, 68 N. Y. 485, digested p. 106; Matter of Yates, 99 id. 94, digested p. 107.

When future estates take effect in such portion of the property as is not consumed by the grantee of the power.

Wager v. Wager, 96 N. Y. 164, digested p. 97; Spencer v. Strait, 38 Hun, 228, digested p. 108; Wortman v. Robinson, 44 id. 357, digested p. 108; Wells v. Seeley, 47 id. 109, digested p. 108; Matter of Fuller, 22 St. Rep. 352, digested p. 108.

See, Matter of Gardner, 140 N. Y. 122, digested p. 107.

Cases where the estate is given to B. in fee, with power to diminish or consume the property for his own purposes and at his discretion and the will gives what is left at the first taker's death to C. See cases, *ante*, pp. 108–109.

Cases where the estate is given to a trustee with power to diminish or consume the principal for the benefit or purposes of B. and the will gives what is left at the death of the first beneficiary to C. See cases, *ante*, pp. 109–110.

Cases where the estate is first given to B. *for life*, with power to diminish or consume the property for his own purposes and at his discretion, and the will gives what is left at the first taker's death to C. See cases, *ante*, p. 110.

Remainders after power to use corpus for support.

Power to use principal for support—whether takers of future estates are entitled to the surplus.

Bundy v. Bundy, 38 N. Y. 410, 421, digested p. 111; Smith v. Van Ostrand, 64 id. 278, digested p. 111.

Where person entitled to take and use the principal for his benefit and support takes an absolute fee.

Crain v. Wright, 114 N. Y. 307, digested p. 112.

When the principal fund is confided to a legatee for life with power to use the same for his support, he becomes a trustee for the person entitled in remainder to the unexpended portion.

Smith v. Van Ostrand, 64 N. Y. 278, digested p. 111.

Power of person entitled to use principal for support to incumber the property.

Swarthout v. Ranier, 143 N. Y. 499, digested p. 112.

When a power of disposition for support is given to A. but the property is given in trust to trustees.

Thomas v. Pardee, 12 Hun, 151.

NOTE TO SECTIONS 129–134.

When a person has power of disposition of principal to use for her support in her discretion she is the sole judge of her necessities. See *ante*, p. 113.

Precatory clauses.

Whether a trust is created in cases when a power of disposition is given, or the words are precatory. See *ante*, pp. 113–115.

Absolute gift, whether cut down to a power of consumption.

Whether gift of title is cut down to the power of consumption by subsequent provisions for a gift over.

Hermance v. Mead, 18 Abb. N. C. 90, digested p. 115.

Whether an absolute gift is repugnant to an absolute power of consumption given to another.

When a gift is not repugnant to a power given to a trustee to apply all or such part of the property as he should deem necessary to the education, maintenance and support of another.

Trustees, etc. v. Kellogg, 16 N. Y. 83, 88, digested p. 116. Compare Howland v. Clendenin, 134 N. Y. 305, digested p. 122.

Whether an absolute gift is cut down by a power to sell or invest.

When a gift of a fee is not cut down by a power of sale.

Jennings v. Conboy, 73 N. Y. 230, digested p. 117. Compare Matter of McClure, 136 id. 238, digested p. 123; Vernon v. Vernon, 53 id. 351, digested p. 117.

Discretionary power to legatee to use property for herself and others.

Discretionary power given to one to retain or dispose of property for the benefit of herself and children did not cut down prior absolute gift.

Clarke v. Leupp, 88 N. Y. 228, digested p. 118.

As to repugnant limitations, see *ante*, pp. 115–129.

VII. POWER OF LIFE TENANT TO MAKE LEASES.

Real Prop. L., sec. 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."

1 R. S., 733, secs. 88, 89 (repealed by Real Prop. L., sec. 300), used the words "any conveyance" instead of "a grant."

VIII. EFFECT OF MORTGAGE BY GRANTEE.

Real Prop. L., sec. 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."

1 R. S. 733, secs. 90, 91 (repealed by Real Prop. L., sec. 300), inserted the clause "or by a married woman by virtue of any beneficial power," after "leases" in the first sentence.

VI. THE EXECUTION OF POWERS.

I. WHEN A TRUST POWER IS IMPERATIVE.

Real Prop. L., sec. 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."

1 R. S. 734, secs. 96, 97 (repealed by Real Prop. L., sec. 300), used the word "objects" instead of "beneficiaries," but was otherwise substantially the same.

See Index to cases, *post*, p. 973).

A trust power is imperative.

Delaney v. McCormack, 88 N. Y. 174; Farrar v. McCue, 89 id. 139, 144; Mott v. Ackerman, 92 id. 539, 551; Dana v. Murray, 122 id. 604, 613; Tilden v. Green, 130 id. 29, 54; Holly v. Hirsch, 135 id. 590, 596; Matter of Gantert, 136 id. 106; Smith v. Floyd, 140 id. 337, 342.

An imperative power imposes a duty on the grantee, the performance of which may be compelled for the benefit of the person interested (as to rights of creditors or assignees see sec. 142, *post*, p. 977.

Power v. Cassidy, 79 N. Y. 602, 613; Dana v. Murray, 122 id. 604, 613; Tilden v. Green, 130 id. 29, 54; Matter of Gantert, 136 id. 106; Smith v. Floyd, 140 id. 337, 342; Manice v. Manice, 43 id. 303, 365; Wild v. Bergen, 16 Hun, 127.

See Index to cases, *post*, p. 977.

Unless its execution or nonexecution is made expressly to depend on the will of the grantee.

Coleman v. Beach, 97 N. Y. 545; Clift v. Moses, 116 id. 144, 153; Tilden v. Green, 130 id. 29, 47; Matter of Gantert, 136 id. 106; Matter of Bierbaum, 40 Hun, 504.

See Index to cases, *post*, p. 974.

A trust power does not cease to be imperative when the grantee has the right to select any and exclude others, of the persons designated as the beneficiaries of the trust. See sec. 138, *post*, p. 965.

Power v. Cassidy, 88 N. Y. 602; Tilden v. Green, 130 id. 29, 64; Ireland v. Ireland, 84 id. 321; Crooke v. County of Kings, 97 id. 443; Holland v. Alcock, 108 id. 312, 320–1. See "Beneficiary," *ante*, p. 823.

A power or authority to sell is discretionary, unless its exercise is directed, or is rendered necessary and essential by the scope of the will, and its declared purposes.

White v. Howard, 46 N. Y. 144, 162; Scholle v. Scholle, 113 id. 261, 270; Clift v. Moses, 116 id. 144, 158; Matter of Gantert, 136 id. 106.

The right and privilege of disposing of property by will to a person or class of persons is imperative.

Smith v. Floyd, 140 N. Y. 337.

A reservation by a grantor of power to devise is not imperative.

Towler v. Towler, 142 N. Y. 371.

I. WHEN A TRUST POWER IS IMPERATIVE.

While a power may be imperative, the time and manner of its execution may be discretionary.

Haight v. Brisbin, 96 N. Y. 132, 135.

When the exercise of the power is in the discretion of the grantee thereof, the court can not control his discretion, nor exercise it for him.

Haight v. Brisbin, 96 N. Y. 132, 135; Holden v. Strong, 116 id. 471, 474; Jones v. Jones, 8 Misc. 660.

The execution of discretionary powers must be in good faith, and must not be abused.

Haight v. Brisbin, 96 N. Y. 132, 135; Holden v. Strong, 116 id. 471, 474; Jones v. Jones, 8 Misc. 660.

The discretion of trustees as to the application of trust funds to the support of designated beneficiaries may be subject to the control of the court.

Bundy v. Bundy, 38 N. Y, 410; Ireland v. Ireland, 84 id. 321; Crooke v. County of Kings, 97 id. 443; Holden v. Strong, 116 id. 471, 474. See Index to cases, *post*, p. 974, 977.

II. DISTRIBUTION WHEN MORE THAN ONE BENEFICIARY.

Real Prop. L., sec. 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."

1 R. S. 734, secs. 98, 99 (repealed by Real Prop. L., sec. 300) used trustee of the "power instead of "grantee of the power"; was otherwise substantially the same.

See Index to cases, *post*, p. 975.

The power exercisable under this section may be imperative. See note to sec. 137, *ante*, p. 964.

Power v. Cassidy, 88 N. Y. 602, digested p. 861; Holland v. Alcock, 108 id. 312, digested p. 863; Austin v. Oakes, 117 id. 577; Drake v. Drake, 134 id. 220; Read v. Williams, 125 id. 560; Matter of Conner, 6 App. Div. 594. See, also, Beneficiary, p. 821 *et seq.*; Charitable uses, p. 847 *et seq.*

III. BENEFICIAL POWER SUBJECT TO CREDITORS.

Real Prop. L., sec. 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."

1 R. S. 733, sec. 93 (repealed by Real Prop. L., sec. 300) was substantially the same. See, also, sec. 142; also Index to cases, *post*, p. 978.

III. BENEFICIAL POWER SUBJECT TO CREDITORS.

In Cutting v. Cutting, 86 N. Y. 541, *et seq.*, it was stated that this section did not declare that every special and beneficial power, *ipso facto*, is liable to the claims of creditors, but "that when a special and beneficial power, by reason of the provisions of the article operating on the terms of the power, is liable to the claim of creditors, the liability is enforceable by creditor's bill, or in any other manner that other debtor interests that can not be reached by law may be reached in equity; and that, when the grantee of the power refuses or neglects to execute the power, or mistakes the manner of the execution, the execution in proper mode may be decreed for the benefit of any creditor who has a right thereby," and the case holds that a general and beneficial power to a person, the beneficiary under a trust estate, to appoint by will, was not subject to a judgment against the beneficiary. The effect of a trust in preventing the beneficiary from taking a fee is pointed out in Hume v. Randall, 141 N. Y. 499.

As to lien of judgment creditor, see Sayles v. Best, 140 N. Y. 368.

IV. EXECUTION OF POWER ON DEATH OF TRUSTEE.

Real Prop. L., sec. 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."

1 R. S. 734, sec. 100 (repealed by Real Prop. L., sec. 300) was substantially the same.

See, also, section 162, *post*, p. 1017.

Power of court to adjudge execution of power

Holland v. Alcock, 108 N. Y. 320-1.

When objects of unexecuted power take equally.

Smith v. Floyd, 140 N. Y. 337, digested p. 897.

See Beneficiary, *ante*, p. 823; also, Index to cases, *post*, p. 977.

V. WHEN POWER DEVOLVES ON COURT.

Real Prop. L., sec. 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."

1 R. S. 734, sec. 101 (repealed by Real Prop. L., sec. 300) used the word "exercised" instead of "executed", and "court of chancery" for "supreme court"; was otherwise substantially the same.

See Index to cases, *post*, p. 977.

The power may devolve on the executor.

Officer v. Board of Home Missions, 47 Hun, 352; citing, Bogert v. Hertell, 4 Hill, 500; Dorland v. Dorland, 2 Barb. 80; see, also, Meakings v. Cromwell, 5 N. Y. 139.

See, also, section 162, *post*, p. 1017.

As to failure to appoint a trustee, see *ante*, p. 841.

VI. WHEN CREDITORS MAY COMPEL EXECUTION OF TRUST POWER.

Real Prop. L., sec. 142. "When creditors may compel execution of trust power.—The execution, wholly or partly, of a trust power may

VI. WHEN CREDITORS MAY COMPEL EXECUTION OF TRUST POWER.

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."

1 R. S. 735, sec. 103 (repealed by Real Prop. L., sec. 300), used "decreed in equity" instead of "adjudged," and "objects of the trust" instead of "beneficiary;" was otherwise substantially the same.

See section 137, *ante*, p. 964; section 139, *ante*, p. 965; Index to cases, *post*, p. 977

VII. DEFECTIVE EXECUTION OF TRUST POWER.

Real Prop. L., sec. 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."

1 R. S. 737, sec. 131 (repealed by Real Prop. L., sec. 300), used "decreed in equity" instead of "adjudged," and "objects" instead of "beneficiary;" was other wise substantially the same.

See section 160, *post*, p. 973; Index to cases, *post*, p. 976–7.

When equity aids a defective execution of a power. Schenck v. Ellingwood, 3 Edwd. Ch. 175.

VIII. EFFECT OF INSOLVENT ASSIGNMENT.

Real Prop. L., sec. 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 the creditors."

1 R. S. 735, sec. 104 (repealed by Real Prop. L., sec. 300), provided that the power or interest should pass under any assignment authorized by chapter V (2 R. S., 40), in relation to trustees of debtors and voluntary assignments; was otherwise substantially the same.

IX. HOW POWER MUST BE EXECUTED.

Real Prop. L., sec. 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 R. S. 735, sec. 113 (repealed by Real Prop. L., sec. 300), was substantially the same.

See Real Prop. L., sec. 240.

X. EXECUTION BY SURVIVORS.

Real Prop. L., sec. 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."

1 R. S. 735, sec. 112 (repealed by Real Prop. L., sec. 300), was substantially the same.

Code of Civil Procedure, sec. 2642. * * * "And where any powers to sell, mortgage or lease real estate, or any interest therein, are given to executors as such, or as trustees, or as executors and trustees, and any such persons named as executors shall neglect to qualify, then all sales, mortgages and leases under said powers made by the executors who shall qualify, shall be equally valid as if the other executors or trustees had joined in such sale."

2 R. S. 109, sec. 55 (sec. 55, title 4, ch. 6, part 2, R. S.).— "Where any real estate or any interests therein, is given or devised by any will legally executed, to the executors therein named, or any of them, to be sold by them or any of them, or where such estate is ordered by any last will to be sold by the executors, and any executor shall neglect or refuse to take upon him the execution of such will, then all sales made by the executor or executors, who shall take upon them the execution of such will, shall be equally valid, as if the other executors had joined in such sale."

See index to cases, *post*, p. 977. The three statutes cover—Real Prop. L., sec. 146, a vacancy caused by death; Code, sec. 2642, a vacancy caused by neglect to qualify, in case of a power to sell, etc. given by will to executors or trustees; R. S. sec. 55, a neglect or refusal of an executor to take upon him the execution of the will. These sections are all limited; but are supplemented by the power conferred on the court by section 162, whereby sections 91 and 92 of the Real Property Law are made applicable to powers.

The Revised Statute was held to be applicable to a discretionary power in Leggett v. Hunter, 19 N. Y. 445, which cites Taylor v. Morris, 1 id. 341, and Niles v. Stevens, 4 Denio, 399.

The rule is that the power must be exercised by all in whom it is vested, unless the instrument creating the power otherwise provide. See *ante*, p. 739, *et seq.* Wilder v. Ranney, 95 N. Y. 7, digested p. 740; Barry v. Lambert, 98 id. 300, digested p. 740; Whitlock v. Washburn, 62 Hun, 373; Van Boskerck v. Herrick, 65 Barb. 258; Matter of Van Wyck, 1 Barb. Ch. 569; Ogden v. Smith, 2 Paige, 198; Berger v. Duff, 4 Johns. Ch. 368.

But the three sections above permit exceptions to this rule. Taylor v. Morris, 1 N. Y. 341; Leggett v. Hunter, 19 id. 445; House v. Raymond, 3 Hun, 44.

Unless the instrument creating the power otherwise provide. Herriott v. Prime, 87 Hun, 95, citing Hyatt v. Aguero, 24 J. & S. 63; Kissam v. Dierkes, 49 N. Y. 602.

These sections do not cover a case of resignation or removal. Matter of Van Wyck, 1 Barb. Ch. 565. See, however, Fleming v. Burnham, 100 N. Y. 1.

But section 55 (R. S.) seems broad enough to cover a case of resignation, for if one executor may exercise the power, when his coexecutor refuses to take upon himself the execution of the will, Roseboom v. Mosher, 2 Denio, 61, how much the more

X. EXECUTION BY SURVIVORS.

should he possess that power when his coexecutor resigns. See, Matter of Bernstein, 3 Redf. 20.

See 2 R. S. 109, sec. 55, distinguished from section 153. Correll v. Lauterbach, 12 App. Div. 531, aff'g 14 Misc. 469.

XI. EXECUTION OF POWER TO DISPOSE BY DEVISE.

Real Prop. L., sec. 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."

1 R. S. 736, sec. 115 (repealed by Real Prop. L., sec. 300), omitted the word "written" and required the execution to be in accordance with chapter VI (2 R. S. 56), concerning wills and testaments; was otherwise substantially the same.

XII. EXECUTION OF POWER TO DISPOSE BY GRANT.

Real Prop. L., sec. 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."

1 R. S., 736, sec. 116 (Repealed by Real Prop. L., sec. 300), used the word "party" instead of "person."

See Matter of Gardner, 140 N. Y. 123, digested p. 107; Hume v. Randall, 141 id. 499; Deegan v. Wade, 144 id. 573; Cutting v. Cutting, 86 id. 534; Calvin v. Young, 81 Hun, 116.

XIII. WHEN DIRECTION BY GRANTOR DOES NOT RENDER POWER VOID.

Real Prop. L., sec. 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."

1 R. S. 736, sec. 118 (repealed by Real Prop. L., sec. 300), was substantially the same.

XIV. WHEN DIRECTIONS BY GRANTOR NEED NOT BE FOLLOWED.

Real. Prop. L., sec. 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."

1 R. S. 736, sec. 119 (repealed by Real Prop. L., sec. 300), was substantially the same.

Kissam v. Dierkes, 49 N. Y. 602; Griswold v. Perry, 7 Lans. 98, 104; Schenck v. Ellingwood, 3 Edw. Ch. 175, 176.

XV. NOMINAL CONDITIONS MAY BE DISREGARDED.

Real Prop. L., sec. 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."

1 R. S. 736, sec. 120 (repealed by Real Prop. L., sec. 300) was the same.

Brown v. Farmer's L. & T. Co., 51 Hun, 386, aff'd 117 N. Y. 266. See Phillips v. Davies, 92 N. Y. 199, 204; Bradstreet v. Clarke, 12 Wend. 602.

See cases under secs. 150, 152, also Index to cases, *post*, p. 976.

XVI. INTENT OF GRANTOR TO BE OBSERVED.

Real Prop. L., sec. 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, 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."

1 R. S. 736, sec. 121 (repealed by Real Prop. L., sec. 300) was substantially the same.

See section 143, *ante*, p. 967; also section 160, *post*, p. 973; The essential requirement in the execution of all powers is that the intention of the grantor of the power shall be observed. Sections 150 and 151 of the Real Property Law provide that certain directions relating to mere formalities, and conditions merely nominal, may be disregarded. But all requirements, directions, and conditions, essentially limiting, or regulating the exercise of the power, must be fulfilled, if it appear that it was the intention of the grantor of the power that the power should not be otherwise executed. This section, then, relates generally to the due exercise of powers, and is illustrated by all cases falling under the execution of powers. A convenient reference to such cases will be found in the Index to cases at p. 973.

XVII. CONSENT OF GRANTOR OR THIRD PERSON TO EXECUTION OF POWER.

Real Prop. L., sec. 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."

1 R. S. 736, sec. 122 (repealed by Real Prop. L., sec. 300) omitted the word "grantor" in the first sentence. In the first clause of the second sentence "signed" was used for "subscribed" and "party" for "person." In the second clause of the second sentence "and certified was omitted" and the signature was to be acknowledged or proved "in the same manner as if subscribed to a conveyance of lands;" otherwise was substantially the same. See Index to cases, *post*, p. 976-7.

XVII. CONSENT OF GRANTOR OR THIRD PERSON TO EXECUTION OF POWER.

This section is modified by section 154, which permits the consent of a survivor or survivors, when the consent of two or more persons is required to the execution of the power, and one or more of them die before the execution of the power. Section 154 therefore supersedes the rule laid down in Barber v. Carey, 11 N. Y. 397, and Kissam v. Dierkes, 49 id. 602. In addition to these cases illustrating section 153, see Hoyt v. Hoyt, 85 N. Y. 142, aff'g 17 Hun, 192, when the power of sale was not to be exercised, save with the approval of each and every of the heirs of the testator's real estate, see case as reported, in 17 Hun, 192, digested p. 1004.

See also Hamilton v. New York Stock Exchange Building Co., 20 Hun, 88; see pp. 96, 97, Correll v. Lauterbach, 12 App. Div. 531, aff'g 14 Misc. 469. See also qualified powers, *post*, p. 1009.

XVIII. WHEN ALL MUST CONSENT.

Real Prop. L., sec. 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."

This section was enacted as a part of the Real Prop. L. by ch. 547, L. 1896, and is intended to change the rule ennunciated in Barber v. Cary, 11 N. Y. 397; Kissam v. Dierkes, 49 id. 602.

XIX. OMISSION TO RECITE POWER.

Real Prop. L., sec. 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."

1 R. S. 737, sec. 124 (repealed by Real Prop. L., sec. 300) was substantially the same. See Index to cases, *post*, p. 975.

White v. Hicks, 33 N. Y. 383, aff'g 43 Barb. 64; Mott v. Ackerman, 92 N. Y. 539, 549; Mutual Life Ins. Co. v. Shipman, 119 id. 324; Austin v. Oakes, 117 id. 577, 593; Roarty v. McDermott, 146 id. 296, 303; Cole v. Gourlay, 9 Hun, 493, aff'd 79 N. Y. 527, see also Heyer v. Burger, 1 Hoff. Ch. 1; Bradish v. Gibbs, 3 Johns. Ch. 522. Also see cases under next section.

XX. WHEN DEVISE OPERATES AS AN EXECUTION OF THE POWER.

Real Prop. L., sec. 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."

1 R. S. 737, sec. 126 (repealed by Real Prop., L., sec. 300) was substantially the same. See Index to cases, *post*, p. 975.

XX. WHEN DEVISE OPERATES AS AN EXECUTION OF THE POWER.

See cases under section 155, *ante*, p. 971. See also cases digested under the Execution of Powers, *post*, p. 975. Wright v. Syracuse, Ontario and New York R. Co., 92 Hun, 32; Hutton v. Benkard, 92 N. Y. 295; New York Life Ins. Co. v. Livingston, 133 id. 125; Thomas v. Snyder, 43 Hun, 14; Hogle v. Hogle, 49 id. 313; Kibler v. Miller, 57 id. 14, aff'd 141 N. Y. 571; Lockwood v. Mildeberger, 5 App. Div. 459; Stewart v. Keating, 15 Misc. 44, where the rule since and before the statute is considered.

In addition to above see VanWert v. Benedict, 1 Bradf. 114; Bolton v. DePeyster, 25 Barb. 539; Sewall v. Wilmer, 132 Mass. 131; Funk v. Eggleston, 92 Ill. 515; Warner v. Conn. M. L. Ins. Co., 109 U. S. 357.

XXI. DISPOSITION NOT VOID BECAUSE TOO EXTENSIVE.

Real Prop. L., sec. 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."

1 R. S. 737, sec. 123 (repealed by Real Prop. L., sec. 300) omitted the words "or charge," otherwise was substantially the same.

Hillen v. Iselin, 144 N. Y. 365, digested p. 471. See cases, *ante*, p. 374, and discussion, *ante*, p. 397.

See, also, Crooke v. County of Kings, 97 N. Y. 445.

XXII. COMPUTATION OF TERM OF SUSPENSION.

Real Prop. L., sec. 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."

1 R. S. 737, sec. 128 (repealed by Real Prop. L., sec. 300) was substantially the same.

See Index to cases, *post*, p. 978.

See discussion and cases, *ante*, p. 404.

XXIII. CAPACITY TO TAKE UNDER A POWER.

Real Prop. L., sec. 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."

1 R. S. 737, sec. 129 (repealed by Real Prop. L., sec. 300) instead of last clause beginning "unless", had "which such person would not have been capable of taking, under the instrument by which the power was granted;" otherwise was substantially the same.

Dana v. Murray, 122 N. Y. 604.

See Matter of Stewart, 131 N. Y. 274; Jackson v. Davenport, 20 Johns 537.

XXIV. PURCHASE UNDER DEFECTIVE EXECUTION.

Real Prop. L., sec. 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."

1 R. S. 737, sec. 132 (repealed by Real Prop. L., sec. 300) was substantially the same. See section 143.

XXV. INSTRUMENT AFFECTED BY FRAUD.

Real Prop. L., sec. 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."

1 R. S. 737, sec. 125 (repealed by Real Prop. L., sec. 300) omitted the words "or will;" otherwise substantially the same.

See Index to cases, *post*, p. 975.

Smith v. Bowen, 35 N. Y. 83; Russell v. Russell, 36 id. 581; McMurray v. McMurray, 66 id. 175; People v. Open Board, 92 id. 98; Haack v. Weicken, 118 id. 67; Harris v. Strodl, 132 id. 396; Matter of Rider, 23 Hun, 91; McPherson v. Smith, 49 id. 254; Harty v. Doyle, id. 410; Benedict v. Arnoux, 7 App. Div. 1; matter of Vandevort, 8 id. 341.

Decisions relating to sections 137–161.

Index to cases.

See Power of disposition by will, *ante*, p. 892; Power of sale, *ante*, p. 901; Power to mortgage, lease, or pledge, *ante*, p. 949; see, also, cases under sections 137–161, given above.

1. Execution of power of sale to pay debts.

Allen v. DeWitt, 3 N. Y. 276; Russell v. Russell, 36 id. 581; Matter of Bolton, 83 Hun, 259 (affirmed 146 N. Y. 257, digested p. 945); Matter of Gantert, 136 id. 106.

2. Payment of outlawed debts.

Butler v. Johnson, 111 N. Y. 204; O'Flynn v. Powers, 136 id. 412.

3. Debts due grantee of the power.

O'Flynn v. Powers, 136 N. Y. 412.

4. Distinction between power to sell to pay debts and one to pay legacies.

Clift v. Moses, 116 N. Y. 144.

5. Power to sell to pay legacies.

Clift v. Moses, 116 N. Y. 144; Keller v. Ogsbury, 121 id. 326; Hoyt v. Hoyt, 17 Hun, 192, aff'd 85 N. Y. 142; Hovey v. Chisholm, 56 Hun, 338.

6. Power to sell and distribute proceeds.

Allen v. DeWitt, 3 N. Y. 276; Prentice v. Janssen, 79 id. 478.

7. Power to sell and invest proceeds for beneficiaries.

Bundy v. Bundy, 38 N. Y. 410.

8. Power to sell and invest proceeds in land.

Leggett v. Hunter, 19 N. Y. 445.

9. Power to sell for support, executed by pledge or mortgage.

Swarthout v. Ranier, 143 N. Y. 499; Brown v. Farmers' Loan & Trust Co., 51 Hun, 386, aff'd 117 N. Y. 266, digested p. 951.

10. Discretionary element in power.

Power to executors to sell "in case they should find it proper or most fit in their opinion," Taylor v. Morris, 1 N. Y. 341; "as deemed expedient for the best interest of all my legatees," Hovey v. Chisholm, 56 Hun, 328; upon such terms and in such manner as they should deem for the best interest of the estate, Benedict v. Arnoux, 7 App. Div. 1; "in such parcels, at such times, and for such considerations as they should judge proper," Allen v. DeWitt, 3 N. Y. 276; "as she shall deem expedient and for the best interests" of legatees, Russell v. Russell, 36 id. 581. Cases involving similar expressions, Hancox v. Meeker, 95 N. Y. 528; Scholle v. Scholle, 113 id. 261; Keller v. Ogsbury, 121 id. 362; Harris v. Strodl, 132 id. 396.

11. Discretion as to time of sale.

Allen v. DeWitt, 3 N. Y. 276; Hancox v. Meeker, 95 id. 528; Haight v. Brisbin, 96 id. 132; Keller v. Ogsbury, 121 id. 362.

12. Discretion as to terms of sale.

Roome v. Philips, 27 N. Y. 357; Hancox v. Meeker, 95 id. 528; see cases above.

13. Discretionary power to convey to beneficiary.

McLean v. McLean, 3 Hun, 395; see, also, *ante*, p. 345.

14. Discretionary power to increase an annuity.

(See Mason v. Mason's Ex'rs, 4 Sandf. Ch. 523, aff'd 13 Barb. 461, digested p. 528).

15. Powers purely discretionary.

Coleman v. Beach, 97 N. Y. 545; see Scholle v. Scholle, 113 id. 261.

16. Discretionary power to apply proceeds of sale to beneficiaries.

Bundy v. Bundy, 38 N. Y. 410; (see Ireland v. Ireland, 84 id. 321).

17. Consideration received on execution of power.

Allen v. DeWitt, 3 N. Y. 276; Russell v. Russell, 36 id. 581; Adair v. Brimmer, 74 id. 539; Syracuse Savings Bank v. Holden, 105 id. 415; Woerz v. Rademacher, 120 id. 62.

18. Sale without consideration.

Smith v. Bowen, 35 N. Y. 83; People v. Open Board, 92 id. 98; Mutual Life Ins. Co. v. Woods, 121 id. 302; Hoyt v. Hoyt, 17 Hun, 192, aff'd 85 N. Y. 142; Benedict v. Arnoux, 7 App. Div. 1.

19. Nominal consideration.

Meakings v. Cromwell, 5 N. Y. 136; McMurray v. McMurray, 66 id. 175; People v. Open Board, 92 id. 98; Hoyt v. Hoyt, 17 Hun, 192, aff'd 85 N. Y. 142.

20. Taking back mortgage to secure purchase money.

Leggett v. Hunter, 19 N. Y. 445.

21. Release of mortgaged lands.

Mutual Life Ins. Co. v. Woods, 121 N. Y. 302.

22. Exchange of lands.

Woerz v. Rademacher, 120 N. Y. 62.

23. Debts primarily payable from personalty.

Benedict v. Arnoux, 7 App. Div. 1.

24. Conveyance in payment of a distributive share.

Allen v. Dewitt, 3 N. Y. 276.

25. Grantee of power conveying premises and taking back lease for life.

McMurray v. McMurray, 66 N. Y. 175.

26. Taking payment in corporate stock.

Adair v. Brimmer, 74 N. Y. 539.

27. Fraudulent or collusive sale.

See Real Prop. L., sec. 161, *ante*, p. 973; Russell v. Russell, 36 N. Y. 581; Smith v. Bowen, 35 id. 83; McMurray v. McMurray, 66 id. 175; People v. Open Board, 92 id. 98; Haack v. Weicken, 118 id. 67; Harris v. Strodl, 132 id. 396; Hoyt v. Hoyt, 17 Hun, 192, aff'd 85 N. Y. 142; Harty v. Doyle, 49 Hun, 410; McPherson v. Smith, id. 254; Benedict v. Arnoux, 7 App. Div. 1; Matter of Vandevort, 8 id. 341.

28. Wrong motive in selling.

Rose v. Hatch, 125 N. Y. 427.

29. Executor selling and receiving back title to himself individually.

People v. Open Board, 92 N. Y. 98.

30. Power to mortgage, executed by mortgage to secure husbands' debt.

Leavitt v. Pell, 25 N. Y. 474. See Syracuse Savings Bank v. Holden, 105 id. 415.

31. Questions involving powers whose execution was alleged to be limited by time, the happening of events, or other restrictions.

Prentice v. Janssen, 79 N. Y. 478; Phillips v. Davies, 92 id. 199; Mott v. Ackerman, id. 539; Hellenberg v. Dist. No. One, 94 id. 580; Coleman v. Beach, 97 id. 545; Austin v. Oakes, 117 id. 577; Bruner v. Meigs, 6 Hun, 203; Wild v. Bergen, 16 id. 127; Parsons v. Rhodes, 22 id. 80; Waldron v. Schlang, 47 id. 252; Cusack v. Tweedy, 56 id. 617.

32. Execution of power for support after the death of the beneficiary.

Allport v. Jerrett, 61 Hun, 447.

33. Execution of power defeated by act of beneficiaries. By election to take the land.

Prentice v. Janssen, 79 N. Y. 478; Mellen v. Mellen, 139 id. 210, digested p. 910; Harper v. Nat. Bank, 17 Misc. 221. By conveyance of the land by beneficiaries. Roberts v. Cary, 84 Hun, 328; see Garvey v. McDevitt, 72 N. Y. 556; Hetzel v. Barber, 69 id. 1, digested p. 1013.

34. Powers of appointment.

Hellenberg v. Dist. No. One, 94 N. Y. 580; Austin v. Oakes, 117 id. 577; New York Life Ins. and T. Co., v. Livingston, 133 id. 125; Drake v. Drake, 134 id. 220; Hillen v. Iselin, 144 id. 365; Kibler v. Miller, 57 Hun, 14, aff'd 141 N. Y. 571; Maitland v. Baldwin, 70 Hun, 267; (see also Fargo v. Squiers, 6 App. Div. 485; Stewart v. Keating, 15 Misc. 44; Metropolitan Trust. Co. v. Seaver, 17 id. 446).

35. Power of selection or allotment.

See Real Prop. L., sec. 138, *ante*, p. 965; sec. 140, *ante*, p. 966; Graham v. Reed, 57 N. Y. 681; Austin v. Oakes, 117 id. 577; Reed v. Williams, 125 id. 560; Drake v. Drake, 134 id. 220; Matter of Conner, 6 App. Div. 594; Jones v. Jones, 8 Misc. 660.

36. Whether deed or will executes power.

See Real Prop. L., secs. 155, 156, *ante*, p. 971; White v. Hicks, 33 N. Y. 383; Hutton v. Benkard, 92 id. 295; Mutual Life Ins. Co. v. Shipman, 119 id. 324; New York Life Ins. & T. Co. v. Livingston, 133 id. 125; Cole v. Gourlay, 9 Hun, 493, aff'd 79 N. Y. 527; Thomas v. Snyder, 43 Hun, 14; Hogle v. Hogle, 49 id. 313; Kibler v. Miller, 57 id. 14, aff'd 141 N. Y. 571; Pollock v. Hooley, 67 Hun, 370.

37. Whether deed or will is intended solely to execute power.

Beardsley v. Hotchkiss, 96 N. Y. 201.

38. Whether deed or will is intended to operate solely on interests other than those covered by the power.

Mutual Life Ins. Co. v. Shipman, 119 N. Y. 324; Lockwood v. Mildeberger, 5 App. Div. 459.

39. Property embraced in power—Lands under contract of sale made by testator.

Lewis v. Smith, 9 N. Y. 502; Roome v. Philips, 27 id. 357; Holly v. Hirsch, 135 id. 590.

40. Afteracquired property.

Byrnes v. Baer, 86 N. Y. 210; Beardsley v. Hotchkiss, 96 id. 201.

41. Estates that may be created in execution of a power.

Beardsley v. Hotchkiss, 96 N. Y. 201; Crooke v. County of Kings, 97 id. 421; Maitland v. Baldwin, 70 Hun, 267.

42. Power given by a woman to her husband to sell, authorized him to release her dower.

Wronkow v. Oakley, 133 N. Y. 505.

43. Disposition of property under a power is not void because too extensive.

Real Prop. L., sec. 157, *ante*, p. 972; Hillen v. Iselin, 144 N. Y. 365.

44. Power of grantee of power to make executory contracts, and the enforcement thereof.

Haydock v. Stow, 40 N. Y. 363; Bostwick v. Beach, 103 id. 414.

45. Manner of executing power. See Real Prop. L., sec. 151, *ante*, p. 970. Sale must be in manner directed.

Hetzel v. Barber, 69 N. Y. 1; Craighead v. Peterson, 72 id. 279; Hellenberg v. Dist. One, etc., 94 id. 581; Bradstreet v. Clark, 12 Wend. 602.

46. Power to sell land executed by selling standing timber.

Keller v. Ogsbury, 121 N. Y. 362.

47. Grantee of power joining in deed by guardian of infants pursuant to order of court.

Cole v. Gourlay, 9 Hun, 493.

48. Power must be exercised for the precise purpose declared.

See Real Prop. L., sec. 152, *ante*, p. 970; Hetzel v. Barber, 69 N. Y. 1; Craighead v. Peterson, 72 id. 279; Haack v. Weicken, 118 id. 67.

49. Reformation of instrument in case of erroneous execution of power.

Haack v. Weicken, 118 N. Y. 67.

50. Executrix signing individual name.

Myers v. Mutual Life Ins. Co., 99 N. Y. 1.

51. In exercising power under Real Property Law (secs. 129–133), no reference to statutory provisions is required.

Brown v. Farmer's Loan & Trust Co., 51 Hun, 386; aff'd 117 N. Y. 226.

52. Defective execution of power—court supplying.

Schenck v. Ellingwood, 3 Edw. Ch. 175. See Real Prop. L., sec. 143, *ante*, p. 967; also sec. 160, *ante*, p. 973. Directory provisions. Bradstreet v. Clarke, 12 Wend. 602.

52a. There must be a substantial compliance with conditions annexed to power.

Harris v. Strodl, 132 N. Y. 392.

When irregularities in execution of power are disregarded.

Conklin v. N. Y. El. R. Co., 76 Hun, 420.

53. Consent of persons other than grantee of power.

See Real Prop. L., secs. 153, 154, *ante*, p. 970–1; Barber v. Cary, 11 N.Y. 397; Kissam v. Dierkes, 49 id. 602; Phillips v. Davies, 92 id. 199; Hoyt v. Hoyt, 17 Hun, 192, aff'd 85 N. Y. 142; Suarez v. De Montigny, 1 App. Div. 494. See, also, Correll v. Lauterbach, 14 Misc. 469.

54. Death of a person or the persons whose consent is required.
Barber v. Cary, 11 N. Y. 397; Kissam v. Dierkes, 49 id. 602; Phillips v. Davies, 92 id. 199.

55. Execution, when some of the donees neglect, refuse or are unable to execute power.
See Real Prop. L., sec. 146, *ante*, p. 967.

56. Execution of powers by executors qualifying.
Taylor v. Morris, 1 N. Y. 341.

57. Execution by executors consenting to act or surviving.
Viele v. Keeler, 129 N. Y. 190.

58. Executor refusing to act.
Ross v. Roberts, 2 Hun, 90.

59. Execution of power by surviving executor.
Anderson v. Davidson, 42 Hun, 431. See Pollock v. Hooley, 67 id. 370.

60. Power must be exercised by all donees.
Wilder v. Ranney, 95 N. Y. 7; Whitlock v. Washburn, 62 Hun, 369

61. Ratification by donees not joining in execution.
Whitlock v. Washburn, 62 Hun, 369.

62. Sale by administrator with will annexed.
Roome v. Philips, 27 N. Y. 357; Matter of Baker, 26 Hun, 626; Fish v. Coster, 28 id. 64; Paret v. Keneally, 30 id. 15; Matter of Patton, 41 id. 498.

63. Appointment by court of person to execute power of sale.
Matter of Bierbaum, 40 Hun, 504. See Real Prop. L., sec. 162, *post*, p. 1017.

64. Executors with power of sale can not convey with covenants of warranty.
Ramsey v. Wandell, 32 Hun, 482.

65. Sale of land in another state.
Newton v. Bronson, 13 N. Y. 587.

66. Delegation of power.
Newton v. Bronson, 13 N. Y. 587; Coleman v. Beach, 97 id. 545.

67. Ratification of exercise of delegated power.
Newton v. Bronson, 13 N. Y. 587.

68. Time within which power should be exercised.
Manice v. Manice, 43 N. Y. 303; Matter of Weston, 91 id. 502; Hancox v. Meeker, 95 id. 528; Haight v. Brisbin, 96 id. 132; Matter of Travis, 85 Hun, 420.

69. Acceleration of execution of power.
Kilpatrick v. Barron, 125 N. Y. 751.

70. Direction as to time within which power should be exercised.
Parsons v. Rhodes, 22 Hun, 80; Waldron v. Schlang, 47 id. 252.

71. Delay in executing power.
Manice v. Manice, 43 N. Y. 303; Hancox v. Meeker, 95 id. 528; Haight v. Brisbin, 96 id. 132.

72. Enforcement of execution of power by the court.
Manice v. Manice, 43 N. Y. 303; Hancox v. Meeker, 95 id. 528; Matter of Gantert, 136 id. 106; Gelston v. Shields, 16 Hun, 143, aff'd 78 N. Y. 275; Hancox v. Wall, 28 Hun, 214. See Real Prop. L., sec. 137, *ante*, p. 964; also sec. 140, *ante*, p. 966; also sec. 141, *ante*, p. 966; also sec. 142, *ante*, p. 966.

73. Whether court will interferfere with the execution of discretionary power.
Jones v. Jones, 8 Misc. 660; see Real Prop. L, sec. 137, *ante*, p. 964.

74. Capacity of person to take under instrument executing the power.
Dana v. Murray, 122 N. Y. 604; see Real Prop. L., sec. 159, *ante*, p. 972.

75. Rights and duties of purchasers.
Rose v. Hatch, 125 N. Y. 427; Suarez v. DeMontigny, 1 App. Div. 494; Benedict v. Arnoux, 7 id. 1; (see Moore v. American Loan and Trust Co., 115 N. Y. 79).

76. Creditors—right of to compel execution of power.
Matter of Gantert, 136 N. Y. 106; Wild v. Bergen, 16 Hun, 127; see Real Prop. L., sec. 137, *ante*, p. 964; sec. 139, *ante*, p. 965; sec. 145, *ante*, p. 967.

77. Whether grantees of power of sale, by the description in the instrument of conveyance, dedicated other land to a public use.
Bloomfield v. Ketcham, 25 Hun, 218.

78. Presumption as to the exercise of power.
Mutual Life Ins. Co. v. Shipman, 50 Hun, 578; rev'd 119 N. Y. 324; Conklin v. N. Y. El. R. Co., 76 Hun, 420.

79. Presumption that conditions have been complied with.
Bissing v. Smith, 85 Hun, 564.

80. Reconveyance to grantor of power before execution thereof.
Briggs v. Davis, 21 N. Y. 574.

81. Restraining unlawful execution of power.
Butler v. Johnson, 111 N. Y. 204; Keller v. Ogsbury, 121 id. 362.

82. Execution of power suspending power of alienation.
See Real Prop. L., sec. 158, *ante*, p. 972; Genet v. Hunt, 113 N. Y. 158; Dana v. Murray, 122 id. 604; Hillen v. Iselin, 144 id. 365.

Execution in excess of the power.
Hillen v. Iselin, 144 N. Y. 365.

83. Power of sale contained in mortgage.
Lawrence v. Farmer's Loan and Trust Co., 13 N. Y. 200.

A testator, by his last will and testament, appointed three persons his executors, and authorized them, or the survivor of them, to sell and convey any part of his real estate, "*in case they should find it proper or most fit in their opinion*," to sell the same for the purpose of paying his debts. Two of the executors neglected to qualify, and never acted as such. The other executor duly qualified, and took out letters testamentary in his own name only, and subsequently sold and conveyed a portion of the testator's real estate for the purpose specified in the will.

Construction:

The power contained in the will was well executed, and the conveyance was valid.

It seems that the statute (2 R. S., 109, sec. 55), which provides that where real estate is devised to executors to be sold by them, or is ordered by any last will to be sold by them, and any of the executors neglect or refuse to qualify and act as such, the sale may be made by the executor or executors who take upon themselves the execution of the will, applies as well to *discretionary*, as to peremptory powers of sale. *Taylor* v. *Morris*, 1 N. Y. 341.

A testator by his will authorized his executors "to sell his real and personal estate in such parcels, at such times, and for such considerations as they should judge proper, for the purpose of discharging his debts and creating funds for the support of his family." *After payment of his debts* he directed the *avails* of his property to be equally divided among all his children. Before the testator's debts were paid, the husband of one of the daughters being indebted to the plaintiff, procured from the executors a conveyance of a portion of the real estate for the purpose of enabling him to mortgage it to secure the debt. Nothing was paid for this conveyance, but the husband agreed to disencumber the land by paying the mortgage, and then to reconvey to the executor, or in default thereof, that the value of the land might be charged against his wife's distributive share in the estate. A bill was filed to foreclose the mortgage given by the husband and wife according to this arrangement.

Construction:

The conveyance was not an execution of the power contained in the will and passed no title, and therefore the mortgage was not a lien upon the interests of the testator's other heirs in the premises.

Under such a power it seems that a sale of the real estate by the executor, for the purpose of distribution among the testator's children, could not be made until after the debts were paid, and the sale should then be absolute for money or funds capable of distribution according to the will. *Allen* v. *De Witt*, 3 N. Y. 276.

As to power to mortgage under power to sell, see "Power to Mortgage, Lease or Pledge," p. 949.

The objection could not be made, on appeal, that a power was not well executed, because the deed on its face showed that only a nominal consideration was received for the lands. That ground, if relied upon, should have been taken on the trial. *Meakings* v. *Cromwell*, 5 N. Y. 136.

A power of sale contained in a will authorizing executors to sell all the testator's "fast estate," does not embrace lands which have been sold by contract by the testator, the purchase money being unpaid, and the title still remaining in him. The interest remaining in the vendor in such case is a right to the money due on the contract, which is not real but personal estate. *Lewis* v. *Smith*, 9 N. Y. 502.

By the common law, where a power was to be executed with the consent of third persons, the death of one of such persons before consent given, rendered the execution of the power impossible.

This rule of law has not been changed by the revised statutes section 112 (1 R. S. 735) is applicable to grantees of a power, not to third persons whose consent is requisite to its execution.

Accordingly, where land was devised to a son for life and then to his heirs, with power to him to sell and convey the same, by and with the consent of his mother and brother, and she died without consenting, and the son afterwards, with the consent of his brother, sold and conveyed the land; held, that no title passed by virtue of the power. *Barber* v. *Cary*, 11 N. Y. 397.

Although an executor appointed in this state can not act as such beyond our jurisdiction, he may convey land situate in another state where the power to do so is contained in the will.

An executor or other trustee empowered to sell lands in his discretion, can not authorize an agent to contract for their sale. The power is a personal trust which can not be delegated, and a contract by an agent is void.

But where such a contract has been executed by an agent, the principal may render it valid by ratifying it with full knowledge of the facts. In ratifying it he exercises the personal qualities essential to the due execution of the trust. *Newton* v. *Bronson*, 13 N. Y. 587.

Since the enactment of the statute (1 R. L. 374, secs. 5, 6; 2 R. S. 545), directing the manner in which mortgaged premises shall be sold by virtue of a power, the sale must be at public auction after notice as prescribed by the statute to bar the right of redemption, notwithstanding the power is contained in the mortgage, and expressly authorizes the mortgagee on default to sell the premises at private sale to satisfy the debt. *Lawrence* v. *Farmers' Loan and Trust Co.*, 13 N. Y. 200.

The Legislature, in the exercise of its tutelary power over the persons and property of infants and others under disability, may provide, by public or private acts, for converting real estate, in which they have vested or contingent interests, into personal property or securities, when necessary for their benefit, and may exercise this power as well in respect to the rights of persons *in esse* as to the contingent interests of persons yet to be born.

Accordingly, an act of the legislature (ch 442 of 1853) is constitutional, authorizing the supreme court, upon the petition of the *cestuis que trust*, to direct the sale of any part or parts of the trust estate from time to time, as might be judged calculated to promote the interests of the infants, whether yet in being or not, providing that the proceeds should be applied by the trustee in paying taxes and incumbrances upon the trust property, or in repairing and improving the unsold portions or invested for the benefit of those who might become interested under the will; and all conveyances under the act, if executed by the trustee, should vest in the grantee a fee simple absolute against all persons, whether in being or not, who might have or acquire any interest under the will.

The trustee's conveyance under the act conveys an indefeasible title against anybody who might otherwise at any time claim an interest under the will, irrespective of the power of sale conferred on him by that instrument. *Leggett* v. *Hunter*, 19 N. Y. 445.

Considering and distinguishing Powers v. Bergen, 2 Seld. 358

Executor's conveyance and subsequent repurchase on the foreclosure of the mortgage taken on sale to secure the purchase money, was valid as an execution of his power to sell, and to invest the proceeds in the purchase of real estate. *Leggett* v. *Hunter*, 19 N. Y. 445.

The grantees of land in trust for creditors have no power to re-convey to the grantor by deed reciting that the trusts have been executed, when in fact there are *cestuis que trust* entitled to a sale and distribution, and the grantor and those holding derivative titles have no rights, legal or equitable, until the purposes of the trust are satisfied. *Briggs* v. *Davis*, 21 N. Y. 574, correcting decision in 20 id. 15.

A power to mortgage reserved to a married woman in respect to land held in trust for her separate use, will support a mortgage to secure her husband's debt. *Leavitt* v. *Pell*, 25 N. Y. 474.

It seems that it should be considered settled that an administrator with the will annexed is not authorized by the statute (2 R. S. 72, sec. 22) to execute a power to sell land conferred by the testator upon his executor.

It seems that the supreme court may appoint a trustee to execute the power, but that the heir at law is a necessary party to the action or proceeding in which an order for that purpose is made.[1]

A power conferred upon an executor to sell real estate on such terms as he might think proper is, it seems, inapplicable to land for the sale of which the testator had made an executory contract and tendered performance in his lifetime.

When the administrator with the will annexed has been appointed trustee to execute the power, and asserted the right to execute it in respect to such land, he ought to join with the heir at law in executing a conveyance, in performance of the testator's contract. *Roome* v. *Philips*, 27 N. Y. 357.

A person entitled, under a power of appointment, to dispose of property by deed or will, may make such disposition by a proper instrument, without inserting in it a reference to the power, if it otherwise appear that the intention was to execute the power. But where the disposition was by will, a parol declaration, by the testator, of an intention to execute the power, was not competent evidence of such intention.

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[1]See Forbes v. Halsey, 26 N. Y. 53.

It is, however, competent for the court to compare the dispositions of the will with the testator's own property, and to deduce therefrom an intention to embrace in his testamentary gifts the subject he was entitled by the power to dispose of.

A married woman had power, under the will of her father, to dispose by will of the principal of a sum of $50,000, the interest of which was given to her for life, to her husband or otherwise, and she made her will, without referring to the power, by which she bequeathed to her husband $50,000 and to other legatees pecuniary legacies amounting to $32,000, and a general residue, and it appeared that her own property amounted to only $54,000, and that she knew well the amount of her estate, and executed the will when she knew herself to be *in extremis*.

Construction:

The power to dispose of the $50,000 was validly executed by the gift of $50,000 to her husband.

The English cases, decided since the American Revolution, by which it was established that the amount of the testator's property could not be inquired into to show an intention to execute a power of appointment, are not to be followed in this state, especially as the rule has been disapproved of by English judges, and has recently been abrogated by act of parliament. (Cases are reviewed.) *White* v. *Hicks*, 33 N. Y. 383.

From opinion.—"So if the power be to a woman to appoint the use of land by last will whether she be married or single, and she, being a married woman, and therefore generally incapable of making a will, devise the land by her last will and testament, with no reference to the power, it is held a good execution of the power. This doctrine proceeds upon the argument, that by doing a thing which, independently of the power, would be nugatory, she conclusively evinced her intention to execute the power. (Curtiss v. Kemich, 9 Sim. 444; Churchill v. Dibden, id. 447, in note; s. c., 3 Mees. & Wels. 446.)

"So, also, if the subject of the power be real estate, and the person entitled to appoint its uses have no real estate, if he give by a will not referring to the power, all his real and personal estates, the estate, subjected to the power, will pass. (Sugden on Powers, ch. 6, sec. 7, pp. 33, 34.) The reason is, that by embracing real estate in the disposition, the testator must have intended to dispose of that species of property, and having none upon which the will could operate, except that affected by the power, it is clear that it was that which he intended to dispose of.

"Besides these instances in which the intention was clearly the governing principle in the decision, we find the judges uniformly declaring that it is unnecessary to refer to the power if an intention to execute it plainly appears. Thus, in the early case of Probert v. Morgan (1 Atk. 440), we find Lord Chancellor Hardwicke declaring, that 'if a man have power to charge an estate, it is not necessary, in the execution of it, that he should refer to the deed out of which the power arises; for in a court of equity it is enough that his intent appears; and if in the execution he sufficiently describes the estate he has power to charge, the estate is certainly bound, especially where the person charging is the purchaser of the powers.' So in Molton v. Hutch-

inson (id. 558), and The Matter of Caswell (id. 559), it was admitted that it was unnecessary to refer to the power; but, as Lord Hardwicke said in the last case, 'he must do such an act as shows he takes notice of the thing he had power to dispose of.' In Bennett v. Aburrow (8 Ves. 609), Sir William Grant, master of the rolls, laid down the general rule thus: 'This (the question whether a particular disposition was an execution of a power) was always a question of intention, whether the party meant to execute the power or not. The intention,' he added, 'may be collected from other circumstances as that the will includes something the party had not otherwise than under the power of appointment; that a part of the will would be wholly inoperative unless applied to the power. There is nothing of that sort in this case. No description of property is disposed of that there is not something to answer.' And Judge Story, in Blagge v. Miles, already referred to, states the spirit of the English cases, most of which he had examined, in the following language: 'But the principle furnished by them, however occasionally misapplied, is never departed from, that if the donee of the power intends to execute, and the mode be in other respects unexceptionable (that is, if it correspond to the former requirements of the power), that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. All the authorities agree that it is not necessary that the intention to execute the power should appear in express terms or recitals in the instrument. It is sufficient that it shall appear by words, acts or deeds demonstrating the intention.'" (392–394.)

Where a person holds an estate in trust, with the power to dispose of it for the benefit of himself and certain others, a disposition of the same to one acquainted with the nature and character of the trust, without any consideration for the benefit of *cestuis que trust*, will be deemed fraudulent as to the beneficiaries.

The vested interests of *cestuis que trust* can not be impaired or destroyed by the voluntary act of the trustee, in breach of the trust; but will follow the lands in the hands of the person to whom it has been conveyed by the trustee with knowledge of the trust. *Smith* v. *Bowen*, 35 N. Y. 83.

A power to an executrix to sell real estate, "as she shall deem expedient and for the best interests" of certain legatees named, is a general power in trust, in which the executor has no interest. Such a power is not well executed by the conveyance to one of the legatees, of a portion of the real estate of the testator, in payment of a debt due from the testator to the legatee.[1]

The debts are to be discharged by means of the personal estate, and the real estate can only be applied for that purpose, upon an order of the surrogate, after the personal estate is exhausted.

[1] Allen v. DeWitt, 3 Comst. 276; Briggs v. Davis, 20 N. Y. 15; Roome v. Phillips, 27 id. 357.

A sale authorized by these terms must be one in which judgment and discretion are exercised, and which the trustee believes to be for the interest of the legatees. A conveyance in discharge of a debt does not comply with these requisites. *Russell* v. *Russell*, 36 N. Y. 581.

NOTE.—"So stringent is the rule on this subject that even legislative action can not avoid its effect. Thus in Powers v. Bergen (2 Seld. 359) lands had been devised to trustees for the use of the testator's daughter for life, with remainder to her issue living at her decease, and for want of such issue to all her grandchildren. During the life of the daughter (she having children living) a statute was passed authorizing the trustees to sell the land, pay certain expenses and liens, and invest the surplus in securities, to be held in trust, as the lands were held under the will. It was held that the act was beyond the power of the legislature, and that the trustees could give no title to lands sold in pursuance of it. (See Smith v. Bowen, 35 N. Y. 83.)" (586.)

Testator by the terms of the will gave to his wife and to his niece all his real and personal estate, property, assets and effects, subject to his debts; and directed his executors to convert the same into cash, etc., and invest for each of the legatees one-half of the proceeds.

Construction :

It was the duty of the executors to sell the real and personal estate of the testator, and invest the proceeds thereof, one-half for the benefit of the widow, and the other half for the benefit of the niece. Where the will does not authorize the executors or trustees to determine the amount to be paid for the support of a beneficiary, and does not authorize the beneficiaries themselves to determine the amount, such amount must be fixed by the court. *Bundy* v. *Bundy*, 38 N. Y. 410.

An instrument in writing, of which the following is a copy, viz., provided: "I hereby authorize and empower Peck, Hillman & Parks, agents for me, to sell, the following described property," etc. Peck & Co. were agents empowered to sell, and not simply brokers or middlemen, acting for both parties, and whose duty is ordinarily limited to bringing together the parties, upon an agreement, without power to execute the contract itself.[1] *Haydock* v. *Stow*, 40 N. Y. 363, 364, 368.

From opinion.—An agent authorized to sell either real or personal estate may enter into a contract, within the terms of his authority, which will bind his principal. This is of the very essence of the authority given, viz., an authority to sell. That he can bind his principal by a formal contract is the doctrine of the books from the earliest law on the subject.[2]

The case of Coleman v. Carrigues (18 Barb. 60), to the contrary was not well decided."

[1] Story on Sales, secs. 85–90; Moses v. Bierling, 31 N. Y. 462; Barnard v. Monnot, 33 How. Pr. 440.

[2] Worrall v. Munn, 1 Seld. 229, and the numerous cases cited; McWhorter v. Baldwin, 10 Paige, 386; Champlin v. Parrish, 11 id. 411; Story on Agency, secs. 58, 60.

Should there be any unreasonable delay in making a directed partition, a court of equity would have power to enforce the performance by the trustees of their duties, and, if necessary, to appoint others to perform them; and this jurisdiction is ample, even to provide a remedy in case the surrogate should refuse to appoint an appraiser. *Manice* v. *Manice*, 43 N. Y. 303, 365.

Citing, Lewin on Trusts, 526, 694–697; Sugden on Powers, 8th ed., p. 50; 2 Story's Eq. sec. 1061; People v. Norton, 9 N. Y. R. 176; DePeyster v. Clendining, 8 Paige, 310.

A condition attached to a power of sale contained in a trust deed, that the trustee shall only sell by and with the consent of the grantor, to be manifested by his uniting in the conveyance, is valid. It is an essential condition and can not be dispensed with. If no provision is made for the execution of the power in case of the death of the grantor, it is extinguished by such death. *Kissam* v. *Dierkes*, 49 N. Y. 602.

For the purposes of equalizing the beneficial interests, all of a fund may be allotted to certain persons of a class, to the exclusion of others. *Graham* v. *Read*, 57 N. Y. 681.

R. died seized of certain premises, which were mortgaged to defendant. R. devised to his widow, whom he made his executrix, a life estate in a portion of the premises, with remainder to plaintiffs; the balance, with his personal property, he directed his executrix to sell, and with the proceeds pay and discharge his debts, including the mortgage. Defendant, after R.'s death, commenced an action for foreclosure, making the widow, and plaintiffs, who were infants, parties; they were served with process, but, although their infancy was known, no guardian *ad litem* was appointed. The widow answered, but under an arrangement with defendant that he would lease to her for life, at a nominal rent, a portion of the mortgaged premises, executed a deed to him of the portion of the premises directed to be sold, which was worth $5,950, for the nominal price of $500, to be applied on the mortgage. She withdrew her answer, and stipulated that defendant might take judgment, and allowed him to take judgment for the full amount of the mortgage, without crediting the $500. Judgment by default was taken against plantiffs, under which the premises were sold and bid in by defendant for much less than their value. There was a surplus on the sale of over $2,000 which was never brought into court, and plaintiffs received no part of it. No report of sale was filed or confirmed. In an action to set aside the judgment and sale, held, that the executrix stood in a relation of trust towards plaintiffs, so far as the exercise of the power of sale was concerned, and violated her trust in conveying for a nominal consideration; the defendant was a party to its violation, and that the

facts sustained a finding of fraud and collusion. *McMurray* v. *McMurray*, 66 N. Y. 175, 176.

Exercise of power must be in the manner and for the precise purpose declared.[1] *Hetzel* v. *Barber*, 69 N. Y. 1.

A formal instrument delegating powers is ordinarily subjected to strict interpretation, and the authority is not extended beyond that which is given in terms, or which is necessary to carry into effect that which is expressly given. *Craighead* v. *Peterson*, 72 N. Y. 279, aff'g 10 Hun, 596.

Under a power of sale in a will, executors are not authorized to dispose of the testator's real estate consisting of coal lands, and receive the stock of a corporation organized for the purpose of mining the same, even though the testator, in his lifetime, was willing to make such a disposition of them. Ratification by *cestui que trust* can only be effective when clearly proved to have been made with full knowledge of the facts, and of his legal right in the premises. *Adair* v. *Brimmer*, 74 N. Y. 539.

Where will directs that real estate be converted into money and the proceeds distributed, the parties entitled thereto, if of full age, may elect to take lands, if the rights of others will not be affected, and slight expression of intent will be sufficient to show election. Hetzel v. Barber 69 N. Y. 1, 11.

B.'s will authorized his son F. to carry on the hotel business for five years, if he desired, in a hotel owned by testator; and empowered executors to sell the hotel property after the occupancy had ceased. F. died before the testator. The interests of three of the four legatees were, conveyed to the plaintiff; defendant M., the other legatee, joined with the plaintiff in leasing and improving the property.

Construction:

The executors took no interest in the lands, but merely a power in *trust*, for the purposes of distribution; the parties beneficially interested had elected to take the land and the power was thereby extinguished and the executors had no title, interest, or lien upon the property under 1 R. S. 735, sec. 107.

A power to sell or lease during the minority of beneficiaries, is not effective after one of the minors has become of age. *Prentice* v. *Janssen*, 79 N. Y. 478, aff'g 14 Hun, 548.

The will of J., after a gift to his wife of his household furniture and of the use of his dwelling house during her life, directed his executors to invest "all the rest, residue and remainder" of his estate in bonds and mortgages; and after direction as to the disposition of the income

[1] See, to same effect, Craighead v. Peterson, 72 N. Y. 279; Prentice v. Janssen, 79 id. 478.

therefrom during the lives of his wife and daughter, upon the death of both, gave the principal to the children of the daughter, etc. The testator acquired certain lands after the execution of the will; held, that the direction applied to all the real estate of the testator; that it fairly implied a power of sale for conversion in the executors; and that said lands passed under the will. *Byrnes* v. *Baer*, 86 N. Y. 210.

There is no rigid or arbitrary standard by which to measure the "reasonable time" within which an executor, directed to convert an estate into money, may exercise his discretion, and beyond which he may not delay in complying with the direction; what is a reasonable time must depend upon the circumstances of each particular case.

It seems that where no special modifying facts are shown to shorten or lengthen the reasonable time, the period allowed before the executor can be compelled to account, *i. e.*, eighteen months, may serve as a just standard. *Matter of Weston*, 91 N. Y. 502, 510, 511.

From opinion.—"There is, and there can be, no rigid and arbitrary standard by which to measure the reasonable time within which the discretion of an executor directed to convert an estate into money must operate. If, in some instances, the English cases indicate a disposition to fix upon one year, because at that date the executor may be compelled to account, in other instances such fixed or arbitrary standard appears to have been rejected. (Hughes v. Empson, 22 Beav. 181; Buxton v. Buxton, 1 Myl. & C. 80; Garrett v. Noble, 6 Sim. 504; Bate v. Hooper, 5 DeG., M. & G. 338; Morgan v. Morgan, 14 Beav. 72; Marsden v. Kent, L. R., 5 Ch. Div. 598.) The better opinion derived from them would seem to be that each case must stand upon its own facts; that what would be a reasonable time in one instance might not be in another; and while the one year allowed to close the estate may sometimes mark the limit of discretion, and is always a circumstance to be considered, it is not necessarily conclusive. In this state, at all events, there is no arbitrary standard. The executor, here, can not be compelled to account until after eighteen months; and yet it may be his duty to sell even earlier than that, or to wait even longer, according to the circumstances of particular cases, and the exigencies which exist. Where no modifying facts are shown to shorten or lengthen the reasonable time, the period of eighteen months may serve as a just standard. It was so held by the learned surrogate of New York in the case of Gillespie v. Brooks (2 Redf. 355). There the will directed the executors to invest the residue of the estate, and the duty of selling the bank, insurance, mining and manufacturing stocks on hand was just as plain and necessary as if there had been a specific direction to convert them into money. It was conceded, in that case, and held by the surrogate that a reasonable time for the disposition of the 'irregular securities' would be eighteen months. Substantially the same doctrine was held in Lockhart v. The Public Administrator (4 Bradf. 21). While such period furnishes a convenient guide where no special circumstances exist, it must, after all, not be taken as a fixed or arbitrary standard. The test must remain, the diligence and prudence of prudent and intelligent men in the management of their own affairs. (King v. Talbot, 40 N. Y. 76; Thompson v. Brown, 4 Johns. Ch. 627; McRae v. McRae, 3 Bradf. 199.)"

Receiver, selling lands January 11, 1882, claimed title under two deeds, one dated March 21, 1863, from an executor, having power

under the will to sell the real estate, to a third person, having the same family name as the executor; the other dated March 25, 1863, by said grantee, conveying the premises back to the executor individually, both recorded April 1, 1863, with an interval of five minutes between. No accounting or settlement of the estate by the executor was shown.

Construction:

The title was defective, as the title was voidable at the election of the beneficiaries, notwithstanding the lapse of time. Purchasers at receiver's sale were not compellable to perform the contract of purchase. *The People* v. *The Open Board of Stock Brokers' Building Co.*, 92 N. Y. 98, rev'g, in part, 28 Hun, 274.

From opinion.—"His title, therefore, was voidable by those whom he was bound to protect, but whose interests were endangered by the collision with his own. (Davoue v. Fanning, 2 Johns. Ch. 252; Gardner v. Ogden, 22 N. Y. 327; Forbes v. Halsey, 26 id. 53; Van Epps v. Van Epps, 9 Paige, 237; Duncomb v. N. H. & N. Y. R. R., 84 N. Y. 199.) The purchaser here is not protected as one buying in good faith and without knowledge of the breach of trust, for he has ascertained the facts, so far as they are known, before any acceptance of the deed or payment of the purchase money. (Wormley v. Wormley, 8 Wheat. 449.) Nor is the lapse of time conclusive upon the beneficiaries under the will of Meier. Twenty years had not elapsed when this attempted sale was made. In Hawley v. Cramer (4 Cow. 735), it was said that an application to set aside the sale must be made within a reasonable time, of which the court must judge under all the circumstances, and twenty years was named as the shortest period which a court of equity would be bound to consider an absolute bar. If a resale was refused after eighteen years (Gregory v. Gregory, Coop. Ch. Cas. 201), and after sixteen years (Bergen v. Bennett, 1 Caine's Cas. in Error, 1), on the other hand in Hatch v. Hatch (9 Ves. 292), the sale was set aside after the lapse of twenty years; in Dobson v. Racey (3 Sandf. Ch. 66), after twenty-seven years; in Purcell v. McNamara (14 Ves. 91), after seventeen years."

In 1869, S. conveyed all her real estate to trustees in trust, to convert into money, keep invested and apply income and such portion of the principal as they should deem proper, to her use during her life, and paying over the residue as she should by will appoint. In 1877, S., being in delicate health and apprehensive that she might die at any moment, made a will, which, not referring to the trust, devised certain real estate, part of the trust estate, gave legacies amounting to $275,000, and her residuary estate, including what she might thereafter acquire or become possessed of, to seventeen beneficiaries named. S., at the time of the execution of her will and at her death, aside from the trust estate, only owned property of the value of about $25,000, consisting principally of an undivided interest in the estate of her sister. She customarily spent all the income paid her by the trustees and well knew the condition and amount of her estate. Action by the trustees for an accounting and for directions as to the disposition of the trust estate.

Construction:

The power of appointment reserved in the trust deed was properly and effectually executed both as to real and personal property.

Where it appears, from the terms of a will, taken as a whole, and construed in the light of surrounding circumstances, that it was the intention of the testator in the dispositions made by him to execute a power of appointment, such intention will have effect although the power is not referred to in express words.

The provisions of the Revised Statutes in reference to powers (1 R. S., pt. 2, ch. 1, tit. 2, art. 3, p. 732, *et seq.*) apply so far as they can be made applicable to personal as well as to real estate, and the rules governing the construction of testamentary appointments in regard to real estate apply when they affect personal property.

The provision, therefore, of such statutes (1 R. S. 737, sec. 126), declaring that lands embraced in a power to devise shall pass by a will purporting to convey all the testator's real estate "unless the intent that the will shall not operate as an execution of the power shall appear, expressly or by necessary implication" applies to personalty. *Hutton* v. *Benkard*, 92 N. Y. 295.

From opinion.—"As to the real estate the question is easily solved by the express provision of the statute, which provides that '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.' (3 R. S. 2193, sec. 126 [7th ed.].) This will purports to convey all the property of the testatrix, both real and personal, and the intention that the will shall not operate as an execution of the power does not appear, expressly or by necessary implication.

"But the claim is very confidently made on the part of the appellants that there was not a valid execution of the power as to the personal property, because the will contains no reference whatever to the power, and does not purport, in its dispositions of the personal property, to be in execution of the power. If we concede the contention of the learned counsel for the appellants, that there should be a valid execution of the power as to the personal property tested by the rules of common law, we are yet of opinion that under the common law, as expounded by the courts of this state, the power was effectually executed.

"When a will is claimed to be effectual as an execution of a power, all parts of it may be considered, and its language and terms construed in the light of circumstances surrounding the testator at the time of the execution of the will, and if, from all these, it can be seen that it was his intention, in the dispositions he made, to execute the power, such intention will have effect. The power need not be referred to in express terms; no form of words need be used; but the will is to be construed, as all wills are to be construed, so as to give effect to the intention of the testator. If it can be seen that he intended to dispose, not only of the property which he owned in his own right, but of property which he had the right to dispose of just as effectually as if he did own it, under the power of appointment, then effect will be given to the intention, if that intention can be gathered from all the terms of the will, read in the light of such circumstances surrounding the testator at the time of its execution as are proper to be

considered. In Bradish v. Gibbs (3 Johns. Ch. 522), Chancellor Kent said: 'The rule is that if a will be made without any reference to the power, it operates as an appointment under the power, provided it can not have operation without the power. If the act can be good in no other way than by virtue of the power, and some part of the will would otherwise be inoperative, and no other intention than that of executing the power can properly be imputed to the testator, the act, or will, shall be deemed an execution of the power, though there be no reference to the power. Here the will can have no effect without the power, not even as to personal property, and if the power operates upon it at all it operates equally upon every part of the disposition.' In Heyer v. Burger (1 Hoff. Ch. 1), it was held that a will, in the execution of a power of appointment, need not refer to the power and was well executed without any reference thereto. In White v. Hicks (43 Barb. 64), H. gave to his executors the sum of $100,000 in trust, to pay over the income to his daughter, R., during her life, and in case she should have no children or grandchildren living at the time of her death, then in trust to pay over one-half of such sum to such person or persons, whether her husband or otherwise, as she might, by last will and testament, appoint; and R. made a will by which she gave her husband $50,000 in general terms and with out any reference to the power of appointment given her by the will of her father. It was held that the will was a valid execution of the power; also that evidence as to the circumstances or condition of the property or fund in the hands of H.'s executors, to show that R.'s own savings or property were not sufficient to answer the special legacies bequeathed by her will, and of other extrinsic facts, as distinguished from what she said at or about the time of executing her will, was properly received. That case was appealed to this court and is again reported in 33 N. Y. 383, and the judgment of the supreme court was here affirmed. In that case, in a very exhaustive and learned opinion, in which the numerous English cases are cited and criticised, Denio, J., reached the conclusion, which was unanimously adopted by the court, that a person, entitled under a power of appointment to dispose of property by deed or will, may make such disposition by a proper instrument without inserting in it a reference to the power, if it otherwise appear that the intention was to execute the power; that it was competent for the court to compare the dispositions of the will with the testator's own property, and to deduce therefrom an intention to embrace in his testamentary gifts the subject he was entitled by the power to dispose of; that the English cases decided since the American Revolution, by which it was established that the amount of the testator's property could not be inquired into to show an intention to execute a power of appointment, are not to be followed in this state, especially as the rule has been disapproved by English judges, and has recently been abrogated by an act of parliament; that it was competent, not only to receive evidence respecting the property owned by the testatrix, but also in reference to her expectation of approximate death, on account of the state of her health, as bearing upon the construction to be given to her will; and that her intention could be collected from the provisions of her will, applied to the state of her property, and her personal condition at the time it was made. * * *

"In affirming the judgment of the court below we could rest here; but we go farther, and are of opinion that, even if this will would not have been a valid execution of the power of appointment as to the personal estate before the Revised Statutes, it is so now. It is provided that '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.' (3 R. S. [7th ed.] 2188, sec. 73.) This language is very broad; broad enough to include all powers, both as to real and personal property. The subsequent provisions in the same article seem in terms to relate mainly, if not exclusively, to real estate. But yet,

by analogy, the rules for the creation, construction and execution of powers as to real estate should be applied, so far as they can be, to personal estate."

M., at the time of making her will and of her death, owned a large amount of real estate, but only a small amount of personal property. By her will, after providing for the payment of debts, she first gave her estate, real and personal, to her executors in trust, to rent, etc., and apply the rents, income, etc., to the use of her husband during his life. Then followed ten clauses purporting to create separate and independent trusts; also numerous legacies, all of which would substantially fail in the absence of a trust estate, or power in trust vested in the executors, by force of which the real estate could be sold and converted into money. Certain real estate was also specifically devised, and the executors were directed to pay off incumbrances thereon, which, in the absence of such power could not be done. The clause appointing executors contained the following: "and during the lifetime of my said husband my said executors, and such and whichever of them as shall act, are authorized and empowered, by and with the consent of my said husband, to sell and dispose of any part of my estate, real and personal, not specifically bequeathed."

Construction:

Said clause was to be construed as conferring upon her executors a power of sale, which, during the life of her husband, was to be exercised only with his consent, but thereafter continuing to exist; and, therefore, the executors had power to sell after the death of the husband, and convert into money so much of the real estate as was not specifically devised. *Phillips* v. *Davies*, 92 N. Y. 199, 200.

A power of sale was not limited by a definite time within which it was directed to be executed. *Mott* v. *Ackerman*, 92 N. Y. 539, digested p. 895.

In 1873 L., plaintiff's testator, became a member of the corporation defendant. By its by-laws, in force at the time, it was provided that upon the death of a member, "the sum of one thousand dollars, collected by contributions from all the lodges in the district, shall be paid to the wife of the deceased, if living, and, if dead, to his children, and, if there are none, then to such person as he may have formally designated to his said lodge prior to his decease," said sum to be collected by assessments upon the lodges in the district. The testator, having no wife or children, designated his mother as the beneficiary. The designation described the payment directed as "the $1,000, my heirs are to receive." The mother died before the testator, and no other designation in the manner specified was made. In an action to recover said sum, held that the

testator had no interest in the fund which could descend, or upon which a will could operate, but simply a power of appointment which, if not exercised prior to his death, in the manner specified, became inoperative; and that, as the beneficiary named died before him, and no other designation was made as prescribed, defendant was not bound to pay to anyone; that the reference to "heirs" in the designation could not be interpreted as making them the recipients, but was only matter of description.

The will of L. bequeathed the sum in question to his mother or, in the event of her death, to his brother. This was in no manner brought to defendant's knowledge until after the testator's death. Held, that this did not operate as a new designation. *Hellenberg* v. *Dist. No. One of I. O. of B. B.*, 94 N. Y. 580, 581.

Distinguishing Catholic Mut. Ben. Ass'n v. Priest, 46 Mich. 429; Ex. Aid Society v. Lewis, 9 Mo. Appeal, 412; Erdmann v. Mut. Ins. Co., etc., 44 Wis. 376; Rosewell v. Eq. Aid Union, 13 Fed. Rep. 840.

Where, by a will, the title to real estate is vested in two executors in trust, with power to sell, one of the executors can not, without the assent of the other, enter into a contract to convey, which will be valid and binding upon the other.

It seems, that as to personal property the rule is otherwise.

The fact, however, that by and under the terms of the will there is an equitable conversion for certain purposes of the real estate into personalty, does not change the rule as to it; until actual conversion it may only be conveyed as real estate, and the rules of law governing such conveyances remain applicable. *Wilder* v. *Ranney*, 95 N. Y. 7.

When power of sale, was not required to be exercised until the termination of life estate of the widow it was held that the executors were not required to sell immediately upon the death of the widow; but in the exercise of a sound discretion were authorized to hold the real estate until they could effect a sale for a price and upon terms fair and adequate and "best for the interests of the estate;" and, in the absence of evidence showing that delay in selling had been unreasonable, or that they had refused a fair offer for any portion of the property, or at least that the estate had sustained injury by the delay, that they were not chargeable with misconduct because of a failure to sell, and so were not liable for expenditures incurred by reason of the delay. *Hancox* v. *Meeker*, 95 N. Y. 528; 28 Hun, 214.

NOTE.—Suit is proper proceeding to compel executor to sell under power of sale, see p. 535 of case.

Where there was an imperative direction to executors to sell real estate "at such time or times as shall, in their best judgment, be for the

best interest of all concerned," and the executors delayed for five years, it was held in a proceeding to remove the surviving executor therefor, that the executor had exercised his discretion in good faith, as there had been no demand for the property, a depreciation of real estate, reasonable effort to sell, and offers of the property. *Haight* v. *Brisbin*, 96 N. Y. 132.

From opinion.—"The learned counsel for the appellants calls our attention to Dimes v. Scott, 4 Russell, 195, as decisive of this question. It lacks, however, an essential element found in the case before us. In the case cited the executors were directed by the testator to convert the personal estate into money and invest the proceeds in a way stated. The language of the will was imperative. In this the testatrix, as we have seen, directs her executors to sell the real estate of which she shall die seized, but leaves the time of sale to be determined by their discretion. This clause can not be disregarded. In both cases the intent to have the land sold is absolute, but in the latter the testatrix relies upon the judgment of her executor as to the time of sale, and whatever the court may think, as to the expediency of an immediate sale, or a sale at some fixed time, its opinion can not control the discretion of the executor in that respect. His (executor's) judgment upon the question is conclusive if exercised in good faith. (1 Story's Eq. Jur., 10th ed., secs. 169–170a; Bunner v. Storm, 1 Sandf. Ch. 357; Hancox v. Meeker, 95 N. Y. 528.)"

In 1844, L., being about to intermarry with H., entered into an antenuptial contract with him and W., by which she conveyed to W. all her real estate in trust for her separate use during life. H. agreed, also, to join with L. in all assignments necessary to transfer her personal property to W., upon a similar trust. It was provided that L. might give, devise and bequeath all her property, covered by the contract, to H., or to any one or more of her issue, in such shares and proportions as to her should seem meet. L. was at the time a minor. The trustee never exercised any control over the property, but it was controlled by L. and her husband, she executing annually to W. a receipt in full for the amounts she was entitled to. After her marriage L. became owner of other real estate. She died in 1855, leaving five children and a will, in which, after referring to the antenuptial agreement, and setting forth the provision reserving to her the right to dispose of the property, was contained this provision: "Now, therefore, I * * * give, devise and bequeath unto such child or children as I shall leave or have living at the time of my decease, and to their heirs and assigns, forever, all of my real and personal estate of every name and nature, and wheresoever situated, and more particularly described in the instrument hereinabove referred to; provided, nevertheless, that in case either or any of my children, living at my decease, shall die before he or they shall arrive at the age of twenty-one years and without issue living * * * the share or estate of the child or children so dying shall vest in and belong to, and I give and devise the same to the survivors or survivor." *Held*,

the facts authorized a finding that the contract was not disaffirmed by L. after she became of age; that her will was intended only as an execution of the power of disposition reserved in the contract, and so did not affect property subsequently acquired; that the limitation over to the surviving children, in case of the death of a child before maturity, was authorized by the antenuptial contract, and was not in conflict with the statute against perpetuities, either as it related to the real or to the personal estate. *Beardsley* v. *Hotchkiss*, 96 N. Y. 201–2.

A general and beneficial power to dispose of property by grant or devise, was properly executed by a devise of the land to the donee's husband, during his life, in trust, to receive the rents and profits and apply them, in his discretion, to the support and education of their children, with remainder to them in fee, with power to sell and convey, either in fee or lesser estate, the proceeds to be disposed of as directed in case of the land. *Crooke* v. *County of Kings*, 97 N. Y. 421.

A power to sell and convey, if the grantee should so desire, was purely discretionary, and hence could not be delegated, and terminated with the death of the grantee. *Coleman* v. *Beach*, 97 N. Y. 545.

When a person described herself in a power of attorney as executrix and sole legatee under a will and signed it simply in her own name, it was sufficient to show that she executed it as executrix. *Myers* v. *Mutual Life Ins. Co. of N. Y.*, 99 N. Y. 1, aff'g 32 Hun, 321.

See Hood v. Hallenbeck, 7 Hun, 14; Bank of Genesee v. Patchin, 19 N. Y. 313.

Where executors, empowered by the terms of the will to sell their testator's real estate, enter into an executory contract of sale, such performance of the contract may be enforced in equity at the suit of the purchaser. *Bostwick* v. *Beach*, 103 N. Y. 414.

Citing, Bowen v. Trustees of Irish Presb. Church, 6 Bosw. 245; Demarest v. Ray, 29 Barb. 563.

See Newton v. Bronson, 13 N. Y. 587; Anderson v. Mather, 44 id. 249, 259.

Where an executor, having power of sale to pay debts, is taking steps to execute the power for the purpose of paying debts which are outlawed, those who have succeeded to the testator's title may maintain an action to restrain such sale, as it would place a cloud upon their title. *Butler* v. *Johnson*, 111 N. Y. 204.

A deed, purporting to be an instrument between E. of the first part and C., in trust for three infant children of C., "with power to sell and convey or mortgage without the appointment of a guardian, of the second part," conveyed certain premises to the party of the second part, "their heirs and assigns, forever." There was no other reference to a trust or power save that contained in the first clause.

Construction:

The three infants were the real beneficiaries of the grant; the land passed to and vested in them (1 R. S. 728, secs. 47, 49), subject to the execution of the power, which was a general trust power to be executed solely for their benefit, and, therefore, a mortgage on the land given by C. to secure a debt of her husband was not a valid execution of the power and was void. *The Syracuse Savings Bank* v. *Holden*, 105 N. Y. 415, aff'g 36 Hun, 168.

Distinguishing, Jennings v. Conboy, 73 N. Y. 230.

NOTE.—"In the construction of this deed we are enjoined by statute '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.' (1 R. S. 748, sec. 2.) Both parties agree that no valid trust was created as no trust purpose was specified which is mentioned in the statute authorizing the creation of express trusts. (1 R. S. 729, sec. 55.) A mere formal, passive trust was attempted to be created which the statute executes by vesting the title in the beneficiaries. (Secs. 47, 49.) They also agree that a valid general power was created under the statute defining and regulating powers (1 R. S. 732, secs. 74, 77), and we will proceed upon that assumption. They differ, however, as to the nature of the power. The appellants claim that no one but the grantee of the power was interested in the execution thereof, and that, therefore it was a beneficial power under section 79."

Unless the exercise of a power to sell is rendered necessary and essential by the scope of the will and its declared purposes, the authority is to be deemed discretionary, to be exercised or not, as the judgment of the executrix may dictate, and so an equitable conversion will not be decreed. *Scholle* v. *Scholle*, 113 N. Y. 261, digested p. 938.

When the execution of a power of appointment by will unduly suspends power of alienation. *Genet* v. *Hunt*, 113 N. Y. 158.

Where power, not imperative, is given to convert real estate into personalty, the conversion will not be regarded as consummated in law until it is consummated in fact.

The distinction between a power of sale to pay debts and one to pay legacies pointed out. *Clift* v. *Moses*, 116 N. Y. 144, aff'g 44 Hun, 312.

A. died, leaving his widow, five children and two children of a deceased son surviving. By his will he gave the use of all his property to his wife for life, with remainder to said children and grandchildren "in such shares and proportions as she may, by her last will and testament, direct and appoint." In default of such appointment the estate to go to the children and to the grandchildren in six shares, the grandchildren to take one, with a substituted remainder to the issue of either of the beneficiaries dying before his or her share should vest. C., one of the grandchildren, died without issue before the death of the widow.

Construction :

While the wife had power to appoint one or more of the beneficiaries named to the exclusion of the others, and in such proportions as she saw fit, the power was limited to those beneficiaries, and she had no right to give any portion of the estate to others; upon the death of C., she was limited to the survivors as the objects of her appointment.[1]

Same will:

By a codicil the testator directed that, on the death of his wife, the share of the estate to go to C. should be held in trust for him during life, and upon his death, the principal to go to his issue; if none, then the share to fall into the general estate, or as the wife should, by will, direct.

Construction:

The provision was confined to the contingency of the death of C. after the death of the widow, and, therefore, as he died before, the secondary power of appointment never became operative; and so, did not affect the power of appointment contained in the will.

Same will:

Before the death of C. the widow executed a will appointing the whole estate, which she described as that "bequeathed and devised to me in trust by my said husband" to the six permitted beneficiaries in unequal proportions, giving one-sixteenth thereof to C. In case of his death, without issue, "the principal sum so held in trust" to go to four of the children and the surviving grandchildren in five equal parts. After the death of C. the widow executed a codicil appointing his share to go to two persons other than the beneficiaries named in the will of A.

Construction:

As she thus transgressed her authority, the codicil was void and inoperative for any purpose, and left the appointment of the will undisturbed; by it the power given to her was completely and perfectly executed; the devise over in case of the death of C. applied to a death during the lifetime of the testatrix,[2] and this construction was not affected by the fact that she referred in her will to the codicil of A. as the source of her authority to appoint; the words "the principal sum so held in trust" referred to the share she had designated which she was holding in trust, not to a trust arising after her death.

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[1] Beardsley v. Hotchkiss, 96 N. Y. 218; 5 N. Y. Stat. at Large, 311, 332.

[2] Vanderzee v. Slingerland, 103 N. Y. 47, 54.

The doctrine that an earlier provision of a will is revoked by a later one, or by a codicil repugnant thereto, operates only so far as it is necessary to give the later provision effect; and, so, does not apply where it is absolutely void. *Austin* v. *Oakes*, 117 N. Y. 577, mod'g 48 Hun, 492.

When by error of donee of a power, lands were conveyed to the husband, rather than to the husband and wife, a reformation of the deed was proper. *Haack* v. *Weicken*, 118 N. Y. 67.

The provision of the Revised Statutes (1 R. S. 737, sec. 124), declaring that "every instrument executed by the grantee of a power, conveying an estate, or creating a charge which such grantee would have no other 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," was not intended to change then existing rules; and whenever, in addition to the power, the grantee has an independent interest in the property, whether legal or equitable, the rule of the statute does not apply, and the instrument will not be deemed an execution of the power, but only a conveyance of the independent interest.

The will of S. devised his real estate to his wife as long as she should remain his widow, and upon her death or remarriage to their children. He made her executrix, and the will authorized her to make advances from the property, from time to time, in her discretion, to the children "for maintenance and support," and empowered her to mortgage, lease and dispose of such property for the purpose of carrying into effect the provisions of the will. The widow married and subsequently executed a mortgage on said real estate in her individual name to secure a loan. The mortgage contained no reference to the character of the mortgagor as executrix, or to the power to mortgage contained in the will. This mortgage was paid from the proceeds of a loan obtained from plaintiff upon a mortgage of the same property, executed by the widow individually and as executrix. In an action to foreclose the latter mortgage, it appeared that plaintiff had knowledge that the purpose of the mortgagor was to pay the prior loan with the money borrowed; such prior loan was procured for the benefit of the widow's second husband.

Construction:

Upon the marriage of the widow the fee of the real estate vested in the children, subject to the execution of the power of sale and to the widow's right of dower; the interest mortgaged must be restricted to the individual interest which the mortgagor had as dowress; although her dower right, while unassigned, did not give her a legal estate in the

land, it was a legal interest and constituted property capable in equity of being sold, transferred and mortgaged by her. *Mutual Life Ins. Co.* v. *Shipman*, 119 N. Y. 324, rev'g 50 Hun, 578.

Distinguishing, Marvin v. Smith, 46 N. Y. 571.

When power was conferred to sell lands, it was not properly executed by an exchange of the lands for other lands.[1] *Woerz* v. *Rademacher*, 120 N. Y. 62.

In an action to compel specific performance of a contract for the purchase of land, plaintiff claimed title under a deed of sale upon foreclosure of a mortgage executed by R., the original owner, and under a deed by the executrix of the will of R. By said will the testator devised his residuary estate to his executrix, in trust, with power "to sell, dispose of or convey the same * * * in such manner as shall seem proper and best for the interest of his estate." A large deficiency arose upon the foreclosure sale for which judgment was entered against the estate of R. The conveyance by the executrix was in consideration of the release of this judgment and the payment of the sum of $50; the referee found that the price paid was an adequate consideration for the land.

Construction:

If the foreclosure sale, for any reason, failed to convey a valid title, any remaining interest in the land was subject to the power of sale; the conveyance by the executrix was a valid execution of the power and conveyed a good title as against any persons who were not cut off by the foreclosure; plaintiff, therefore, had a valid title, such as the defendant was bound to accept, and the action was maintainable. *Mutual Life Insurance Company* v. *Woods*, 121 N. Y. 302.

O. died, leaving a will by which he disposed of all his estate. He authorized and directed S., his executrix, to sell all his real estate, except a portion specifically devised, within five years from the date of his decease, and at such time within that period as may seem best to her, and "in such portions or parcels, or all together as she may think best or most profitable," and from the proceeds to pay certain legacies. The use and possession of said realty, until its sale, with the rents and profits thereof, were given to S., and she was made the residuary legatee. In an action brought by legatees against S. in her individual capacity, the complaint alleged that she was cutting down and selling off timber from the real estate, and had done so to the extent of about $800; that

[1] An exchange of lands is justified under a power to sell lands and buy other land. Mayer v. McCune, 59 How. Pr. 78.

the commission and continuance of such acts have reduced the value of the realty and rendered doubtful the sufficiency of the estate to pay plaintiffs their legacies, and that plaintiffs' interests as tenants in common are threatened; an injunctionwas asked for.

Construction:

No cause of action for equitable interference appeared on the face of the complaint, and it was properly dismissed; the averments in the complaint were to the effect simply that defendant had been and was converting the realty into personalty by a sale, which she was authorized to do under the will, and for the proceeds of the sale she was obliged to account as executrix. *Keller* v. *Ogsbury*, 121 N. Y. 362.

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. *Dana* v. *Murray*, 122 N. Y. 604, 616.

Citing, 1 R. S. 737, secs. 120, 129; Everett v. Everett, 29 N. Y. 39–78.

Execution of power was invalid, as violating the statute against perpetuities. *Dana* v. *Murray*, 122 N. Y. 604, digested p. 461.

It seems, that where, by a will, the exercise of a power of sale given to executors is postponed for the benefit of legatees or devisees, during the intermediate period, the execution of the power may be accelerated by the consent of the executors and all the person interested, they joining in the conveyance, provided they are *sui juris* and the conveyance is not in contravention of any trust and is consistent with the substantial purpose of the testator in creating the power. *Kilpatrick* v. *Barron*, 125 N. Y. 751, aff'g 54 Hun, 322.

While the law recognizes the right of a testator to create by will powers of appointment and selection, and will sustain dispositions of property made pursuant thereto, although the testator did not designate the particular individuals in whose favor the power should be exercised, this right is subject to the limitation that the testator must designate the class of persons in whose favor the power may be exercised, with sufficient certainty so that the court can ascertain who were the objects of the power.

A power to select beneficiaries from all the members of the community, or all corporations of a particular class, wherever they may exist, however numerous, is void for indefiniteness.

The statute of powers presupposes that a power of selection must be so defined in respect to the objects that there are persons who can come into court and show that they are "designated as objects of the trust,"

and demand the enforcement of the power as authorized by the statute. (1 R. S. 734, sec. 100.) *Read* v. *Williams*, 125 N. Y. 560.

Tilden v. Green, 130 N. Y. 29, 79–81. Will of O'Hara, 95 id. 403, digested p. 598; see *ante*, pp. 822, 847.

A wrong motive on the part of the executor in making the sale, and the misappropriation of the proceeds, would not defeat the purchaser's title. *Rose* v. *Hatch*, 125 N. Y. 427, 428.

Power was conferred upon executors, by giving a testimonial, to convert a life estate into an absolute title.

The words of the gift to the executors were "unto my said executor or executors who shall consent to act or may survive." *Held*, that upon the death of all of the executors but one, the survivor had power to execute the prescribed testimonial. *Viele* v. *Keeler*, 129 N. Y. 190, 191.

The general rule is that to the due execution of a power there must be a substantial compliance with every condition required to preclude or accompany its exercise. *Harris* v. *Strodl*, 132 N. Y. 392, digested p. 1010. (See cases cited.)

A married woman executed a power of attorney to her husband empowering him to sell and convey all lands belonging to her, and to execute in her name, "all necessary or proper deeds, conveyances, releases, releases of dower and thirds, and rights of dower," for conveying any "right, title and interest, whether vested or contingent, choate or inchoate." The husband was authorized to sign the name of his wife to a deed conveying real estate owned by him, and so, to release her inchoate right of dower in the land. *Wronkow* v. *Oakley*, 133 N. Y. 505.

The same rule applies to wills of personal property as is given in regard to realty by the provision of the statute of powers (1 R. S. 737, sec. 126), which provides that "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]

C. executed to plaintiff a deed of trust of real and personal property, with directions to pay to him the rents and income during his life, and upon his death to convey the property to such persons and in such shares "as shall be designated and appointed" by his last will, and in default of such appointment, to his heirs at law and next of kin. By his will, after giving a legacy, C. gave all the residue of his estate, real or personal, which he owned or was "in any manner entitled to," to L.

Construction:

This was a good execution of the power of appointment, and so, L.

[1] Cutting v. Cutting, 86 N. Y. 522; Hutton v. Benkard, 92 id. 295.

was entitled to the trust estate. *New York Life Ins. & Trust Co.* v. *Livingston*, 133 N. Y. 125.

Where a power is given 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.

The will of D. gave to M., his adopted daughter, certain real estate for life; in case of her death "without leaving lawful issue," the testator gave to her power to devise or appoint by will the said real estate "to all or any or either" of his three sisters named, "or to all or any or either of the lawful issue" of said sisters "in such shares and proportions as she may think proper." In default of such devise or appointment, the testator devised said real estate to his said sisters in equal proportion on the death of M.; in case either of them died before M., "leaving lawful issue," the will provided that said issue should "take the share or part thereof which the parents of such issue would have taken if she had survived." The will contained a number of other devises, each to a beneficiary for life with remainder over to their "lawful issue," to be divided equally between them, if of equal degree of consanguinity, if not, the issue to take the share the parent would have been entitled to if living. All of the sisters died during the lifetime of M., two of them leaving children and grandchildren. M. died without issue, leaving a will appointing a portion of the said real estate to four of the said grandchildren, whose parents were then living, and the balance to children of the deceased sisters. In an action to determine the validity of the appointment to the grandchildren and to obtain a construction of the will of D., held (Follett, Ch. J., Haight and Brown, JJ., dissenting), that the words "lawful issue" in the provision creating the power were not limited to the children of said sisters, but included the grandchildren; that conceding the same words used in the devise over in case of a failure to appoint, embraced the children only, this did not control their interpretation as used in the grant of the power, and there was nothing in the context to restrict or qualify them as so used; and that, therefore, the appointment was valid. *Drake* v. *Drake*, 134 N. Y. 220–1, aff'g 56 Hun, 590.

Executors did not take any legal estate under the preliminary devise in trust to them of all of testator's property; yet the trust, being an active one and enforceable as a power in trust, comprehended and subjected to its execution every disposable or realizable interest in the testator's estate. The power in trust had all the character of a trust,

and being designed for the purpose of effectuating a trust, it was imperative. *Holly* v. *Hirsch*, 135 N. Y. 590, 596.

Citing, 2 Sugden Powers, 158; 1 Perry Trusts, 248.

Whenever a power or authority to sell is given by will to executors, without limitation and not in terms made discretionary, and its exercise is rendered necessary by the scope of the will and its declared purposes, the authority is to be deemed imperative and a direction to sell will be implied, provided the design and purpose of the testator is unequivocal and the implication so strong as to leave no substantial doubt, and his intention can not otherwise be carried out. (Scholle v. Scholle, 113 N. Y. 261; Chamberlain v. Taylor, 105 id. 194; Hobson v. Hale, 95 id. 598.)

The exercise of such an imperative power of sale may be compelled in favor of any party lawfully entitled under the provisions of the will to the proceeds of the real estate when sold, and so, may be compelled by a creditor, whose debt is directed by the will to be paid, and for the satisfaction of which the personal estate proves insufficient. (1 R. S. 684, sec. 96.)

J. died owing unsecured debts amounting to much more than the value of his personal estate; by his will he directed the payment of all his just debts and funeral expenses by the executors and trustees. He then gave all his property, real and personal, to executors and trustees, upon certain specified trusts, with "full power and authority to sell and convey any and all" the real estate. Proceeding instituted under the provisions of the Code of Civil Procedure (secs. 2749, 2801) by a general creditor, to obtain payment of his debt, by a sale of real estate of the decedent.

Construction:

The power to sell was imperative and the exercise of it might be compelled by the creditor; and, as the debtor had thus provided another remedy equally prompt and effective in its operation, the statutory remedy could not be resorted to. *Matter of Gantert*, 136 N. Y. 106, aff'g 63 Hun, 280. Scholle v. Scholle, 113 N. Y. 261; In re McComb, 117 id. 378; In re Bingham, 127 id. 296; In re City of Rochester, 110 id. 159; Clift v. Moses, 116 id. 144; In re Powers, 124 id. 361, distinguished.

NOTE.—"We are referred to many other cases where it has been held that a power of sale is not available for the payment of debts, but they are all cases where the power was either discretionary, or limited to some other specific purpose, or where it could not be exercised without breaking up or destroying the scheme of the will and frustrating the intention of the testator. (Kinnier v. Rogers, 42 N. Y, 531;

Scholle v Scholle, *supra;* Matter of McComb, 117 N. Y. 378; Matter of Bingham, 127 id. 296.)" (111.)

When power is conferred by will upon an executor to sell real estate for the payment of debts, he may lawfully exercise it for the payment of an honest debt, in no way invalid or outlawed, owing to himself. *O'Flynn* v. *Powers*, 136 N. Y. 412.

For election of beneficiaries to take land and defeat execution of power, see *Mellen* v. *Mellen*, 139 N. Y. 210, digested p. 910.

Where a life tenant has power to sell for her support, she has the right to mortgage for that purpose. *Swarthout* v. *Ranier*, 143 N. Y. 499.

The donee of a special power given by will to appoint an estate is invested with an authority merely, and an appointment, so far as it transcends the power, is invalid.

The execution of the power, however, will not be defeated because of some provision in the appointment made which is in excess of the power, when such provision may be eliminated without disturbing the general scheme. (See Alexander v. Alexander, 2 Ves. Sr. 644.)

A general and unlimited power of appointment to be exercised in the future is not void, because under it the donee may, without departing from the express language, attempt to create an illegal estate; the legal effect of the power is simply to authorize the donee to do what is lawful. In this case the power was held not to be limited to the creation of vested estates. *Hillen* v. *Iselin*, 144 N. Y. 365, aff'g 67 Hun, 444.

A mortgage executed under a power of sale was a valid lien. *Roarty* v. *McDermott*, 146 N. Y. 296, digested p. 952.

Power of sale—if essential to scheme of will, not defeated by executor's refusal to act. *Ross* v. *Roberts*, 2 Hun, 90.

Discretionary power to executor to convey such portion to beneficiary at any time, when the executor should be satisfied that he would make prudent use of it. *McLean* v. *McLean*, 3 Hun, 395, aff'd 62 N. Y. 627.

Power to executors to sell real estate was terminated by expiration of trust. *Bruner* v. *Meigs*, 6 Hun, 203.

By the will, the testator appointed his wife executrix thereof, and authorized her to sell and dispose of the real estate, if necessary, for the support and maintenance of the children. Her joining with the guardian of the minor children, in the deed of bargain and sale, delivered to the purchaser, pursuant to an order of court, the will being supposed to be lost, and no mention made thereof, must be deemed a valid execution of the power of sale conferred by the will. (Per Learned, P. J., and Boardman, J.) *Cole* v. *Gourlay*, 9 Hun, 493, aff'd 79 N. Y. 527.

When the exercise of a discretionary power of sale will not be compelled. *Gelston* v. *Shields*, 16 Hun, 143, aff'd 78 N. Y. 275.

Power of sale to executor to pay debts—direction that it be executed within two years—when a creditor can compel a sale after the expiration of that time. *Wild* v. *Bergen*, 16 Hun, 127.

By a codicil testator's wife was authorized to sell and dispose of any or all of the real estate, subject to the approval of each and every of his heirs surviving at the

time of the sale. The personal estate was not sufficient for the payment of the legacies. The plaintiffs, legatees and grandchildren of the testator, joined with the widow and other heirs in a deed of conveyance of all the real estate to one of said heirs, and also executed another deed in which they approved and ratified the conveyance. They were induced so to do by the representation, that it was necessary to execute the papers in order to obtain funds for the payment of the legacies. No consideration was given by the grantee, and at the time of its execution none was expressed in the instrument, though one was subsequently inserted. The conveyance was not a proper execution of the power of sale, and plaintiffs might bring an action to have it set aside. *Hoyt* v. *Hoyt*, 17 Hun, 192, aff'd 85 N. Y. 142.

Direction as to the time within which the trustees must sell—when the property does not revert to the grantors on their failure to sell within that time. *Parsons* v. *Rhodes*, 22 Hun, 80.

Dedication of land as a street—power of executors, having a power of sale, to dedicate land to the public use by the description used in conveying adjoining land. *Bloomfield* v. *Ketcham*, 25 Hun, 218.

When an administrator with the will annexed may execute powers and trusts conferred upon the executor by the testator. *Matter of Baker*, 26 Hun, 626.

Power to sell real estate—when it may be exercised by an administrator with the will annexed—as to his power to execute a trust confided to the executor—submission of controversy. *Fish* v. *Coster*, 28 Hun, 64.

How far the court will control the discretion vested in executors by the testator to exercise a power of sale. *Hancox* v. *Wall*, 28 Hun, 214.

Administrator with will annexed—right of, to execute power of sale given to the executor. *Paret* v. *Keneally*, 30 Hun, 15.

Power of sale to executors—they can not convey with covenants of warranty and against incumbrances. *Ramsey* v. *Wandell*, 32 Hun, 482.

Discretionary power of sale conferred upon an executor—this court can not appoint, to exercise it, a successor to the one named by the testator. L. 1882, ch. 185. *Matter of Bierbaum*, 40 Hun, 504.

A power of sale to executors must be executed by a trustee and not by the administrator. *Matter of Patton*, 41 Hun, 498.

Legacies were charged upon the real estate, and the sole surviving executor had power to sell the real estate to provide a fund from which to pay them. *Anderson* v. *Davison*, 42 Hun, 431.

Construction of a power to dispose of property by will—when it will be deemed executed by the use of general language in the will of the devisee of the power. *Thomas* v. *Snyder*, 43 Hun, 14.

Limitation of time for the exercise of a power of sale contained in a will—when a sale after the expiration of the time is valid. *Waldron* v. *Schlang*, 47 Hun, 252.

A fraudulent exercise of a power of sale is void. *Harty* v. *Doyle*, 49 Hun, 410.

The will of Peter R. Hogle gave two-thirds of his property in trust for his wife, Mary A. Hogle, during life, with power to the wife to dispose of the same as she might choose by will. The wife survived him and made her will by which, after giving some legacies, she disposed of some household furniture for the use of certain grandchildren, and also the use of all the residue of her property of every description for the maintenance of said grandchildren during their minority. There was no evidence that, aside from the household furniture, Mary A. Hogle had any considerable property. The general bequest, although not referring to the power, was a strong indication of the intent to execute the power unless the contrary was shown, and it must be presumed that, in this case, the testatrix intended to execute the power given

to her by the will of her husband, as otherwise there was no property on which the general demise and bequest could operate. *Hogle* v. *Hogle*, 49 Hun, 313, 314.

Power of sale to executors—what facts appearing of record show that a sale thereunder was not made in good faith and is invalid. *McPherson* v. *Smith*, 49 Hun, 254.

Presumption as to the exercise of a power of sale given by a will. *Mutual Life Ins. Co.* v. *Shipman*, 50 Hun, 578, rev'd 119 N. Y. 324.

No reference to the statutory provision (1 R. S. 732, secs. 77–79) relating to powers is necessary in the instrument. When such a power is general and beneficial and changes an estate for life into a fee in respect to creditors and purchasers. *Brown* v. *Farmers' Loan & Trust Co.*, 51 Hun, 386, aff'd 117 N. Y. 266.

Power of sale of land—to be exercised as "deemed expedient and for the best interest of all my legatees"—not properly exercised where there is sufficient personal property to pay all the legacies—title acquired thereunder. *Hovey* v. *Chisholm*, 56 Hun, 328.

Power of sale—when it survives the duration of the trust estate created by the will. *Cusack* v. *Tweedy*, 56 Hun, 617.

When provisions of will will be held to execute a power of appointment given to the testatrix by the will of another person. *Kibler* v. *Miller*, 57 Hun, 14, aff'd 141 N. Y. 571.

Widow's support—power of sale given to executors for that purpose—failure to exercise it—equitable relief after the widow's death. *Allport* v. *Jerrett*, 61 Hun, 447.

Ratification—all donees must unite in exercising a discretionary power. *Whitlock* v. *Washburn*, 62 Hun, 369, 374.

Will—deed by the grantee of a power—1 R. S. 737, sec. 124—testamentary power of sale—not frustrated by a deed purporting to be under an unauthorized sale. *Pollock* v. *Hooley*, 67 Hun, 370.

Will provided, "At the death of my wife I give fifty thousand dollars in such manner and form and to such person or persons as she, by her last will and testament, may direct, limit and appoint." The wife survived the testator, and at her death left a will in which she directed and appointed her executor to receive the sum referred to in the above provision of her late husband's will, and to invest the same and to pay one-fifth of the income to each of five several persons named, during their respective lives; and after the death of certain of such beneficiaries, she appointed other persons to receive their respective shares of income for life. The power of appointment was not limited to a direct and absolute gift, but permitted the wife, in exercising it in her will, to place limitations upon the absoluteness of the enjoyment within the restrictions prescribed by law. *Maitland* v. *Baldwin*, 70 Hun, 267.

A deed from commissioners claiming to be appointed under a will partitioning certain real estate, and evidence of possession thereunder for over twenty years, are sufficient to create at least presumptive evidence of title to such real estate.

Whether there is any power to partition or not, when an actual partition of real estate has been made and the parties have received deeds thereof and have acted thereon, such partition will be held valid and effectual, even though there are some irregularities in the proceedings for partition.

Upon the execution of a power contained in a will the devise takes effect as though it was contained in the will conferring the power, and is not deemed to descend by virtue of the appointment contained in a will executed pursuant to a power of appointment contained in a previous will. *Conklin* v. *N. Y. Elevated R. R. Co.*, 76 Hun, 420.

Scope of a power of sale of realty contained in a will—extended to the payment of debts and legacies. *Matter of Bolton*, 83 Hun, 259, aff'd 146 N. Y. 257.

Where the beneficiary under the power of sale is also vested as heir or devisee,

with the title of the real estate subject to such power, he may if competent, before the power has been exercised, convey the real estate, and thus defeat and annul the power of sale. *Roberts* v. *Cary*, 84 Hun, 328.

Two years is an ample time within which to sell real estate under directions contained in a will *Matter of Travis*, 85 Hun, 420.

Where persons are by certain instruments constituted trustees, or at least donees of powers in trust, and are given a power of sale, their execution of the same will be presumed to have been effectually made notwithstanding the existence in the grants of certain conditions which seem to limit their powers. *Bissing* v. *Smith*, 85 Hun, 564.

Trusts—one dealing with a trustee must ascertain the limitation of his powers—where the written consent of the beneficiary is necessary to the assignment of a mortgage—subsequent knowledge by the *cestui que trust* of its assignment is insufficient. *Suarez* v. *De Montigny*, 1 App. Div. 494.

Will—when a power to devise is not executed by the will of the donee of the power—when an intention not to execute the power is implied. 1 R. S. *737, sec. 126. *Lockwood* v. *Mildeberger*, 5 App. Div. 459.

The will of James M. Conner provided as follows : "I hereby direct my executors and executor to distribute and apportion to my wife and children, viz., Josephine V. Conner, Eliza Conner, Charles S. Conner, Benjamin F. Conner, Alfred V. Conner and Archibald Conner, my estate, in such manner and time or times as shall, in their judgment, be for the best interest of my wife and children."

The testator nominated his wife and three of his sons, one of whom was an infant, as his executors.

Construction :

The estate was left in equal shares to the decedent's wife and his six children.

The term "manner" applied to the method of allotment ; a discretion was given as to the time when the money should be paid over, but not as to the quantity of the estate to be distributed to each beneficiary.

It was not the intention of the testator to bring the estate within section 99 of 1 Revised Statutes, 734, relative to powers, and to allow the executors to allot the whole estate to themselves, to the exclusion of the other children. *Matter of Conner*, 6 App. Div. 594.

Power of sale—improper exercise—*bona fide* purchaser—notice to and knowledge of one member of a firm binds the client—exception to the rule,—that a purchaser from a trustee need not concern himself with the disposition made by the trustee of the purchase price. *Benedict* v. *Arnoux*, 7 App. Div. 1.

A gift of property to trustees "to be used by them or the survivor of them either wholly or in such parts or shares as they or the survivor of them, in their or his discretion, shall deem desirable for the benefit of the children" of a certain person, vests in the trustees a discretion as to the amount of principal or income to be used for that purpose, but gives them no discretion to withhold the benefit from any one or more of such children; whatever amount is used must be divided equally between all the children.

A court of equity may interfere with the discretion vested in trustees, where they abuse such discretion or are acting in bad faith.

The withholding of all income from one of the beneficiaries because he married against the wishes of the trustees, and from another because of a dispute with his mother as to his schooling, is an abuse of discretion and an act of bad faith. *Jones* v. *Jones*, 8 Misc. 660.

Where the grantor provided that the instrument in execution of the power should be executed in the presence of two witnesses and only one was present, it did not

render the whole transaction void, but was a defective execution which the court would supply in favor of a purchaser for a valuable consideration. *Schenck* v. *Ellingwood*, 3 Edw. Ch. 175.

A provision that the trustee, in all dispositions of the property, should express the trust was merely directory, and the omission to do so did not affect the validity of a conveyance. *Bradstreet* v. *Clarke*, 12 Wend. 602.

See, in addition to above cases, Matter of Vandevort, 8 App. Div. 341 (collusive sale); Correll v. Lauterbach, 14 Misc. 469 (consent of others to execution); Fargo v. Squiers, 6 App. Div. 485 (execution of power of appointment); Harper v. National Bank, 17 Misc. 221 (election of beneficiaries to take land); Stewart v. Keating, 15 id. 44 (execution of power of disposition by will); Metropolitan Trust Co. v. Seaver, 17 id. 466 (execution of power of appointment); Mason v. Mason's Exr's, 4 Sandf. Ch. 623, aff'd 13 Barb. 461 (discretion to increase an annuity).

VII. DELEGATION OF POWERS.

See Real Property Law, sec. 126, *ante*, p. 890. See, also, "The Execution of Powers, *ante*, p. 977.

Although an executor appointed in this state can not act as such beyond our jurisdiction, he may convey land situate in another state where the power to do so is contained in the will.

An executor or other trustee empowered to sell lands in his discretion, can not authorize an agent to contract for their sale. The power is a personal trust which can not be delegated, and a contract by an agent is void.[1]

But where such a contract has been executed by an agent, the principal may render it valid by ratifying it with full knowledge of the facts. In ratifying it he exercises the personal qualities essential to the due execution of the trust. *Newton* v. *Bronson*, 13 N. Y. 587.

Citing Berger v. Duff, 4 Johns. Ch. 369.

Testator may in his will delegate the power to select an executor.

Testator nominated his wife as executrix and requested that such male friend "as she may desire be appointed with her as executor." Selection and appointment of such person was valid. *Hartnett* v. *Wandell*, 60 N. Y. 346, rev'g 2 Hun, 552.

See Code of Civil Proc., sec. 2640.

DeP. executed to his son's wife a deed containing words sufficient and appropriate to convey an absolute fee. The deed, however, declared that it was made by way of advancement to be charged

[1] Berger v. Duff, 4 Johns. Ch. 369.

against the share of the son in the grantor's estate, and to enable the grantee to sell and convey in fee simple if she should desire so to do, and contained a covenant upon the part of the grantee, that upon sale by her she should cause the proceeds to be properly invested, and at her decease the premises or the principal realized from a sale, should be conveyed to the issue of her marriage with the grantor's son living at her death, or their legal representatives. The grantee died without having sold the real estate, but devised the same to her son, with power to her executor to sell and convey.

Construction:

The grantee took only a life estate, with remainder in fee to the issue of the marriage, with power in the grantee to sell and convey, which power was general, but neither imperative nor beneficial, but in trust to be exercised in the discretion of the donee; and could not be delegated, but it and the trust terminated at donee's death and thereafter the fee went to the remainderman. Hence, any title from the executor was defective. *Coleman* v. *Beach*, 97 N. Y. 545.

NOTE.—As to discretionary powers see pp. 964, 974.

NOTE.—The subject of the delegation of powers was considered in Crooke v. County of Kings, 97 N. Y. 421. Earl, J., in the course of his opinion discussed the subject, and reviewed the decisions (p. 453 *et seq*). It is there stated as follows: "It is settled beyond controversy, that when the donee of a power has any discretion to exercise for the benefit of others, in the execution of the power, he must exercise such discretion, and the execution can not be delegated. But * * when there is no discretion to be exercised, where one person can execute the power as well as another, then its execution may be delegated. In such case there can be no reason for holding that the donee of the power must personally execute it.[1] * * In 4 Cruise's Digest, 257, it is said that a power of revocation and appointment can not be delegated to another, for it is a maxim of law that "*delegatus non potest delegare!*" but it is said that "this doctrine is, however, confined to that part of the execution of a power in which confidence and discretion are exercised." See, also, the opinion of Finch, J.

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[1] See, also, Mayor v. Stuyvesant, 17 N. Y. 42.

See further, Whitlock v. Washburn, 62 Hun, 369; Real Prop. L., sec. 162, *post*, p. 1017; Trusts, whether the trust duty is annexed to the office or the person, *ante*, p. 718; Chaplin's Express Trusts and Powers, p. 476.

VIII. QUALIFIED POWERS.

See cases involving limitation and restriction of powers, *ante*, p. 975.

By the common law, where a power was to be executed with the consent of third persons, the death of one of such persons before consent given, rendered the execution of the power impossible.

This rule of law has not been changed by the revised statutes.[1] Section 112 (1 R. S. 735) is applicable to grantees of a power, not to third persons whose consent is requisite to its execution.

Land was devised to a son for life, and then to his heirs with power to him to sell and convey the same, by and with the consent of his mother and brother; she died without consenting, and the son afterwards, with the consent of his brother, sold and conveyed the land.

Construction:

No title passed by virtue of the power. *Barber* v. *Cary*, 11 N. Y. 397.

1. The rule has been changed by Real Prop. L., sec. 154, *ante*, p. 971. For general rule see also Real Prop. L., sec. 153, *ante*, p. 970.

Power of disposal—qualified. *Terry* v. *Wiggins*, 47 N. Y. 512, digested p. 95.

See decisions collected under "Effect of powers in creating a fee," p. 92 *et seq.*; also p. 955 *et seq.*

A condition attached to a power of sale contained in a trust deed, that the trustee shall only sell by and with the consent of the grantor, to be manifested by his uniting in the conveyance, is valid. It is an essential condition and can not be dispensed with. If no provision is made for the execution of the power in case of the death of the grantor, it is extinguished by such death. *Kissam* v. *Dierkes*, 49 N. Y. 602.

NOTE.—See Note 1 to Barber v. Cary, 11 N. Y. 397, digested above.

Power of appointment, qualified by condition that it should be exercised only in case of failure of issue. *Vernon* v. *Vernon*, 53 N. Y. 351, digested p. 927.

Qualified power of sale. *Ackerman* v. *Gorton*, 67 N. Y. 63, digested pp. 96, 301.

Consent of beneficiary of power to execution when necessary. *Onondaga Trust and Deposit Co.* v. *Price*, 87 N. Y. 542, digested p. 906.

A power to devise in case the grantee married gave a conditional power of diposition. *Low* v. *Harmony*, 72 N. Y. 408.

V. died seized of certain premises, leaving a widow and three children, all of age, surviving him. By his willl he gave to his widow all of his estate during life, or until she should remarry. Should she remarry, the executors were directed to sell all of the estate, pay one-third of the proceeds to her and divide the residue equally among the children, the children of any child who may have died to receive the parent's share. Upon the death of the wife without having remarried, the property was directed to be divided equally among the testator's children, the children of a deceased child to receive their parent's share. Full power was given to the executors to sell and convey the real estate "whenever they may deem it best to do so, and upon such terms as they may think desirable." The widow and children united in a conveyance of the premises to defendant, who contracted to sell the same to plaintiff. Defendant tendered a deed, executed by himself, which plaintiff refused to accept. In an action for specific performance, or, in case it could not be had, to recover back the purchase money paid, defendant produced a deed, executed by the executors, which recited that the consideration stated was the same as that stated in the deed of the widow and children. It was not claimed that any portion of the consideration was paid to the executors as such.

Construction:

The first deed simply conveyed a title, subject to be defeated in part by the death of one of the children prior to the death or remarriage of the widow; nothing remained for the executors to convey but the future contingent interests of the grandchildren, and this, under the power of sale, they could only so sell and convey as to secure the proceeds to the grandchildren in case of the contingency happening making them the ultimate devisees; the deed executed by them was not a valid execution of the power, and, therefore, the defendant did not have a marketable title. *Harris* v. *Strodl*, 132 N. Y. 392.

NOTE.—What defense could he (plaintiff) make to the claim of the grandchildren if, as is not improbable, they become the testator's devisees? (McMurray v. McMurray, 66 N. Y. 175.)

The question is an important one. The general rule is that to the due execution of a power there must be a substantial compliance with every condition required to precede or accompany its exercise. (Allen v. DeWitt, 3 N. Y. 276; Roome v. Phillips, 27 id. 357; Russell v. Russell, 36 id. 581; Adair v. Brimmer, 74 id. 539; Syracuse Savings Bank v. Holden, 105 id. 415.)

Two cases recently before this court under the same will illustrate both the valid and the invalid execution of a power much like the one before us. (Scholle v. Scholle, 113 N. Y. 261; Mutual Life Ins. Co. v. Woods, 121 id. 302.)

It may be that the grandchildren will never take under the will, or if they should, that a satisfactory answer to the question we have suggested could be made. But

the purchaser is entitled to a marketable title. He should be protected against the risk suggested. (Moore v. Appleby, 108 N. Y. 241; Meth. Epis. Ch. v. Thompson, 13 N. Y. S. R. 130.) (397.)

By an antenuptial agreement, S., in contemplation of the marriage, conveyed to a trustee certain lands, the trustee to pay to her the rents and profits, or at her election to permit her to hold and use the lands during her life, and upon her death to convey them as she, by deed, appointment or will, "should order, direct or appoint." S. retained possession until her death.

Construction:

The antenuptial conveyance did not create a trust within the meaning of the statute of uses and trusts (1 R. S. 728, sec. 55), as the power of the trustee to receive and apply the rents and profits was dependent on the election of S., and she exercised the right reserved by her to herself to take and hold the property; no title vested in the person named as trustee (1 R. S. 727, sec. 47; id. 728, sec. 49; id. 729, sec. 58), and, therefore, the premises were held and owned by S. at her decease. *Wainwright* v. *Low*, 132 N. Y. 313, aff'g 57 Hun, 386.

An expression of the testator's expectation and desire that his wife should not dispose of any of the estate by will in such a way that the whole that might remain at her death would not go out of his "own family and blood relations." This was but the expression of the testator's expectation and desire and did not qualify a power of disposition given wife. *Matter of Gardner*, 140 N. Y. 123, digested p. 114.

A purchaser of land from a trustee with power to convey only on the happening of an event, which is a condition precedent, must ascertain at his peril whether the condition has been fulfilled. And this is so, even although the deed recites performance of the condition.

It is otherwise, under a condition subsequent, under 1 R. S. 730, sec. 66.

Accordingly, where trustees had power to sell only in case there should be a deficiency of income for certain purposes, and conveyed, reciting the condition and a deficiency under it, *held*, that their conveyance was void, it appearing there was in fact no such deficiency.[1]

To justify a sale the trustee should state an account and show a deficiency in point of fact. An offer to show payments of portions of the income, without going this length, is insufficient. *Griswold* v. *Perry*, 7 Lans. 98.

The testator authorized his executors to sell his real estate whenever they and his wife (his executrix), unanimously thought that such sale would be advantageous to her estate. After the decease of his wife, his surviving executors were authorized to sell the real property. *House* v. *Raymond*, 3 Hun, 44.

The will of a testator contained the following power of sale: "I do hereby give to my executors and trustees (the plaintiff and the testator's widow), full and complete power to sell and dispose of my said real estate at such time, in such manner and on

[1] See Anderson v. Davison, 42 Hun, 431.

such terms as they shall jointly consider beneficial and for the interest of my estate, with full power to convey by deed jointly and not singly, as I might or could do if living "

This power ended upon the death of the testator's widow, at which time the trust estate to which the power was annexed terminated.

Section 2642 of the Code of Civil Procedure does not prevent a testator from placing such limitations on the exercise of powers granted by him as he may deem fit. It merely prescribes a rule applicable in the absence of directions by a testator to the contrary. *Herriott* v. *Prime*, 87 Hun, 95.

IX. DURATION AND EXTINGUISHMENT OF POWERS.

(1.) As to extinguishment by revocation; see Real Prop. L., sec. 128, *ante*, p. 891.

(2.) See Duration and termination of an express trust, *ante*, p. 692; see note under sec. 162 (Real Prop. L.), *post p.* 1019.

(3.) See Power of sale, *ante*, p. 901; also Equitable conversion, *ante*, p. 917.

(4.) See The execution of powers, *ante*, pp. 975.

(5.) See Qualified powers, *ante*, p. 1009.

(6.) See Powers extinguished by the death of the donee, Real Prop. L., sec. 162, *post*, p. 1019.

1. Death of person whose consent was required to the execution.

Kissam v. Dierkes, 49 N. Y. 602; Phillips v. Davies, 92 id. 199.

2. Termination of trusts; Brunner v. Meigs, 64 N. Y. 506; Phillips v. Davies, 92 id. 199; Cussack v. Tweedy, 126 id. 81.

3. Failure of trust upon which power is dependent.

Benedict v. Webb, 98 N. Y. 460.

4. Sale of land by beneficiary, or election to keep the same.

Hetzel v. Barber, 69 N. Y. 1.

5. Power surviving death of *cestui que trust*.

Phillips v. Davies, 92 N. Y. 199; Cussack v. Tweedy, 126 id. 81.

6. Failure or accomplishment of purpose of powers.

Sweeney v. Warren, 127 N. Y. 426.

7. Power for benefit of life tenant as well as remainderman survives death of latter.

Cotton v. Burkelman, 142 N. Y. 160.

8. Power surviving death of life tenant.

Millspaugh v. VanZandt, 55 Hun, 463.

9. Birth of posthumous child.

Smith v. Robertson, 89 N. Y. 555.

Provision that grantee of power shall only sell with consent of grantor power; if unexecuted, is extinguished by grantor's death. *Kissam* v. *Dierkes*, 49 N. Y. 602.

See to same effect, Barber v. Cary, 11 N. Y. 397. The rule is changed by Real Prop. L., sec. 154, *ante*, p. 971.

When the power is in terms restricted and limited in point of time to the continuance of respective trusts, the ending of the trust ends also the power. *Brunner* v. *Meigs*, 64 N. Y. 506.

See Cussack v. Tweedy, 126 N. Y. 81, 88.

A power vested in executors to sell "if they should deem it expedient for the purpose of making such division * * * or for carrying into effect all or any of the purposes of the trust," is, at least so far as vested for the purpose of making the distribution, dependent upon the validity of the trust and falls with it. *Benedict* v. *Webb*, 98 N. Y. 460.

See Suspension of power of alienation, p. 373, *et seq.* As to whether power falls with void limitation, see Robert v. Corning, 89 N. Y. 225; Fowler v. Ingersoll, 127 id. 472; Garvey v. McDevitt, 72 id. 556, 562; McCready v. Mut. Life Ins. Co., 83 Hun, 526, aff'd 148 N. Y. 761.

A power to sell land can only be exercised in the manner and for the precise purpose declared and intended by the donor; when the purpose becomes wholly unattainable the power ceases, although the purpose is defeated by the voluntary act of the one to be benefited by the creation of the power.

Devise of land to husband and two daughters in equal thirds, with authority to husband to sell and direction to invest and keep invested from the proceeds of sale the daughter's portions, to be paid them with accumulations of interest when they severally reached the age of twenty-five years.

Construction:

The power of sale of one-third given her husband was merged in fee thereof.[1]

The daughters took an absolute fee of two-thirds, subject to the execution of the power,[2] which was a power in trust.[3]

The accumulation was valid only until the daughters respectively arrived of age. After the daughters became of age they conveyed their interests. This conveyance extinguished the power.[4] *Hetzel* v. *Barber*, 69 N. Y. 1, rev'g, in part, 6 Hun, 534.

NOTE 1.—By the will the trustee would retain and invest the principal until the period of distribution. R. S., pt. 2, ch. 5, tit. 4, secs. 3, 4; Harris v. Clark, 7 N. Y. 242; Williams v. Williams, 8 id. 524; Kilpatrick v. Johnson, 15 id. 322.

NOTE 2.—The general rule is that persons entitled to the money from lands directed to be converted into money by the exercise of a power conferred upon another, may upon

[1] 4 Kent's Com. 348; 1 R. S. 733, secs. 83, 85.

[2] Reed v. Underhill, 12 Barb. 113; Crittenden v. Fairchild, 41 N. Y. 289.

[3] R. S., pt. 2, ch. 1, tit. 2, art. 3, secs. 77, 94.

[4] Jackson v. Jansen, 6 J. R. 73; Sharpstein v. Tillou, 3 Cow. 651.

coming of lawful age, elect to take the land itself, if the right of others will not be affected. Leigh & Dalzell on Eq. Cas. 177 (5 Law Library, 89); 1 Story's Eq. Jur. sec. 793; Crabtree v. Bramble, 3 Atk. 680; Seeley v. Jago, 1 P. Wms. 389; Craig v. Leslie, 3 Wheat. (U. S.) 577; Smith v. Starr, 3 Whart. 62, 65; Burr v. Line, 1 id. 252, 265; Stuck v. Mackey, 4 Watts. & Serg. 196; Mandlebaum v. McDonell, 29 Mich. 78.

NOTE 3.—See, for cases involving the failure of a power through the sale of the land by the beneficiaries, or their election to take the land, Prentice v. Janssen, 79 N. Y. 478, digested p. 929; Armstrong v. McKelvey, 104 id. 179, digested p. 909; Parker v. Linden, 113 id. 28, digested p. 936; Mellen v. Mellen, 139 id. 210, digested p. 910. See cases gathered thereunder. McDonald v. O'Hara, 144 id. 566, digested p. 914; Purdy v. Wright, 44 Hun, 239; Matter of McCaffrey, 50 id. 371; Roberts v. Cary, 84 id. 328, digested p. 917; Harper v. Chatham Nat. Bank, 17 Misc. 221; Smith v. Farmer's T. Co., id. 311.

Power may be terminated by birth of a posthumous child for whom no provision has been made in the will. *Smith* v. *Robertson*, 89 N. Y. 555.

M., when she made her will, and at her death, owned a large amount of real estate but only a small amount of personal property. She provided by her will for the payment of debts, first gave her real and personal estate to her executors *in trust*, to rent, etc., and apply the rents, income, etc., to the use of her husband during life. Then followed ten clauses purporting to create separate and independent trusts, also numerous legacies, all of which would substantially fail in the absence of a trust estate or power in trust vested in the executors, by force of which the real estate could be sold and converted into money. Certain real estate was also specifically devised, and the executors were directed to pay off incumbrances thereon, which, in the absence of such power, could not be done. The clause appointing executors provided "and during the lifetime of my said husband my said executors, and such and whichever of them as shall act, are authorized and empowered, by and with the consent of said husband, to sell and dispose of any part of my estate, real and personal, not specifically bequeathed."

Construction:

The said clause conferred on the executors a power of sale, which during the husband's life could be exercised only by his consent, but thereafter continued to exist, so that the executors might convert into money so much of the real estate as was not specifically devised. *Phillips* v. *Davies*, 92 N. Y. 199.

L., by his will, gave his residuary estate to his executors in trust, creating four separate trusts for the benefit of his children, each covering an undivided one-fourth of said residue, the income of the fourth set apart for each child to be paid to him or her during life, and upon his or her death the executors to convey such share with any unapplied

income to such child's issue. By a subsequent clause of the will the executors and the survivors and survivor of them were authorized at any time or times to sell and dispose of the whole or any part of the estate, and in the meantime to collect and receive the rents. The contract in question was made after the death of one of the testator's children. A deed of the sole surviving executor was tendered to the purchaser and rejected.

Construction:

Such deed was effectual to convey a good title; the power of sale conferred upon the executors did not terminate on the death of one of the *cestui que trustent*, but survived; the will authorized the trustee, holding as to an ended trust in the character of a tenant in common, to retain and exercise the power of sale and receive rents until final severance and distribution. *Cussack* v. *Tweedy*, 126 N. Y. 81, aff'g 56 Hun, 617.

Citing, Trower v. Knightley, Madd. & Geld. 134; Taite v. Swinstead, 26 Beav. 525.

Where a testator authorizes his executor to sell and convert into money all or a part of his realty for a specific purpose, which fails or is accomplished without a conversion, the power is extinguished and the land can not be sold by virtue of it or treated as personalty, but descends to his heirs, unless it is devised. *Sweeney* v. *Warren*, 127 N. Y. 426, aff'g 52 Hun, 246.

Citing, Wood v. Keyes, 8 Paige, 365; McCarty v. Terry, 7 Lans. 236; Jackson v. Jansen, 6 Johns. 73; Sharpsteen v. Tillou, 3 Cow. 651; Bogert v. Hertell, 4 Hill, 492; Hetzel v. Barber, 69 N. Y. 1; Read v. Williams, 125 id. 560; Hill v. Cook, 1 Ves. & B. 175; Chitty v. Parker, 2 Ves. 271; Taylor v. Taylor, 3 DeG., M. & G. 190; Leigh & D. Conv. 93; Lewin on Tr. (8th ed.) 149, 953.

The will of C. gave to his wife all of his property during life, charging upon it the support of his mother. The wife was made sole executrix with full power to sell and dispose of any part of the real estate in her discretion and to invest the proceeds as she might deem best for the benefit of M., their adopted daughter, to whom the remainder in fee was given. M. died after the death of the testator, leaving a son surviving. Thereafter the executrix contracted to sell and convey a portion of the real estate of which C. died seized. An action to compel specific performance of the contract.

Construction:

The power of sale was not given for the benefit of the remainderman simply, but its chief purpose was the benefit and safety of the life tenant; and so, the power was not extinguished by the death of M. and

the deed of the executrix was sufficient to carry the fee. *Cotton* v. *Burkelman*, 142 N. Y. 160.

Distinguishing, Sweeney v. Warren, 127 N. Y. 434.

When power of sale did not cease from failure to exercise it in the lifetime of life tenant. *Millspaugh* v. *VanZandt*, 55 Hun, 463.

X. VOID POWERS.

Powers may be void,

1. Because they create an undue suspension of the power of alienation, etc. *Benedict* v. *Webb*, 98 N. Y. 460; see this case with annotations under Duration and extinction of powers, *ante*, p. 1013.

See also Garvey v. McDevitt, 72 N. Y. 556; Robert v. Corning, 89 id. 225; Van Brunt v. VanBrunt, 111 id. 178; Booth v. Baptist Church, 126 id. 215; Matter of will of Butterfield, 133 id. 473; Haxtun v. Corse, 2 Barb. Ch. 506; McSorley v. Leary, 4 Sandf. Ch. 414; see, *ante*, pp. 374, 396.

2. Becuse they are too indefinite, and incapable of execution. *Sweeney* v. *Warren*, 127 N. Y. 426; *Tilden* v. *Tilden*, 130 N. Y. 29.

See, *ante*, p. 892, note, 2. See Beneficiary, p. 821; Charitable uses, p. 847; but section 162 of the Real Property Law makes section 93 of the Real Property Law, *ante*, p. 847, applicable to powers, and it may be that hereafter it will be no objection to a power that it is indefinite.

3. Because of birth of a posthumous child not provided for in will. *Smith* v. *Robertson*, 89 N. Y. 555.

XI. VACANCY CAUSED BY DEATH, ETC., OF GRANTEE.

Real Prop. L., sec. 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."

1. R. S. 734, sec. 102 (repealed by Real Prop. L., sec. 300) rendered the provisions of the statute of uses and trusts from sec. 66 to sec. 71, both inclusive, applicable as in the above section of Real Prop. Law. This included section 66, now section 88, relating to "Person paying money to trustee protected;" section 67, now section 89, "When estate of trustee ceases;" section 68, now section, 91, "Trust estate not to descend;" sections 69, 70, 71, now section 92, "Resignation or removal of trustee and appointment of successor." The Revised Statutes, sec. 102, omitted words "estate" and "however created."

The following statutes and suggestions may be consulted upon the subjects involved in section 162.

(1.) Real Prop. L. sec. 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." This section supersedes 1 R. S. 730, sec. 68, repealed.

See this section with pertinent decisions, p. 837–842.

(2.) Real Prop. L., sec. 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 rule 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." This section supersedes 1 R. S. 730, secs. 69, 70, 71; 1 R. S. 731, sec. 72, repealed.

See this section, with pertinent decisions, pp. 841–2; see, also, pp. 837–41.

(3.) Real Prop. L., sec. 140. "Execution of power on death of trustee.—If the trustee of a power, with 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." This section supersedes 1 R. S. 734, sec. 100, repealed.

See this section, with pertinent decisions, p. 969.

(4.) Real Prop. L., sec. 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." This section supersedes 1 R. S. 734, sec. 101.

See this section, with pertinent decisions, p. 966.

(5.) Real Prop. L., sec. 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."

See Laws of 1893, ch. 701, not repealed.
See this section, with discussion and decisions, at p. 847 *et seq.*

(6.) Code of Civil Procedure, sec. 2613.—"When letters of administration with the will annexed are granted, the will of the deceased shall be observed and performed; and the administrators, with such will, have the rights and powers and are subject to the same duties as if they had been named executors in the will."

See 2 R. S., 72, sec. 22, repealed.

(7.) Real Prop. L., sec. 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."

1 R. S. 735, sec. 112 (repealed by Real Prop. L., sec. 300), was substantially the same.

Code of Civil Procedure, sec. 2642. * * * "And where any powers to sell, mortgage or lease real estate, or any interest therein, are given to executors as such, or as trustees, or as executors and trustees, and any such persons as executors shall neglect to qualify, then all sales, mortgages and leases under said powers made by the executors who shall qualify, shall be equally valid as if the other executors or trustees had joined in such sale."

2 R. S. 109, sec. 55 (sec. 55, title 4, ch. 6, part 2, R. S.)—"Where any real estate or any interest therein, is given or devised by any will legally executed, to the executors therein named, or any of them, to be sold by them or any of them, or where such estate is ordered by any last will to be sold by the executors, and any executor shall neglect or refuse to take upon him the execution of such will, then all sales made by the executor or executors, who shall take upon them the execution of such will, shall be equally valid, as if the other executors had joined in such sale."

See above sections, with annotations, at pp. 967–8.

(8.) The court has no power to appoint a person to execute a power, where it appears, that it was intended by the grantor of the power that no other person than the grantee named by him should execute it.[1]

In re Bierbaum, 40 Hun, 504. Tilden v. Green, 54 id. 231, aff'd 130 N. Y. 29. See decisions collected under "Whether the trust duty is annexed to the person or the office," p. 718-727. See also pp. 964, 977.

(9.) The question often arises, whether the power was conferred on the person appointed executor or trustee, in his individual capacity, or in his official capacity as executor or trustee. It may be necessary to decide this in order to determine whether the power survives the death, or resignation of the grantee of the power or his refusal to act, and if it does so survive, in what capacity his successor may exercise it. As stated under subdivision (8), *supra*, the power given to a person may be so purely discretionary that another may not be allowed to exercise it. But if otherwise, if a successor may be appointed, must he be a person appointed by the court for that purpose, or may the administrator with the will annexed exercise the power? The statute (Code of Civil Procedure, sec. 2613, superseding 2 R. S. 72, sec. 22), gives an administrator with the will annexed, "the rights and powers," and sub-

[1] Hull v. Hull, 24 N. Y. 647, dig. p. 719; Bain v. Matteson, 54 id. 663, dig. p. 719; Coleman v. Beach, 97 id. 545, dig. p. 994; Lahey v. Kortright, 132 id. 450, 456-7, dig. p. 727.

jects him to the same duties, as if he "had been named" executor in the will. But this has been construed to refer to the "distinctive duties of an executor as such."[1] So that the inquiry, whether the power was intended to be given to the executor as such, is not helped by the statute. If the power was given to the executor as such the statute merely enables the administrator with the will annexed to exercise it. The courts have naturally differed in determining the power of an administrator with the will annexed in this regard. Nevertheless some general rules have been stated. It has been said:[2] "When the will gives a power to the donee in a capacity distinctively different from his duties as executor, so that as to such duties he is to be regarded wholly as trustee and not at all as executor; and when the power granted or the duty involved imply a personal confidence reposed in the individual over and above and beyond that which is ordinarily implied by the selection of an executor, there is no room for doubt or dispute. In such case the power and duty are not those of executor, *virtute officii*, and do not pass to the administrator with the will annexed. But outside of such cases the instances are numerous in which, by the operation of a power in trust, authority over the real estate is given to the executor as such, and the better to enable him to perform the requirements of the will. It will not do to say, in the present state of the law, that whenever a trust or trust power is conferred upon executors, relating to real estate, some personal confidence distinct from that reposed in executors is implied. An executor is always a trustee of the personal estate for those interested under the will. We have recently so decided where the trust character could only be derived from the office and its relation to rights claimed through it.[3] * * We have no doubt, therefore, that when a power of sale is given to executors for the purpose of paying debts and legacies, or either, and especially when there is an equitable conversion of land into money for the purpose of such payment and for distribution, and the power of sale is imperative and does not grow out of a personal discretion confided to the individual, such power belongs to the office of executor, and, under the statute, passes to and may be exercised by the administrator with the will annexed."[4] So in numerous cases it has been held that the administrator with the will annexed could exercise the power.[5] In many other cases it has been

[1] See opinion in Mott v. Ackerman, 92 N. Y. 539, dig. p. 721.

[2] Mott v. Ackerman, 92 N. Y. 539.

[3] Wager v. Wager, 89 N. Y. 161.

[4] In the same connection see the opinion given in Greenland v. Waddell, 116 N. Y. 234, when it was held that trustees could not be appointed to execute the duties imposed on the executor.

[5] See cases, *ante*, p. 718–727. See also "The Execution of Powers," p. 977.

held that the power could only be exercised by a trustee, as in the case of discretionary powers given to executors.[1]

So new trustees are properly appointed to execute a power when the power is given to the executors in trust.[2]

The question of the capacity in which the grantee of the power should execute the duty has a bearing upon his commissions. See Commissions; also upon the formal manner in which the power should be executed.[3]

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[1] Cooke v. Platt, 98 N. Y. 35; Matter of Blauvelt, 131 id. 249; Matter of Bierbaum, 40 Hun, 504, dig. *ante*, p. 721, note. This is recognized in other cases, Mott v. Ackerman, 92 N. Y. 553; Greenland v. Waddell, 116 id. 234; Royce v. Adams, 123 id. 402, dig. p. 726.

[2] Dunning v. Ocean Nat. Bank, 61 N. Y. 497, dig. p. 719; Farrar v. McCue, 89 id. 139, dig. p. 720; Royce v. Adams, 123 id. 402, dig. p. 726; Lahey v. Kortright, 132 id. 450; Kortright v. Storminger, 49 Hun, 249, dig. p. 721. See opinion in Greenland v. Waddell, 116 N. Y. 234, given at p. 725.

[3] See Roome v. Philips, 27 N. Y. 357, dig. p. 981.