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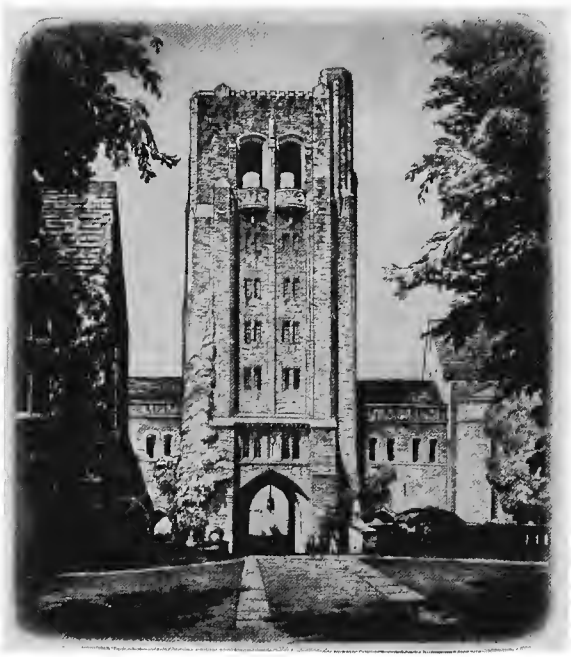

THE LAW

OF

REAL PROPERTY,

WITH AN APPENDIX OF

FORMS OF CONVEYANCING

ADAPTED TO THE

LAW OF THE STATE OF NEW YORK,

AND TO STATES HAVING SIMILAR LAWS.

BY

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PREFACE.

THE object of this treatise is to set forth the Law of Real Property as it exists at the present time.

The law of real property has been fully discussed by the best of the English juridical writers. From the time when Littleton published his treatise upon tenures, more than four hundred years ago, successive writers have discussed the subject in all its bearings, and no portion of the English law has been more elaborately explained, none better illustrated. These works are of great value to the American student, and yet they are incumbered with much that is useless to him, much that may mislead him.

The many and various changes made by the Revised Statutes, with the amending statutes which have since been passed, seemed to require that a new treatise should be written, rather than any attempt to modify or change any of the text-books which have been in use for the past twenty or thirty years.

How well the author has succeeded in presenting the Law of Real Property as it is, freed from much that has changed and passed away, he submits to the candor and judgment of his brethren of the profession, trusting that he has done something to aid the student, the conveyancer and the counsellor.

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Woolley v. Constant, 214.
Worrall v. Munn, 209.
Wright v. Butler, 219.
" v. Douglass, 152, 277.
" v. Saddler, 132.
Wyckoff v. Remson, 360.
Wyman v. Mayor, 246.
Wynkoop v. Burger, 10.

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Young v. Black, 219.
" v. Dake, 69.
Youngs v. Wilson, 363.

LAW OF REAL PROPERTY.

CHAPTER I.

REAL PROPERTY.

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1. *Real property* consists of land and of all rights

and profits arising from or annexed to land, which are of a permanent and immovable nature.

2. It is distinguished from *personal property:*

1*st.* By its permanent and immovable qualities.

2*d.* The alienation of it must be made by deed: and

3*d.* On the death of the owner, intestate, it descends to the heir instead of passing into the hands of the administrator.[1]

3. Real property is corporeal or incorporeal.

4. Corporeal real property includes all which are visible, tangible and capable of seisin and possession, and comprehended under the general denomination of land.

5. *Incorporeal real property* consists of rights and profits issuing out of, or annexed to corporeal real property, and is merely the right to have only some part of the produce or benefit of such corporeal real property, or to exercise a right, or have a privilege or advantage over or out of it.[2]

6. In the technical phraseology of the law real property consists of *land, tenements* and *hereditaments.* The term land is the least comprehensive including only real property corporeal; while the term hereditament (when applied to real property) is the most comprehensive of the three as it includes everything which passes to the heir and not to the administrator.[3]

7. A *tenement* comprises everything which may be holden so as to create a tenancy, including things corporeal as well as incorporeal.[4]

[1] 1 Cruise, 2; Co. Litt., 6a; 2 Black. Com., 16.
[2] 2 Black. Com., 20; 1 Cruise, 2; Willard, 47.
[3] 1 Cruise, 1.
[4] 3 Kent Com., 401; 1 Preston on Estates, 8.

8. The term *land* comprehends any ground, soil or earth whatsoever as meadows, pastures, woods, waters, marshes, furze and heath. It has an indefinite extent upwards as well as downwards, and includes whatever grows or is built upon it, as well as all mines, metals, fossils and whatever is contained beneath the surface.[5] Hence if a man devise a lot of land having a building upon it, the building will pass with the land without being named, even though other buildings are named in the same devise.[6] So too the road-bed, the rails fastened to it, and the buildings at the depots of railroads are real property, and the rolling stock of railroads has been held to be a fixture belonging to such real property.[7]

9. The grant of a lot of land by metes and bounds conveyed a pump and well of water, and fencing materials on a farm although temporarily detached without any intent of diverting them from their use as such; and in the same manner it was held to convey manure laid upon heaps in the farm yard.[8]

10. All things which are necessary to the full and free enjoyment of the freehold and are in any way attached to it are held to be parts of the freehold and pass with it. In the sale of a cotton plantation, it was held that the cotton gin passed as part of the freehold. And hop poles, used necessarily in cultivating hops,

[5] Black. Com., 18; 1 Cruise, 2; Com. Dig., Grant E., 3.

[6] Com. Dig., Grant E., 3; Co. Litt., 4 a; Greenleaf *v.* Francis, 18 Pick., 117.

[7] Farmers Loan, etc., Co., *v.* Hendrickson, 25 Barb., 493.

[8] Goodrich *v.* Jones, 2 Hill, 142; Middlebrook *v.* Corwin, 15 Wend., 171; Brown *v.* Pinkham, 18 Pick., 172; Lassell *v.* Reed, 6 Greenl., 222; Daniels *v.* Pond, 21 Pick., 367.

which were taken down, for the purpose of gathering the crop, and piled in the yard with the intention of being replaced in the season of hop raising, are part of the realty. So that as between grantor and grantee, it seems that articles to be treated as parts of the realty need not be constantly fastened to it.[9] And where the owner of a farm, on which stood a cider mill and barn, and parts of the mill were taken out and laid up for safety, and the barn being in process of repair, the stancheons and the chains for the cattle were taken out and the door hinges were lying loose upon the premises, conveyed the farm, it was held to pass all these articles as parts of the realty although at the time separated from it.[1] So also by the grant of land with the mill thereon, the waters, flood gates, etc., pass as incidents to the principal subject, and which are necessary for the use of the mill. In like manner pass the saws, crank and mill gear of a saw mill as part of the realty, and the doors, windows, locks, keys, window blinds, lightning rods, though removed for repairs, and the deer in a park, fish in a pond and doves in a dove-cote;[2] the steam engine and boiler, engines and frames designed and adapted to be moved and used by such engine, dye kettle set in brick, the main mill wheel and gearing of a factory necessary to operate it.[3]

[9] Walker *v.* Sherman, 20 Wend., 643, 655; Farris *v.* Walker, 1 Bail., 540; Bishop *v.* Bishop, 1 Ker., 123;

[1] Wadleigh *v.* Janvrin, 41 N. H., 503.

[2] Le Roy *v.* Platt, 4 Paige, 77; Linton *v.* Wilson, 1 Kerr, N. B., 223; Walker *v.* Sherman, 20 Wend., 646.

[3] Sparks *v.* State Bank, 7 Blackf., 469; Winslow *v.* Merchant Ins. Co., 4 Met., 306; Sands *v.* Pfiefer, 10 Cal., 258; Noble *v.* Bosworth, 19 Pick., 314; Union Bank *v.* Emerson, 15 Mass., 159; Buckley *v.* Buckley, 11 Barb., 43.

11. To make such articles a part of the realty it is necessary that they should have been actually fitted for and applied to the realty. For where rolls were procured and intended for an iron mill, but not actually fitted and applied for use, they were held not to be a portion of the realty.[4]

12. Growing crops planted by the owner of the soil constitute a part of the realty, and when one devised his farm, the crops then growing thereon passed with it.[5] But when a person dies intestate the annual crops go to the administrator and not to the heir, but this does not extend to grass or fruit which are the natural growth of the soil.[6]

13. *Prima facie* a building erected by one person on another's land is to be treated as a part of the realty, and this is especially the case when the builder has an interest in the realty, although not the absolute owner: as the husband of the tenant in fee, or a reversioner or remainderman, or an occupant under a contract of purchase.[7]

14. But when the buildings are erected under an agreement with or by permission of the owner of the soil it would be otherwise.[8]

15. As growing grass, fruit and trees are part of

[4] Johnson *v.* Mehaffey, 43 Penn. St., 308.

[5] Bradner *v.* Faulkner, 34 N. Y., 349.

[6] 2 R. S., 83; Bank of Lansingburgh *v.* Crary, 1 Barb., 542; Warren *v.* Leland, 2 Barb., 613.

[7] Smith et al. *v.* Benson et al., 1 Hill, 176; Brown *v.* King, 5 Met., 173; Washburn *v.* Sproat, 16 Mass., 449; Glidden *v.* Bennet, 43 N. H., 306; Cooper *v.* Adams, 6 Cush., 90; Eastman *v.* Forster, 8 Met., 26.

[8] Wells *v.* Bannister, 4 Mass., 514; Ashmun *v.* Williams, 8 Pick., 402; Russell *v.* Richards, 2 Fairf., 371.

the land and pass to the heir, rather than the executor; so on the foreclosure of a mortgage, they pass to the purchaser as against the lessee of the mortgagor, whose lease was subsequent to the mortgage.[9] This is upon the principle, that on the foreclosure, the mortgagee and those succeeding to him is in by title paramount, thus vesting in him not only the estate mortgaged but also the emblements.[1]

16. When a mortgagor erects buildings upon land previously mortgaged, upon foreclosure of the mortgage such buildings pass to the purchaser as a portion of the real estate.[2]

17. The term *fixtures* is applied to that class of articles which may assume the character of realty or personalty according to the circumstances in which they are placed, and come most frequently under the consideration of the courts. In a technical sense they are something substantially and permanently affixed to the soil, though in their nature removable.[3].

18. The persons between whom questions in regard to them more frequently arise, are

1*st.* Vendor and vendee, including mortgagor and mortgagee, or the purchaser under a mortgagee's sale.

2*d.* Heir and administrator.

3*d.* Landlord and tenant.

[9] Lake *v.* King, 8 Wend., 584.

[1] Jackson *v.* Dickerson, 6 Cow., 147; Aldeck *v.* Reynolds, 1 Barb. Ch., 613; Shepard *v.* Philbrick, 2 Den., 174; Gillet *v.* Balcom, 6 Barb., 370.

[2] Gardner *v.* Finley, 19 Barb., 317.

[3] Walker *v.* Sherman, 20 Wend., 636.

4*th*. Executor of tenant for life, and reversioner or remainderman; and will be treated more fully under those titles.

19. As to lands gained from the sea either by alluvion, by the washing up of the sand and earth so as in time to make *terra firma;* or by dereliction, as when the water shrinks back below the usual water mark; in those cases the law is held to be that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. In the same manner if a river running between two land owners by degrees gain upon one, and thereby leaves the other dry, the one who loses his ground thus imperceptibly has no remedy. So too sea-weed and drift-wood gradually accumulating on the land are considered a part of the soil, and the rule is so established as if to afford but a reasonable compensation for the gradual encroachments of the sea to which other parts of the estate may be exposed.[4]

20. Trees standing wholly within the boundary line of one's land belong to him, although their roots and branches may extend into the adjacent owner's land; and so the fruit grown upon the branches which extend beyond the line of the owner's land. The adjacent owner may lop off the branches and roots of such trees up to the line of his land. When the tree stands upon the dividing line so that portions of the body extend into each, then the tree is the property, in common, of the land owners; and neither of them is at liberty to cut the tree without the consent of the

[4] 2 Black. Com., 262; Emans *v.* Trumbull et., 2 Johns. R., 312.

other, nor to cut away the roots or branches extending into his land, if he thereby injures the common property in the tree.[5]

21. Water being a movable, wandering thing is and ever must remain common by the law of nature. And a grant of water as such does not convey the soil, but only certain rights or privileges as to take fish therefrom, or to use for mill privileges or manufacturing purposes; water with the soil which it covers being conveyed only as so much land covered with water.[6]

22. Under certain circumstances real property becomes impressed with the incidents and subject to the laws of personal property, as when land is directed by a will to be sold and converted into money, it passes into the hand of the executor instead of going to the heir or devisee as real estate, and in case the devisee should die, and the specific legacy fail, it would still pass to the hands of the executor and be by him transferred to the heir as personal property.[7]

23. So too personal property may become subject to the incidents of real property, as money directed by a testator to be laid out in land is considered as land, and a chattel real is bound by a judgment in the same manner as real estate, and when land of one deceased is sold by order of the court for the pay-

[5] Dubois *v.* Beaver, 25 N. Y., 123; 3 Kent, 438; Lyman *v.* Hale, 11 Conn., 177; Holder *v.* Coates, 1 Moody & M., 112; Skinner *v.* Wilder, 38 Verm., 115; Griffin *v.* Bixby, 12 N. H., 454.

[6] Co. Litt., 4 a; Mitchel *v.* Warner, 5 Conn., 497; Jackson *v.* Halstead, 5 Cow., 216.

[7] Bogert *v.* Hertell, 4 Hill, 492; Smith *v.* Claxton, 4 Mad., 484; Wood *v.* Keyes, 8 Paige, 365; Kane *v.* Gott, 24 Wend., 641.

ment of debts the surplus shall be treated as real estate.[8]

24. The proceeds of real estate of infants, idiots and insane persons, when sold by order of the court, are still subject to the incidents and law of real property, although they may have been invested in bond and mortgage or other personal property.[9]

25. Crops fit for harvesting may be levied upon and sold as personal property.[1]

26. When there are mines or quarries, or the like, there may be a double ownership of such land, one of the mines and the other of the soil, and these may be held by different persons and by independent and separate titles, and each may have a fee or a lesser estate in his respective portion.[2]

27. *Incorporeal real property* consisting of rights and profits issuing out of, or annexed to corporate real property, are of the following sorts or kinds: commons, ways, franchises, annuities and rents.

28. *Common* or a right of common, is a right or privilege which several persons have to the produce of the lands or waters of another. Thus *common of pasture* is a right of feeding the beasts of one person on the lands of another; *common of estovers* is the right a tenant has of taking necessary wood and timber from the woods of the lord for fuel, fencing, etc.; *com-*

[8] The People *v.* Haskins, 7 Wend., 468; 2 R. S., 359, § 3; Moses *v.* Murgatoryd, 1 Johns. Ch., 130.

[9] Code, §§ 2348 and 2359.

[1] Penhallow *v.* Dwight, 7 Mass., 34; Heard *v.* Fairbanks, 5 Met., 111.

[2] Adam *v.* Briggs, 7 Cush., 361; Green *v.* Putnam, 8 Cush., 21; Stoughton *v.* Leigh, 1 Taunt., 402; Harker *v.* Birbeck, 3 Burr., 1556.

mon of turbary and *piscary* are in like manner rights which tenants have to cut turf in the grounds or catch fish in the waters of the lord.[6] These rights formerly prevailed to a considerable extent in this country, but have now nearly ceased to exist.

29. The right to allow cattle, horses and sheep to go at large upon the highway was formerly granted to the towns to be voted at the annual town meeting, but has now been taken away by statute.[7]

30. *The right of way* is the right of going over another man's ground. It may arise by grant of the owner of the soil, or by prescription, or from necessity. It is usually appurtenant to some other property or estate, which it follows by grant or devise. If a man sells land to another which is wholly surrounded by his own land, the purchaser is entitled to a right of way over the other's ground to arrive at his own land; and even this would be the case although the land sold was held in trust and to which there was no access but over the trustee's own land.[8] This right of way is entirely distinct from public highways leading from town to town.

31. *Franchises* are special privileges conferred by government on individuals. These privileges are not granted to the citizens of the country generally, but are usually granted to and held by corporations created for the special purpose of holding and using

[6] Van Rensselaer *v.* Radcliff, 10 Wend., 647; Hardenburgh *v.* Lockwood, 25 Barb., 9.

[7] Laws of 1869, ch. 424.

[8] 3 Kent's Com., 420; 2 Black. Com., 36; Holmes *v.* Seeley, 19 Wend., 507; Wynkoop *v.* Burger, 12 Johns., 222; Willoughby *v.* Jenks, 20 Wend., 99; Gidney *v.* Earl, 12 Wend., 98.

them: such as railroads, ferries, bridges and banks. When granted to an individual, they are hereditaments, but when granted to a corporation they are not properly hereditaments because corporations cannot have heirs.

32. An *annuity* is a yearly sum of money chargeable usually on the person; and when granted to a man and his heirs, it is a fee simple personal.[9] An annuity may be charged on land, and the remedy of the grantee in such cases may, at his election, be real or personal.[1]

33. *Rent* is a certain profit issuing yearly out of lands and tenements corporeal.[2] It is not necessary that it should be in money; it may consist of horses, corn or manual services: as to plough so many acres, or to labor so many days. The rent reserved must be certain, or capable of being reduced to a certainty.[3]

34. An *easement* is a right which the owner of one parcel of land, by reason of such ownership, has to use the land of another for a special purpose not inconsistent with a general property in the owner.[4] The parcel to whose ownership such right is attached, is called the *dominant*, while that in or over which the right is to be used, is called the *servient* estate. Easements and servitudes are sometimes used as convertible terms; but easements are properly the benefits which one estate enjoys in or over another, while

[9] Co. Litt., 2 a, 144 b.
[1] 2 Black. Com., 40 n.
[2] 2 Black. Com., 41.
[3] Van Rensselaer *v.* Jones, 5 Den., 449.
[4] 3 Kent's Com., 435.

servitudes imply the burdens that are imposed upon one estate in favor of another, the dominant enjoying the easement, the servient sustaining the burden.

CHAPTER II.

TITLE TO REAL PROPERTY.

1. Estates in real property.
2. Title to real property.
3. Common source of title.
4. English source of title.
5. Titles from the Dutch government.
6. Dutch grants confirmed.
7. Common law adopted here.
8. English right of soil transferred.
9, 10. Eminent domain.
11. Eminent domain a necessity.
12. Who may hold lands.
13, 14. Who are citizens.
15. Married women.
16. Colonial naturalization.
17. U. S. naturalization.
18. Aliens how naturalized.
19. Persons born abroad.
20. Married women abroad have dower when.
21. Aliens may hold land when.
22. Alien devisees take lands when.
23. Special statute as to aliens.
24. Citizens forfeit title when.
25. Indians may hold in severalty.
26. Corporations take and hold when.

1. An *estate* in real property is the interest, or quantity of interest which a person has in lands, tenements and hereditaments. This may be an absolute ownership or a right to occupy and use for life or for a longer or shorter time.

2. A *title* to real property is defined by Sir Edward Coke to be, the means whereby the owner of lands hath the just possession of his property.

3. The common source of title is the government, either of the State or of the United States, and upon the death of the owner, intestate, without heirs, it escheats to the State.

4. By the English common law, the king was the feudal paramount proprietor and source of title to all land within his dominion, and it was considered that all the lands were held mediately or immediately from him. The original title to land on this continent, as between the different European nations, was founded on the right of discovery and conquest. This title was not the absolute right to the ownership of the soil, but to the exclusive right of acquiring the soil from the natives for the purposes of settlement. And when the English first discovered this part of the continent, they claimed it as a part of the national domain over which was to be extended English civilization and English law. The subsequent Dutch invasion and occupation of portions of the State was considered in hostility to this claim, and the reoccupation by the English was claimed to be in vindication of their original title.

5. Portions of the State lying upon the Hudson river were subject to the Dutch government from about 1609 to 1664, when the colony and possessions were surrendered by the Dutch to the English government, by whom it was governed until 1673 when the Dutch resumed possession. In 1674 the English reestablished their possession and government and continued the same until the independence of the State.

6. Grants were made by the Dutch government,

while in possession, to municipal bodies and to individuals; these grants were confirmed by the English, either by new grants or charters from the government, or by the proclamation made by Gov. Andros on the restoration of the English rule in 1675. By the articles of capitulation, in 1664, it was stipulated that the inhabitants should continue free denizens, and should enjoy and dispose of their lands as they pleased and should enjoy their own customs as to inheritance. This compact was recognized and confirmed by the legislature in 1715.[1]

7. Our ancestors from England, on the settlement of this country, brought with them and adopted such parts of the common law and statute law of that country as were applicable to our circumstances. But the feudal system as it formerly existed in England never prevailed in this country: most of its oppressive features had been abolished or modified by statute, and especially by the act 12 Charles II, previous to the restoration of this State to English rule in 1675. During the period from 1675 to our revolution, the different systems of land tenure, arising under Dutch and English law, had merged into one system. And as one of the fruits of our revolution whatever rights or title to soil and sovereignty formerly belonged to the crown of Great Britain passed to the people of this country and vested in the general government, and the governments of the several States. And our legislature expressly enacted that the people of this State,

[1] See Denton *v.* Jackson, 2 Johns. Ch., 324; North Hempstead *v.* Hempstead, 2 Wend., 110; Gerard Title, 1.

in their right of sovereignty, are deemed to possess the original and ultimate property in and to all the lands within the jurisdiction of the State. And it further provided that all lands, the title to which shall fail from a defect of heirs, shall revert or escheat to the people.[2]

8. By the treaties between Great Britain and the United States of 1782–3 and 1794, the right to the soil which had been previously in Great Britain, passed definitely to these States. Thus the actual ownership in the soil which was vested in the English crown, by virtue of the revolution and the force of the concurring treaties, passed to the people of the State, subject however to the right of Indian occupancy: and these rights of Indian occupancy have been nearly all extinguished by treaty or by purchase. Hence it is a settled and fundamental doctrine with us, that all valid individual title to land is derived from our own government, or from that of the United States, or from the crown or royal chartered governments established here prior to the revolution, and our courts have long since decided that they cannot take notice of any title to land not derived from our own government, and verified by a patent under the great seal of the State or the province of New York.[3]

9. Akin to this doctrine that the source of all title comes from the people, that is the State, in which the ultimate right of property vests on the failure of heirs, is the doctrine of eminent domain.

10. The right of *eminent domain* is defined to be

[2] 1 R. S., 718.

[3] 3 Kent's Com., 378; Jackson *v.* Ingraham, 4 Johns., 163; Jackson *v.* Waters, 12 Johns., 365; Johnson *v.* McIntosh, 8 Wheaton, 543.

the ultimate right of the sovereign power to appropriate not only the public property, but the private property of all persons within the sovereign territory to public purposes.[4]

11. The enjoyment of this right is necessary to every civilized State. Without it there could not be the proper construction of roads, railroads and canals, or the securing of land for the erection of public buildings, for the public charities of the country, or for the administration of justice.

12. The statute declares that every citizen of the United States is capable of holding lands within this State, and of taking the same by descent, devise or purchase. And that every person capable of holding lands (except idiots, persons of unsound mind and infants), seised 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,[5] and such was the rule of the common law previous to the statute.

13. The constitution of the United States provides that all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.[6]

14. And by the laws of Congress: All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are de-

[4] Vattel, Book 1, ch. 20, § 244; Charles River Bridge *v.* Warren Bridge, 11 Peters, 641.

[5] 1 R. S., 719.

[6] Art. 14, sec. 1.

clared to be citizens of the United States. All children heretofore born or hereafter born out 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.

15. Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized shall be deemed a citizen.[7]

16. The colonial government early made provision for the naturalizing of aliens. The act of July 5, 1715, declared that all persons of foreign birth, theretofore inhabiting within the colony, and dying seised of any lands, should be deemed to have been naturalized. It also provided that protestants inhabiting the colony should, on taking the oath of allegiance, be deemed subjects, and made provisions for naturalizing others by act of assembly.

17. Upon the adoption of the constitution of the United States the right and power of naturalization passed to and became vested in the general government, and Congress has passed laws from time to time with reference to naturalization. By the law of 1802, aliens residing in the United States before January 29, 1795, might be admitted citizens, on proof of two years residence in the United States, and one year in the State: and aliens having a two years' residence between 29th

[7] R. S. of U. S., 2d ed., §§ 1992–3–4; Renner *v.* Muller, 57 How., 229; *In re* Hawley, 1 Daly, 531.

of January, 1795, and 18th of June, 1798, may be admitted within two years after the passage of the act.[8]

18. In order that an alien may be naturalized it is necessary that he should declare on oath or affirmation, before certain State, Federal or Territorial Courts his intention to become a citizen, and to renounce all fereign allegiance and titles of nobility. He must show that he is a person of good moral character, attached to the constitution of the United States, that he has resided in the United States five years, and one year within the State or territory where his application is made, and that he has at least two years before that time filed, in some proper court, his declaration to become a citizen. Minors who have resided here three years next before they become twenty-one years of age and have had a continued residence here of two years after they became twenty-one years of age, may be naturalized, without having previously filed their declaration of intentions, upon proving that it was their *bona fide* intention to become citizens.[9]

19. Persons born out of the limits and jurisdiction of the United States, whose fathers at the time of their birth were citizens of the United States, shall be deemed citizens.[1]

20. The citizenship of the husband confers citizenship upon the wife without application on her part.[2] And she would be entitled to dower in her husband's

[8] U. S. Stat., 153.
[9] U. S. Laws, May 25, 1824.
[1] U. S. Laws, Feb. 10, 1855.
[2] Kelly *v.* Owen, 7 Wall., 496.

estate, although she never resided in the United States.[3]

21. By the common law an alien may purchase and hold lands, or take lands by devise and hold the same against every person except the State. But he is in constant danger of having his lands taken from him by the paramount authority of the State, or upon his decease of having his lands escheat to the State, and his children deprived of their inheritance. To remedy this, the statute provides that any alien who has come, or may hereafter come into the United States, may make a deposition in writing, 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 him to obtain naturalization; and on having the same recorded in the office of the Secretary of State, he is authorized and enabled to take and hold lands and real estate, of any kind whatever, to him and 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 and could do if he were a native citizen of this State or of the United States, except that he shall have no power to demise any real estate which he may take or hold by virtue of this provision, until he becomes naturalized.[4]

22. The foreging statute did not provide for the

[3] Burton *v.* Burton, 1 Keyes, 359.

[4] 1 R. S., 720, § 15, as amended in 1834, ch. 272.

proper descent of, or devise of real estate in every case it gave power to devise, but it did not give power to alien devisees to take the real property devised. An alien, who had complied with the provisions of the statute as to holding and devising real property, might have children or relatives a portion of whom, though residents, might be aliens and the others naturalized or native citizens; in such cases the naturalized or native citizens would take the whole estate, to the exclusion of those who were not naturalized, although equally related to the deceased; hence another statute was passed providing that the heirs and devisees of alien residents of this State, or of any naturalized or native citizens of the United States, or persons who would answer the description of heirs of such deceased persons, or of devisees under his last will, and being of his blood, are made capable of taking and holding as devisees of such deceased persons as if they were citizens of the United States, provided however that alien males of full age cannot take and hold unless they make and file the deposition or affirmation above mentioned.[5]

23. To remedy and perfect titles that have been held and conveyed by aliens who have not complied with the foregoing provisions of the same, statutes have been passed at different times ratifying and confirming such conveyances.[6] So too laws have been passed releasing to children and other relations real property which without such release would escheat to the State.

[5] Laws of 1875, chap. 38.

[6] See Laws of 1872, ch. 358.

24. A citizen forfeits his estate upon a conviction of outlawry for treason; but there has been no conviction and forfeiture for treason in this State since the revolution. A person sentenced to a State prison for life is thereafter civilly dead; and a sentence of imprisonment in a State prison for a term less than life suspends all the civil rights of the person so sentenced.[7]

25. The Indians are not treated as citizens, but as distinct tribes or nations, being under the protection of the government. The owning and holding lands in severalty was something unknown and unpractised by them till by the law of 1843 any native Indian is permitted to purchase, take, hold and convey lands and real estate in this State, in the same manner as a citizen.[8] And the tribes or bands of Indians, who own and occupy Indian reservations in common, are permitted to partition and divide the same, so that the lands may be held in severalty and in fee simple, according to the laws of this State.[9]

26. Every corporation, as such, has power to hold, purchase and convey such real estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter.[1] And this power is incident to a corporation at common law, unless expressly forbidden by statute.[2] Though the corporation is created but for a limited period it may acquire the

[7] 2 R. S., 701, §§ 19, 20; Penal Code, § 708.

[8] Laws of 1843, ch. 87.

[9] Laws of 1849, ch. 420.

[1] R. S., Title 3, ch. 18, part 1.

[2] Moss *v.* The Rossie Lead Mining Co., 5 Hill, 137.

absolute title to lands necessary for its use.[3] Counties, towns, cities, villages and school districts may also purchase, hold and convey real estate.

[3] Nicholl *v.* New York & Erie R. R. Co., 2 Kern., 121.

CHAPTER III.

ESTATES IN REAL PROPERTY.

1. Subject of this chapter.
2. Different interests in the same land.
3. Estate in land, what is.
4. Absolute ownership — title.
5. Each State determines the law of its real property.
6. As to foreign corporations.
7. Contracts, deeds, wills, etc., how construed.
8, 9. Quantity and quality of land.
10. Estates, how divided.
11. Fee simple.
12. Estates tail abolished.
13. Remainders in fee, vest when.
14. Freehold estates.
15. Estates for life of a third person.
16. As to time of enjoyment, how divided.
17. In possession — in expectancy.
18. Expectant estates, how divided.
19. Future estates.
20. Reversions.
21, 22. Vested estates.
23. Contingent estates.
24. Feudal and allodial tenures.
25. Consideration paid in pure feuds.
26. Original feuds.
27. Inferior feuds — rents.
28. Intricate system of feudal tenures.
29. Statute of tenures of 1787.
30. Constitution on feudal tenures.
31. Feudal tenures abolished.
32. Lands to be allodial.
33. Leases of agricultural lands limited.

1. Having treated of real property and shown what it is, and who may hold, own and possess the same; the next object of inquiry is to show how and in what manner it may be held, and the right and interest of different persons therein, and the evidences of the right or title by which the same is held.

2. One person may be the absolute owner of a piece of land as his sole and absolute property, with the right of using or abusing, or doing what he will with it, without the right or power of any other person to interfere with such use or abuse, or to exercise any control over it; or he may have the right to use and enjoy the same for a longer or a shorter time or for life, and upon the termination of his interest it may pass into the hands of one or more persons whose interest may be the same or different from his own; or he may be entitled to the possession and control of the property either at some certain time in the future or upon the happening or not happening of some uncertain event; with the possibility of his losing all control or interest in the property at the happening or not happening of some other future event, when the property may pass into the hands or control of some person or persons now unknown.

3. Under all these changes the real property may remain the same while the interest of each individual therein may be different. Thus it is seen that the real property is one thing, while the ownership thereof or the interest therein is different. The interest in the real property is called the estate in the land. That is, an *estate* in land is the interest which the owner has therein[1] or the right by which a thing belongs to some one or more in exclusion of all other persons.

4. When it is said that such a person is the absolute owner of a farm, or that he is entitled to the use or occupation of the same for life, this does not indi-

[1] Van Rensselaer *v.* Poucher, 5 Den., 40.

cate how he acquired such right or ownership whether by gift or grant from the former owner, or by his last will and testament, or by inheritance; or he may have entered and occupied so long that no other person can oust him from his right of occupation. The means or manner by which he acquired possession, together with the evidence, is called his title, or, as Sir Edward Coke has said, *a title* to real property is defined to be the means whereby the owner of lands hath the just possession of his property.[2]

5. Inasmuch as the common and original source of title is the State, and the State has determined what right, interest, property or possession it would grant to its citizens, it has also defined the kind, quality and quantity of estate its citizens may grant to, or confer upon each other. So that the title to land can only be acquired or lost in accordance with the law of the State where it is situated. This is the doctrine and is in accordance with the decisions of all the tribunals of this country and of England. In this it differs from personal property. The law as to personal property follows the person, while the law of real property is the law of the place where the real property is situated.[3] So that should a person residing in another State die, leaving personal property and real property in this State, the personal property would be distributed or disposed of in accordance

[2] 1 Coke Inst., 345 b.

[3] Levy *v.* Levy, 33 N. Y., 97; White *v.* Howard, 52 Barb., 294; McCormick *v.* Sullivant, 10 Wheat., 192; Hosford *v.* Nichols, 1 Paige, 220

with the law of the State, of which he was a citizen; while his real property would descend or be disposed of in accordance with the laws of this State. And the sale of land in one State under the authority of the court of another State, would not pass title, unless the parties in interest submitted to the jurisdiction of the court. But if the court had jurisdiction of the person it might compel a performance of the contracts, or a conveyance of the property in accordance with the laws of this State.[4]

6. When a foreign corporation claims to hold lands situated in this State, it is for the courts of this State to construe the charter of such corporation, and determine whether the corporation is authorized to take or hold such real estate; and a foreign corporation, not authorized by its charter or by statute, to take and hold real estate, cannot take by devise lands lying within this State.[5] And although a devise of real property to a foreign corporation might not be good, yet a power to the executor to sell the real estate and give the proceeds to a foreign corporation might be enforced.

7. Hence all contracts, deeds, wills, devises and conveyances for the transfer of land, or any interest therein, must be made, executed and delivered in accordance with the formalities and directions of the law where such real property is situated.[6]

8. The *quantity* of an estate signifies the time of

[4] Williams *v.* Fitzhugh, 37 N. Y., 450.

[5] Boyce *v.* City of St. Louis, 29 Barb., 650; Chamberlain *v.* Chamberlain, 43 N. Y., 434.

[6] Hosford *v.* Nichols, 1 Paige, 220; Kerr *v.* Moon, 9 Wheat., 566; White *v.* Howard, 52 Barb., 294; Chapman *v.* Robertson, 6 Paige, 627; Levy *v.* Levy, 33 N. Y., 97.

continuance or extent of interest; and the *quality* of an estate has reference to the manner of its enjoyment, as whether it be absolutely, solely, in common, in coparcenary, or in joint tenancy.[7] In some instances there is so near a relation between the quantity and quality of an estate, that the quality of the estate is the measure of its quantity. This is the case with those which are determined and qualified, and all estates which have a collateral determination: as a grant to A. for ninety-nine years if he should live so long, or a grant to a man and his heirs so long as a certain tree shall stand. Here the words which relate to the measure of the estate (that is the quantity) determines the quality of the estate as determinable and limited.[8]

9. The statute recognizes the distinctions between the *quantity* and the *quality* of estates, and the first six of the following sections have reference to their quantity of interest.

10. Estates in lands are divided into estates of inheritance, estates for life, estates for years, and estates at will and by sufferance.

11. Every estate of inheritance, notwithstanding the abolition of tenures, shall continue to be termed a fee simple or fee; and every such estate, when not defeasible or conditional, shall be termed a fee simple absolute, or an absolute fee.

12. All estates tail are abolished; and every estate which would be adjudged a fee tail, according to the

[7] 1 Preston on Est., 21; 2 Black. Com., 102.

[8] 1 Preston on Est., 22.

law of this State, as it existed previous to the 12th 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.

13. Where a remainder in fee shall be limited upon any estate, which would be adjudged a fee tail according to the law of this State, as it existed previous to the time mentioned in the last section, such remainder shall be valid as a contingent limitation, upon a fee, and shall vest in possession on the death of the first taker, without issue living, at the time of such death.

14. Estates of inheritance and for life shall continue to be denominated estates of freehold; estates for years shall be chattels real; and estates at will or by sufferance shall be chattel interests, but shall not be liable as such to sale on execution.

15. An estate during the life of a third person, whether limited to heirs or otherwise, shall be deemed a freehold during the life of the grantee or devisee, but after his death it shall be deemed a chattel real.

16. Estates, as respects the time of their enjoyment, are divided into estates in *possession* and estates in *expectancy*.

17. An estate in *possession* is where the owner has an immediate right to the possession of the land. An estate in *expectancy* is where the right to the possession is postponed to a future period.

18. And estates in expectancy are divided into estates commencing at a future day (that is on some day certain) denominated future estates and reversions.

19. 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.

20. 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.

21. Future estates are *vested* or *contingent.*

22. 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.

23. They are *contingent* whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain.[9]

24. One quality early impressed upon estates in this country, differing from those of England and most European countries at that time, is their allodial character. The tenure of real estate at the time of the settlement of this country was eminently feudal. A system said to have been introduced into England by William the Conqueror. The system is based upon the maxim or fiction, that all the lands in the kingdom were originally granted out by the king, and held mediately or immediately of the crown, in consideration of certain services to be rendered by the tenant. The thing holden was called a *tenement,* the possessors thereof *tenants,* and the manner of their

[9] 1 R. S., 722, 723.

possession a *tenure*.[1] So extensively did this system prevail that Lord Coke said "We have not properly in the law of England, *allodium*, that is, any subject's land that is not holden."[2]

25. The consideration rendered by the tenant in pure, proper and original feuds, was only twofold; to follow, or do suit to the lord in his courts in the time of peace; and in his armies or warlike retinue, when necessity called him to the field. The vassals of the inferior lords were bound by their fealty to attend their domestic courts baron, in the same manner as the barons themselves, or lords of inferior districts, were bound to attend the King's Courts.[3]

26. At the first introduction of feuds, as they were gratuitous, so also they were precarious, and held at the will of the lord, who was then the sole judge whether his vassal performed his services faithfully. The feuds were not yet hereditary, though frequently granted to the children of the former possessor. Infants, women, and professed monks, who were incapable of bearing arms, were incapable of succeeding to a genuine feud.[4]

27. The feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants; obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distrac-

[1] Cruise, Greenleaf's ed,, p. 23.

[2] Co. Litt., 1 b.

[3] 2 Black. Com., 54.

[4] 2 Black. Com., 56.

tion; which returns, or *reditus* were the original of rents[5] under the English feudal system.

28. Under these feudal laws and customs there grew up an intricate system of tenures, oppressive upon the tenants, some of which are in force in England at the present time, although many of them were taken away by statute previous to our revolution.

29. To prevent such a system from prevailing in this State, the statute of tenures, passed in 1787, abolished or took away all wardships, liveries, primer seisins by reason of tenures by knight service; all mean rates, gifts, charges incident to, or arising for wardships; all fines for alienations, seisures and pardons for alienations, tenure by homage, tenure by knight service; and all charges arising from wardship, livery, relief, aids, etc., and declared that all conveyances and devises of manors, lands, tenements or hereditaments shall be expounded as if said manors, lands, etc., were held in free and common socage; and that all gifts, grants and conveyances of estates of inheritance shall be *allodial* and not *feudal*.[6]

30. The same principles have been incorporated into the several constitutions heretofore adopted; the constitution of 1846 declaring that:

31. § 12. All feudal tenures of every description, with all their incidents, are declared to be abolished, saving, however, all rents and services certain, which, at any time heretofore, have been lawfully created or reserved.

32. § 13. All lands within this State are declared

[5] 2 Black. Com., 57.

[6] 1 R. L., p. 70.

to be *allodial;* so that, subject only to the liability to escheat, the entire and absolute property is vested in the owners according to the nature of their respective estates.[7]

33. And the constitution of 1846 further established that:

§ 14. No lease or grant of agricultural land, for a longer period than twelve years hereafter made, in which shall be reserved any rent or service of any kind shall be valid.[8]

[7] Constitution, Art. I, §§ 12, 13.

[8] Id., § 14.

CHAPTER IV.

ESTATES IN FEE.

Fee simple. Qualified fees. Conditional fees.

1. Fee simple, absolute fee.
2. Tenant in fee, estate of.
3. Fee simple, subject to what.
4. Divisions of.
5. Fee simple, absolute.
6. Seisin.
7. Seisin in deed — in law.
8. Livery of seisin.
9. Disseisin.
10. Estates carved out of a fee.
11. Result of granting a fee.
12. Previous to 1830, what would create a fee.
13. Power of alienation not restricted.
14. Fines and quarter sales.
15. Fee simple in incorporeals.
16. Qualified fees.
17. Conditional fees.
18. Estates tail.
19. Tenant in tail, general.
20. Tenant in tail, special.
21. Effect of conveying conditional fees.

1. The highest estate in land is called a *fee simple* or fee; and when not defeasible or conditional is termed a fee simple absolute, or an absolute fee.

2. The owner of the estate is sometimes called a tenant in fee simple, or tenant in fee.[1] And his estate is an estate in fee simple and is the entire and absolute interest and property in the land; from which it follows that no one can have a greater estate.[2]

3. Sometimes an estate of this kind is granted in

[1] Littleton, § 1.

[2] Cruise's Dig., p. 59.

lands subject to be defeated by the happening or not happening of some particular event whence it is called a *defeasible fee;* or it may be given or *granted* upon the condition that some event shall happen or not happen and is called a *conditional fee.*

4. Hence arises the following divisions:

1*st.* A fee simple absolute.

2*d.* A qualified fee.

3*d.* A conditional fee.

1. *Fee simple absolute.*

5. The owner of the fee simple (called the *tenant in fee*) has the entire control, as such, of all houses and other buildings erected on the premises, and of all timber and other trees growing thereon; he is entitled to all the mines of metal except gold and silver, and to dig up and dispose of all minerals and fossils which are under the land.[3]

6. The possession of an estate in fee simple is termed a *seisin,* and the tenant in fee is said to be *seised* of his estate; and the same terms are applied to freehold estates while the owner of an estate less than a freehold is said to be in possession merely.[4]

7. Seisin is of two kinds: seisin in deed, and seisin in law. *Seisin in deed* is where the tenant is in possession of the land; and *seisin in law* is where he has the right of entry and a stranger is in possession.

8. *Livery of seisin* was the ancient manner or ceremony of putting the purchaser in possession.

9. *Disseisin* is where one enters into and takes pos-

[3] 1 Cruise's Dig., 60.

[4] 1 Cruise, § 35.

session of the lands of another wrongfully, thus ousting the true owner.

10. All inferior estates and interest are derived from or carved out of the fee simple. The owner may convey the whole, or he may grant a part out of it retaining in himself the reversion. He may lease for a term of years the whole or any portion of it, he may charge it with debts or with legacies, or both; and at his decease he may dispose of the whole or of the reversionary interest by will, or should he fail to make a will, it descends to his heirs. An estate in fee, on the death of the owner intestate, is subject to the dower of the wife, or the curtesy of the husband and the debts of the intestate.

11. He who has granted an estate in fee has no further interest in it remaining in him. But if he has granted it upon a condition, or subject to a defeasance it may revert to him or to his heirs; and it reverts to the grantor or his heirs because the fee simple is an estate without limitation as to time and runs to the owner and his heirs forever.

12. Previous to 1830, it was necessary that the word heirs or other words denoting inheritance should be inserted in the conveyance in order to create an estate in fee simple, but since that time such words are not necessary. And every grant or devise of real estate, or any interest therein, passes all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest should appear by *express*

terms or be necessarily implied in the terms of such grant.[5]

13. The *power of alienation* is an inseparable incident to an estate in fee simple, and any general restriction of this power annexed to the creation of such an estate is absolutely void.[6] A reservation in a conveyance in fee of a pre-emptive right of purchase in the grantor or his heirs, or in case of sale a reservation by the grantor, of a right or portion of the sale money is void as being repugnant to the estate granted, and an illegal restraint upon the power of alienation.[6]

14. The constitution of 1846, provides that all fines, quarter sales or other like restraints upon alienation, reserved in any grant of land, thereafter to be made, shall be void.[7]

15. A fee simple may be had in an incorporeal as well as a corporeal hereditament. But there is this distinction between the two species of hereditaments: that, of a corporeal inheritance a man shall be said to be seised *in his demesne as of fee;* of an incorporeal one, he shall only be said to be seised as *of fee*, and not in his demesne. The property is frequently in one man, while the appendage or service is in another. Thus A. may be seised *as of fee* of a way leading over the land of which B. is seised *in his demesne as of fee.*[8]

[5] 1 R. S., 748, § 1; Moore *v.* Pitts, 53 N. Y., 89, 90.

[6] 1 Cruise's Dig., 63; De Peyster *v.* Michael, 2 Seld., 467.

[7] Constitution, Art. I, § 15.

[8] 2 Blackstone, 106.

2. *A qualified fee.*

16. *A qualified fee*, sometimes denoted a *base fee*, is such an one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. This estate is a fee, because by possibility it may endure forever to a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee.[9] If the event marked out as the boundary to the time of the continuance of the estate becomes impossible, the estate then ceases to be determinable, and changes into a simple and absolute fee. On a limitation to a man and his heirs, till the marriage of B., by the death of B. before his marriage, the estate then ceases to be determinable, and changes into a simple and absolute fee.[1]

3. *A conditional fee.*

17. *A conditional fee*, is one which restrains the fee to some particular heirs exclusive of others, as to the heirs of a man's body, or to the heirs male of his body;[2] or it may be one which is created or defeated by or upon some uncertain event. Under the former definition were embraced a species of estate denominated estates tail.

18. An *estate tail* is an estate of inheritance descendible to some particular heirs only of the person to whom it is granted, and not to his heirs in general. They

[9] 2 Black. Com., 109.

[1] 4 Kent's Com., 9.

[2] 4 Kent, 11.

are two kinds: tenant in tail general, and tenant in tail special.

19. Tenant in tail general is where lands and tenements are given to one and the heirs of his body begotten. In this case the estate upon the death of the donee goes to all his children.

20. Tenant in tail special is where the gift is restrained to certain heirs of the donee's body and does not go to all of them in general, as where lands are given to a man and the heirs of his body of Mary his wife now to be begotten. So the estate might be limited to the heirs male of the body of the donee, which is called an estate in *tail male*, or to the heirs female of his body, called an estate in *tail female;* as this species of estate was abolished by the statute of 1782,[3] and estates in tail were changed into estates in fee, the learning concerning them is of little practical value. In some of the States they have prevailed to a certain extent, but they are not in harmony with the spirit of our institutions. And it has also been discovered by many other nations, as well as our own, that the free and unrestricted alienation of property is more conducive to the advancement of society than the accumulation of large masses in the hands of a few.

21. A gift, grant or conveyance of a qualified or conditional fee does not free it from any of its base, qualified or conditional qualities, and the purchaser or donee takes it subject to all its limitations, because no person can convey any greater estate than he himself possesses in the subject of the grant.[4]

[3] 1 Greenl., 205.

[4] 1 R. S., 739, § 143; Sage *v.* Cartwright, 5 Seld., 52; Moore *v.* Little, 41 N. Y., 78.

The subject of conditions affecting conditional fees will be treated more fully in the chapter of estates upon condition.

CHAPTER V.

ESTATES FOR LIFE.

1. Estates for life.
2. Tenant for life.
3. Freeholder.
4. Must be defined in its creation.
5. For life of grantee unless specified.
6. Life estate upon condition.
7. Measured by life of some person.
8. Estate pur auter vie.
9. Estate pur auter vie terminates when.
10. If the dependent life is abroad.
11. Termination by civil death.
12. Estate by the curtesy how created.
13. Estate by the curtesy defined.
14. Four things requisite.
15. Marriage must be valid and continued.
16. Seisin of the wife.
17. Curtesy in base fees.
18, 19. Entry into possession by wife not necessary.
20. Estate must be of inheritance.
21. Husband of mortgagee.
22. Curtesy in money.
23. Curtesy in devise in a remainder.
24. Conveyance not to be in fraud of.
25. Issue must be born alive.
26. Death of the wife.
27. Curtesy initiate previous to 1848.
28. Curtesy by act of 1860.
29. Dower.
30. Tenant in dower.
31. Statute conferring dower.
32. Widow's quarantine.
33. Requisites of dower.
34. Marriage legal — widow may be alien.
35. Seisure of the husband.
36. Freehold and inheritance united.
37. No dower in trust estates.
38. Dower subject to liens.
39. Dower of mother and daughter-in-law.

40. Dower in hereditaments.
41. Dower in exchanged lands.
42. Dower in land taken for public use.
43. Dower attaches when.
44. Dower in lands partitioned.
45. Dower demanded when.
46. Dower estopped when.
47. Dower released how.
48. Dower defeated by paramount title.
49. Dower defeated by void marriage.
50. Dower defeated by divorce when.
51. Dower may be barred.
52. Dower, devise in lieu of.
53. Dower, heirs duty to assign.
54. Dower, widow may demand.
55. Dower recovered by ejectment.
56. Dower, damages for withholding.
57. Duties of life tenant similar.
58. As to interest on incumbrances.
59. As to repairs.
60. May cut timber, when.
61. Liable for permissive waste.
62. Who may sue for waste.
63. Tenants in common liable for.
64. May take estovers.
65. Kind of wood for fuel.
66. May take emblements.
67. May lease.
68. Surrender when.

1. An estate for life in lands is a freehold.[1]

They are of two kinds:

1*st.* Such as are created by the act of some party as by deed or devise; and

2*d.* Such as are derived from the operation of law.

Under the first are embraced:

1*st.* An estate for the life of the tenant;

2*d.* An estate for the life of another person or persons.

[1] 1 R. S., 722.

Under the second head are embraced:

1*st.* An estate by the curtesy.

2*d.* An estate in dower.

2. The owner of an estate for life is called a tenant for life, for he is only a holder of the lands during the life for which the estate is granted.

1. *Life estates created by act of the parties.*

3. A tenant, either for his own life, or for the life of another (*pur auter vie*) hath an estate of freehold, and he that hath a less estate cannot have a freehold. Under the early English law a life estate was such as was considered worthy the acceptance of a *free man*, a less estate was not. And an estate for a man's own life was then the only life estate considered of sufficient importance to be an estate of freehold; an estate for the life of another person was not then reckoned of equal rank.[2] Greater rights and privileges were granted to freeholders than to persons holding less estates. Similar distinctions were made in our statutes, and the statutes afterwards provided that an estate during the life of a third person, whether limited to heirs or otherwise, shall be deemed a freehold during the life of the grantee or devisee, but after his death it shall be deemed a chattel real.[3]

4. In order to create an estate for life by deed it is necessary that it be defined therein by express terms, as otherwise it might be an estate in fee. In the construction of grants where the language is equivocal, that construction is to be given to it which is most favorable to

[2] Williams' Real Prop., 22.

[3] 1 R. S., 722.

the grantee,[4] and a conveyance without limitation would convey all the estate which the grantor had in the premises.[5] A tenant for life may alien his estate, and his grantee becomes a tenant for the life of his grantor, and not for his own life, because no man can grant a greater estate than he possesses.

5. Where an estate is granted for life, without saying for whose life it is granted, it is to be taken for the life of the grantee. But if the grantor has only an estate for his own life, then it is to be taken for the life of the grantor.[6]

6. There are some estates which may not last a lifetime, but are yet considered in law as life estates and are estates of freehold. Thus, an estate granted to a woman during her widowhood is in law a life estate, though determinable on her marrying again.[7] So too an estate to a man and woman during coverture, or so long as the grantee shall dwell in a certain place, are estates for the life of the grantee, but are determinable on the happening of these events. While they subsist they are reckoned estates for life, because, the time for which they will endure being uncertain, they may possibly last for life, if the contingencies upon which they are to determine do not sooner happen.[7]

7. In order to create an estate of freehold it is necessary that the estate should be measured or limited

[4] 2 Black. Com., 121.

[5] 1 R. S., 748.

[6] Jackson *v.* Van Hoesen, 4 Cow., 325 ; 1 Preston on Estates, 206-209.

[7] 2 Black. Com., 121.

by the life of some person. And an estate for a thousand years would not be an estate of freehold in the hands of the grantee, although it would last far beyond the life of the grantee.

8. An estate during the life of a third person is deemed a freehold only during the life of the grantee or devisee, but after his death a chattel real.[8] After the death of the grantee or the devisee, the remainder of the estate becomes assets in the hands of the executor or administrator for the payment of debts and is to be included in the inventory.[9]

9. An estate granted on the life of a third person terminates on the death of such third person, although the grantee or donee of the estate be living. Hence a lease granted by the tenant *pur autre vie* will cease on the death of the *cestui que vie*, and not on his own death.

10. When the person upon whose life any estate in lands or tenements shall depend, remains beyond sea, or absents himself in this State or elsewhere for seven years together, the statute provides that such person shall be accounted as naturally dead, in any action concerning such lands or tenements, in which his death shall come in question, unless sufficient proof be made in such case of the life of such person.[1]

11. Every life estate may be determined by the civil death of the party, as well as by his natural

[8] Roseboom *v.* Van Vechten, 5 Denio, 415.

[9] 2 R. S., 82.

[1] 1 R. S., 749, § 6; Code, § 841.

death; for which reason in conveyances the grant is usually made for the term of a man's natural life.[2]

The duties as well as rights incident to all estates for life will be noticed at the close of this chapter.

2. *Life estates derived from the operation of law.*

The life estates derived from the operation of law are two.

1*st.* Estates by the curtesy, and

2*d.* Estates in dower.

1. *Estates by the curtesy.*

12. An *estate by the curtesy* is an estate for life created by the operation of law.

13. When a man marries a woman, seised, at any time during the coverture, of an estate of inheritance, and hath issue by her born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of her husband, he holds the land during his life. It is immaterial whether the issue be living at the time of the seisin, or at the death of the wife, or whether it was born before or after the seisin.[3]

14. Four things are requisite to an estate by the curtesy, viz., marriage, seisin of the wife, issue, born alive during the life of the mother, and death of the wife. The law vests the estate in the husband immediately on the death of the wife, without entry,

[2] 2 Black. Com., 121.

[3] 4 Kent, 27; Jackson *v.* Johnson, 5 Cow., 74.

His estate is *initiate* on issue had, and consummate on the death of the wife.[4]

15. The marriage must be a legal, valid marriage, between parties able to enter into the contract. In case of a judgment of divorce *a vinculo*, at the instigation of the wife, the husband loses all right in the income of the wife's separate real estate.[5] There must be an actual judgment to defeat the curtesy and the fact that the marriage is voidable is not sufficient, for no marriage is voidable after the death of either of the parties.[6]

16. The seisin of the wife must be actual or constructive, and where it is not rebutted by an actual disseisin.[7] Even though the lands were wild lands if not held adversely.[8] There must be possession or a title to possession in the wife.[9] If there is an outstanding life estate, however, it must be ended before the death of the wife, otherwise there is no seisin in fact.[1] Where a daughter becomes, during coverture, seised of her father's lands, and her mother has her dower set out of the same lands, it defeats the seisin of the daughter in the lands so set out, and with it the

[4] 4 Kent, 29; Knapp *v.* Smith, 27 N. Y., 277; Ferguson *v.* Tweedy, 56 Barb., 168; S. C., 43 N. Y., 543; *In re* Winne, 2 Lans., 21; Ellsworth *v.* Cook, 8 Paige, 643.

[5] 2 R. L., 197.

[6] 1 Cruise, 107.

[7] Jackson *v.* Sellick, 8 Johns., 262; Ellsworth *v.* Cooke, 8 Paige, 643; Adair *v.* Lott, 3 Hill, 182; Vrooman *v.* Shepard, 14 Barb., 441; Ferguson *v.* Tweedy, 43 N. Y., 543.

[8] Jackson *v.* Sellick, 8 Johns., 262.

[9] Burke *v.* Valentine, 52 Barb., 412; Ferguson *v.* Tweedy, 43 N. Y., 543.

[1] *In re* Cregier, 1 Barb. Ch., 598; Taylor *v.* Gould, 10 Barb., 388.

husband's curtesy. But if the widow die in the lifetime of the daughter and her husband, the latter will have curtesy by the actual seisin thereby conferred. But if the outstanding life estate were a mere equitable interest, the title by curtesy prevails.[2] If the wife has an equitable estate of inheritance, and the rents and profits are paid to her separate use during coverture, curtesy exists; the receipt of the rents and profits being considered a sufficient seisin in the wife.[3]

17. Curtesy applies to qualified and conditional fees as well as to absolute fees, but can only be commensurate with the original estate, and when the estate of the wife is determined, curtesy is determined with it.[4] So if the seisin of the wife is tortious or under a defective title a judgment of eviction destroys curtesy.

18. It is not necessary that the wife shall have entered into the possession in such a manner as to have enjoyed the rents and profits. Thus where a man is seised of a rent in fee, has issue, a daughter who is married and has issue, and he then dies seised, and the wife before the rent becomes due dies, she had but a seisin in law, yet her husband shall be tenant by the curtesy because he could by no industry attain any other seisin. So too in lands descended to the wife where there were leases for years existing, and a rent incurred which remained due during three months of the coverture, and into which

[2] Adair *v.* Lott, 3 Hill, 182.

[3] Morgan *v.* Morgan, 5 Madd., 408; Pitt *v.* Jackson, 2 Bro. C. C., 51; Payne *v.* Payne, 11 B. Mon., 138; Powell *v.* Gossom, 18 id., 179.

[4] Hatfield *v.* Sneden, 42 Barb., 615; Weller *v.* Weller, 28 Barb., 588.

lands she made no entry nor received any payment during her life.[5]

19. It seems that the rule which requires actual seisin 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.[6]

20. The estate of the wife must be an estate of inheritance, and which her children would take if living or the tenancy by the curtesy will not attach. If the wife be one of two or more joint tenants, though she is actually seised, and she die, her estate at her death becomes the absolute and several estate of the survivor and curtesy does not attach.[7] But if she were a tenant in common, curtesy will attach although she may never have been in actual possession, the possession of one tenant in common being the possession of all.[8]

21. The husband of a mortgagee in possession is not entitled to curtesy, unless there has been a foreclosure, or unless the possession has subsisted so long a time as to bar the redemption. And where the redemption is barred she has acquired title by occupancy. The husband is entitled to curtesy in an equity of redemption.

22. Where it has been agreed that money shall be laid out in the purchase of land, in such a way that the money is treated by a court of equity as land, curtesy attaches.[9]

[5] Co. Litt., 29 a; DeGrey *v.* Richardson, 3 Atk., 469.

[6] Jackson *v.* Sellick, 8 Johns., 262; Jackson *v.* Johnson, 5 Cow., 74; Davis *v.* Mason, 1 Peters, 506; Ellsworth *v.* Cook, 8 Paige, 643.

[7] Litt., 7, § 45.

[8] Buckley *v.* Buckley, 11 Barb., 44.

[9] 4 Kent, 50.

23. Where there is a devise to the widow in trust to raise money with remainder to the daughter, the husband of the daughter is entitled to curtesy.

24. A woman on the eve of her marriage conveyed her real estate without the consent of her contemplated husband, it was held to be a fraud upon his rights and void as to him.[1]

25. The issue must be born alive in the lifetime of the wife; and if she dies in childbed, and the issue is taken out of the womb by the Cæsarian operation, the husband will not be entitled to curtesy.[2]

26. The last circumstance required to give a title to curtesy is the death of the wife, by which the estate of the husband becomes consummate.[3] But if she has conveyed away her estate during her life or disposed of it by will the curtesy does not attach.

27. Previous to the statute of 1848 and 1849, if the wife, at the time of or during the marriage, was seised of an estate of inheritance in land, the husband, upon the marriage, became seised of the freehold, and he took the rents and profits during their joint lives. If the wife died before her husband, having had issue, her husband immediately succeeded to the estate. This right was taken away by that statute, and she also was authorized to convey her real estate either by deed or by will and thus defeat the tenancy by the curtesy. And if she does not dispose of her real estate

[1] Robertson *v.* Stevens, 1 Ired. Eq., 247.

[2] Marsellis *v.* Thalimer, 2 Paige, 35; 1 Cruise's Dig., 152, Greenl. ed.

[3] 1 Inst., 30 a.

by deed or by will the right of curtesy is still in force. The object of those statutes was to protect the wife during coverture, and to empower her to convey by deed or devise.[4]

28. The act of March 20, 1860, provided that upon the decease of a husband or wife, leaving no minor child or children, the survivor should have a life estate in one-third of all the real estate whereof the husband or wife died seised; and at the decease of the husband or wife intestate, leaving minor child or children, the survivor should have the income of all the real estate whereof the intestate died seised, during the minority of the youngest child, and one-third during his or her life. This act was repealed in 1862, and the estates which vested under it will soon terminate.

2. *Estates in Dower.*

29. Dower is an estate for life derived from the law, and is that which a widow acquires in a certain portion of her husband's real property after his death.

30. The owner of the estate is called *tenant in dower.* As Blackstone defines it, Tenant in dower is where the husband of a woman is seised of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life.[5]

31. Our statute confirms it by the following words: A widow shall be endowed of the third part of all the

[4] Rider *v.* Hulse, 24 N. Y., 372; Burke *v.* Valentine, 52 Barb., 412; Scott *v.* Guernsey, 60 Barb., 163; Matter of Winne, 2 Lans., 21.

[5] 2 Black. Com., 129.

lands whereof her husband was seised of an estate of inheritance at any time during the marriage.[6]

32. The right of the widow to tarry forty days in the house of her husband without being liable for rent, and to have reasonable sustenance out of the husband's estate, is no part of her dower.

33. The requisites of dower are 1, marriage; 2, seisin of the husband during coverture; and 3, death of the husband before the death of the wife.

34. The marriage must be a legal marriage. If it be merely voidable, yet if it be not avoided in the life-time of the parties, it cannot be annulled afterwards. It belongs to a marriage within the age of consent, though the husband dies within that age.[7] Formerly an alien widow could not be endowed, though her husband was a citizen.[8] But the statute of 1830 gave dower to the widow of any alien, who at the time of his death should be entitled by law to hold any real estate, if she be an inhabitant of this State at the time of such death, in the same manner as if such alien had been a native citizen. And by the statute of 1845, the wife of an alien resident of this State who had become seised of any real estate, and had died before the passage of the act; and the wife of any alien resident of this State who might thereafter become seised of real estate, shall be entitled to dower therein, whether she be an alien or citizen; but no such dower could be claimed in land conveyed by the husband before the act took effect. The same act

[6] 1 R. S., 740, § 1.

[7] 1 Co. Litt., 33 a.

[8] Mick *v.* Mick, 10 Wend., 379; Connolly *v.* Smith, 21 Wend., 60.

also provided that any alien woman shall be entitled to dower as if she were a citizen.[9] This law applies to an alien woman residing abroad at the time of the marriage, although the husband was afterwards naturalized:[1] and confers the right of dower on an alien widow of an alien purchaser.[2]

35. The husband must be seised during the coverture of a present freehold estate of inheritance. And a seisin in law of the husband will be as effectual as a seisin in deed.[3] If the husband died before the entry, the wife is entitled to dower unless the estate has been forfeited by non-entry.

36. The freehold and the inheritance must be in the husband at the same time during the marriage, for there can be no dower in a reversion in fee, or a vested remainder expectant on an estate for life or the like;[4] nor in a life estate *pur auter vie*;[5] nor in a future estate which the husband conveyed before he came into possession; nor in an estate held adversely, after release to the legal owner,[6] nor where the seisin of the husband was merely transitory for the purpose of transferring the title from one person to another; but if the realty vested beneficially for a moment dower attaches.[7]

37. There is no dower in trust estates, on the

[9] Laws 1845, ch. 115.

[1] Burton *v.* Burton, 1 Keyes, 359.

[2] Larreau *v.* Davignon, 5 Abb. (N.S.), 367.

[3] 2 Black. Com., 131.

[4] Durando *v.* Durando, 23 N. Y., 331; Green *v.* Putnam, 1 Barb., 500.

[5] Gillis *v.* Brown, 5 Cow., 388.

[6] Poor *v.* Horton, 15 Barb., 485.

[7] Cunningham *v.* Knight, 1 Barb., 399.

principle that the husband has a mere power in trust and no beneficial interest in the estate.[8] But if he is beneficially interested in the estate she will be endowed of that interest.[9]

38. Where there is a judgment outstanding at the time of the marriage, the widow can only claim her dower in the land subject to the judgment[1] unless the judgment happen to be entered up the same day with the marriage, in which case the dower right obtains precedence.[2] And the same principle holds with reference to a mortgage. She is entitled to dower out of the lands against all but the mortgagee,[3] even though the mortgage was given for the purchase-money, her dower is to be taken out of the surplus. And where a purchase-money mortgage is foreclosed, and she is not made a party she may have relief in equity.[4] And whenever she is made a party to a foreclosure the court will protect her inchoate dower interest.[5] But if the purchase-money mortgage has been paid, and discharged, the assignee cannot set up the mortgage as a bar to his widow's right of dower;[6] upon foreclosure of a mortgage she has a dower in the surplus.

39. If the father die, and the land descends to the

[8] Cooper *v.* Whitney, 3 Hill, 95; Germond *v.* Jones, 2 Hill, 559; Gomez *v.* Tradesmen's Bank, 4 Sandf. S. Ct., 102.

[9] 4 Kent, 43.

[1] Warren *v.* Van Alstyne, 3 Paige, 513.

[2] Ingram *v.* Morris, 4 Harring., 111.

[3] 1 R. S., 740; Stow *v.* Tifft, 15 Johns., 458; Jackson *v.* De Witt, 6 Cowen, 316.

[4] Van Dyne *v.* Thayer, 19 Wend., 162; Swaine *v.* Perine, 5 Johns. Ch., 482.

[5] Babcock *v.* Babcock, 53 How., 97; Mills *v.* Van Vorhis, 20 N. Y., 415.

[6] Runyan *v.* Stewart, 12 Barb., 537.

son and heir, subject to the dower of the mother, and dower is assigned her in the premises and the son die in the lifetime of the mother, the widow of the son will be entitled to dower in the remaining two-thirds, and not entitled to dower in the reversion, because the seisin of the mother relates back to the death of the husband and is continuance of his seisin, and there never was any seisin in the son. But if the father conveyed to the son, the son becomes seised of the whole premises subject to the dower right of his mother if she survives the grantor; and the wife of the son is entitled to dower in the whole subject to the same right.[7] Upon the death of the mother in the former instance the dower of the estate of the widow would not be enlarged, while in the latter case it would be enlarged.

40. A woman is entitled to dower in all hereditaments appertaining to the realty, as well as to the lands of which her husband was seised including rents, commons, mines, and other incorporeals.[8] She is entitled to grass or fruit, not resulting from special cultivation but not to crops sown. She is dowable in lands purchased by the husband at sale on execution, when the husband dies after purchase and before the giving of the deed by the sheriff, unless the lands are redeemed from the sale.[9] The deed in such cases is to be given to the executors or administrators in trust for the heirs: so, too, of lands held by the husband under contract

[7] Dunham *v.* Osborn, 1 Paige, 634; Safford *v.* Safford, 7 Paige, 259; Reynolds *v.* Reynolds, 5 Paige, 161; Matter of Cregier, 1 Barb. Ch., 599.

[8] Coates *v.* Cheever, 1 Cow., 460; 4 Kent, 41.

[9] Laws of 1847, ch. 410.

for purchase:[1] but not in lands agreed to be sold where the contract is of such a nature that a court of equity would deem it personal.[2]

41. When lands have been exchanged by the husband, she is not entitled to dower in both; but there must be a mutual grant of equal interests, not the giving of a fee for an equitable interest,[3] or payment of part in land and part in money. She must make her election within one year from the death of her husband, or she will be deemed to have elected to take dower of the lands received in exchange.[4]

42. If the land is taken for public purposes by the right of eminent domain she has no dower.[5]

43. The title to dower attaches to the land on marriage and seisin and is then inchoate, but is not consummate until the death of the husband;[6] and generally no deed, conveyance or act of the husband, or judgment or decree confessed by or recovered against him or his heirs, can prejudice the wife's right to dower, nor can deeds fraudulently made by him to defeat dower, have that effect. Nor can the courts compel a widow to accept a gross sum in lieu of dower unless under express provisions of the statute.[7] This was the provision before the statute, which provides that no act, deed or conveyance executed or performed by the

[1] Hawley *v.* James, 5 Paige, 318, 453; Hicks *v.* Stebbins, 3 Lans., 39.

[2] Coster *v.* Clarke, 3 Edw. Ch., 437; 4 Kent, p. 50; Church *v.* Church, 3 Sand. Ch., 475.

[3] Wilcox *v.* Randall, 7 Barb., 633; 2 Black. Com., 323.

[4] 1 R. S., 742.

[5] Moore *v.* The Mayor, etc., 8 N. Y., 110; S. C., 4 Sand., 456.

[6] Denton *v.* Nanny, 8 Barb., 618; Sutliff *v.* Forgey, 1 Cow., 89.

[7] Crain *v.* Cavana, 36 Barb., 410.

husband, without the assent of his wife, evidenced by her acknowledgment thereof, in the manner required by law to pass the estates of married women, and no judgment or decree confessed by or recovered against him, and no laches, default, covin or crime of the husband, shall prejudice the right of his wife to her dower or jointure or preclude her from the recovery thereof, if otherwise entitled thereto.[8]

44. Where there has been a voluntary partition among tenants in common, the inchoate dower right of each wife attaches to the share in severalty of her husband.[9] So too if they were joint tenants. But where there is no partition among joint tenants, the inchoate dower of the wife of the survivor only attaches. A sale in partition extinguishes dower if the wife is made a party, and if her husband is still living the court will see that her inchoate dower rights are protected.[1]

45. The widow must 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.[2]

46. A widow will be estopped by her own acts from setting up dower, under a statement to an innocent purchaser that her dower had been extinguished.[3]

[8] 1 R. S., 742.

[9] Wilkinson *v.* Parish, 3 Paige, 653; Jackson *v.* Edward, 7 Paige, 386.

[1] Noble *v.* Cromwell, 26 Barb., 475; S. C., 27 How., 289.

[2] Code, § 1596; Brewster *v.* Brewster, 32 Barb., 428.

[3] Maloney *v.* Horan, 53 Barb., 29; Jewitt *v.* Miller, 10 N. Y., 402.

47. The wife may release her dower by joining with her husband in the conveyance as provided by the statute.[4] An agreement between her and her husband, or his trustee during coverture, is invalid to release her dower. The laws of 1848 and 1849, for the protection of married women, does not enable her to release her dower directly to her husband.[5] It has been questioned whether she can release her dower in the lifetime of the husband in any other manner than by joining with her husband in any conveyance as provided by the statute, except in an action for partition as provided by the statute. An infant feme covert cannot bind herself by deed so as to release her dower.[6]

48. Her dower may be defeated by the disseisin of her husband by paramount title, or re-entry on condition broken, or by a limitation determining the estate, or by the conveyance of the husband in pursuance of an agreement to convey made before dower attached.[7]

49. Dower may be defeated by the judgment of a competent court granted for a cause rendering the marriage void *ab initio*. The Supreme Court is authorized, by a sentence of nullity, to declare void the marriage contract, for either of the following causes, existing at the time of the marriage:

1*st*. That the parties, or one of them, had not attained the age of legal consent (12 in females and 14 in males);

[4] Wood *v.* Seeley, 32 N. Y., 105; Lawrence *v.* Brown, 5 N. Y., 394; 1 R. S., 742.

[5] Graham *v.* Van Wyck, 14 Barb., 531.

[6] Cunningham *v.* Knight, 1 Barb., 399.

[7] Sanford *v.* McLean, 3 Paige, 117.

2*d*. That the former husband or wife of one of the parties was living, and that the marriage with such former husband or wife was then in force;

3*d*. That one of the parties was an idiot or lunatic.

4*th*. That the consent of one of the parties was obtained by force, duress or fraud;

5*th*. That one of the parties was physically incapable of entering into the marriage state, and such physical incapacity continues and is incurable;[8]

6*th*. That the female was at the time of the alleged marriage under the age of fourteen years, and that such marriage was without the consent of her father, mother, guardian or other person having the legal charge of her person; and that the marriage was not followed by consummation or cohabitation, and not ratified by any mutual assent of the parties after the female had attained the age of fourteen years.[9]

50. A divorce or separation, *a mensa et thoro*, does not defeat dower in lands of the husband whereof he was seised before the granting of the decree.[1] But a divorce of the wife on account of her misconduct defeats dower, and the decree should be specific on that subject. But adultery without a decree does not bar dower.[2]

When the divorce is granted to the wife for the adultery of the husband, she being the innocent and he the guilty party, she is entitled to dower in lands seised by him before the divorce,[3] or a reasonable provision

[8] 2 R. S., 142; Code, § 1743.

[9] Code, § 1742; Bennett *v.* Smith, 21 Barb., 440; Wait *v.* Wait, 4 Com., 95.

[1] Wait *v.* Wait, 4 Com., 95.

[2] Reynolds *v.* Reynolds, 24 Wend., 193.

[3] Wait *v.* Wait, 4 Com., 95; Forest *v.* Forest, 3 Abb., 144.

may be made for the wife out of the husband's estate.[4]

51. The wife may be barred of dower by a jointure, as when an estate in lands shall be conveyed to a person and his intended wife, or to such intended wife alone, or to any person in trust for such person and his intended wife, or in trust for such wife alone, for the purpose of creating a jointure for such intended wife, and with her assent; such jointure shall be a bar to any claim of dower of such wife in any lands of the husband. But she, if of full age, must become a party to the conveyance by which it shall be settled, or if she be an infant her father or guardian must join in the conveyance.[5] A pecuniary provision may also be made which will bar her dower. But such provision must be a fair equivalent therefor and be a reasonable and competent livelihood.[6] And unless carried out they will not bar dower,[7] nor unless they are to take effect immediately on the decease of the husband.[8] Jointure may be barred or forfeited in the same way and for the same reasons as dower.[9]

52. As has been seen, no act of the husband can defeat the dower of the wife, but he may make a provision in his will for her *in lieu of dower* and the acceptance of such provision, by her, will bar her dower in his realty; but any provision, made in the

[4] Code, § 1759.

[5] 1 R. S., 741; McCarter *v.* Teller, 2 Paige, 511.

[6] McCarter *v.* Miller, 8 Wend., 267; Pierce *v.* Pierce, 71 N. Y., 154.

[7] Ellicott *v.* Mosier, 11 Barb., 574; S. C., 7 N. Y., 201; Sheldon *v.* Bliss, 4 Seld., 31.

[8] Crain *v.* Cavana, 36 Barb., 410.

[9] 1 R. S., 742.

will for her will not defeat her dower unless it is so declared, or is the manifest intention of the will,[1] and such intention must be gathered from the will itself and not from his oral declarations, or other extrinsic acts.[2] She must make her election within one year whether she will take the provision of the will or dower, and unless within one year she commences proceedings for dower or enters on lands assigned to her for dower she will be considered to have chosen the jointure or provision, whether she knew of the provision or not.[3]

53. The law casts the freehold on the heir on the death of the ancestor and it is his duty at once to assign dower. Before the assignment the widow has a mere right and can convey no interest in the land until assignment.[4] The seisin of the widow upon the assignment relates back to the death of her husband and is considered a continuance of his seisin, so that there never is any seisin of the part so assigned in the heir until the death of the widow.[5]

54. Unless dower is assigned within forty days from the death of the husband she may apply to the court for the appointment of commissioners to admeasure her dower. Upon the admeasurement the commissioners are to lay off one-third the lands and shall describe the same by metes and bounds, and if the lands cannot be admeasured, then one-third the rental

[1] Church *v.* Bull, 2 Den., 430; Palmer *v.* Voorhis, 35 Barb., 479; Savage *v.* Burnham, 17 N. Y., 562.

[2] 1 R. S., 741.

[3] Palmer *v.* Voorhis, 35 Barb., 479.

[4] Sigler *v.* Van Riper, 10 Wend., 414; Green *v.* Putnam, 1 Barb., 500.

[5] Dunham *v.* Osborn, 1 Paige, 636; Safford *v.* Safford, 7 Paige, 260.

value is to be set off for her and shall be a charge upon the lands. If she is evicted from the lands so assigned, by a paramount title, she may recover from the remaining two-thirds of the land.

55. When dower has been assigned and possession is not given her she may recover possession by an action of ejectment.

56. When dower has been withheld from her she may bring an action for her damages in so withholding the lands, and if she recover, the measure of the damages are one-third of the annual value of the mesne profits from the husband's death, in a suit against heirs; and from the time of the demand in a suit against any persons other than the heirs, up to the time of recovering the judgment; but they cannot be recovered for a period of over six years in any one case.[6] Damages are to be estimated on the value of the property at the time of the husband's death and not on any improvements made since his death.[7] On lands sold by the husband the value is to be reckoned according to the value of the lands, exclusive of improvements made since the sale; this does not exclude the increased value from extrinsic or general causes.[8]

Incidents of estates for life.

57. The duties and liabilities of tenants for life, whether their estates arise from contract or the operation of law, are so nearly alike that they will be treated together.

[6] Marble *v.* Lewis, 53 Barb., 432; S. C., 36 How., 337.

[7] 1 R. S., 743; Code, 1600, etc.

[8] Shaw *v.* White, 13 Johns., 179; Gore *v.* Brasier, 3 Mass., 544; 4 Kent, 68; Marble *v.* Lewis, 36 How., 343.

58. It is the duty of the life tenant to keep down the interest upon the liens or incumbrances and pay all ordinary taxes and assessments on the same out of the rents and income of the estate,[9] and if he do not do so a receiver may be appointed to take charge of the property for that purpose, and the tenant in dower should pay one-third of the interest if the incumbrance cover the whole estate. He must take proper care to prevent deterioration from neglect or decay; or he may be liable to an action for waste. It is the duty of the remainderman to pay the principal of the incumbrance, and he is liable to the tenant, when the tenant has been compelled to pay it.[1]

59. If a house be ruinous when it comes into the possession of the tenant for life, he is not punishable for suffering it to fall down; for in that case he is not bound in law to repair it. But as the law favors the maintenance of houses, if he cuts down timber and therewith repairs it he can justify.[2] It is his duty to cut timber for the ordinary repairs of the buildings and fences; and if the timber on the premises is not suitable, he may sell some of the timber and purchase boards or other timber suitable for repairs. But he must do this in a prudent and economical manner.[3]

60. A reasonable amount of timber land may be cleared for cultivation and cut for use, though not to

[9] Cairns *v.* Chabert, 3 Edw. Ch., 312; 4 Kent, 75; Stillwell *v.* Dougherty, 3 Brad., 311; Mosely *v.* Marshall, 22 N. Y., 200; House *v.* House, 10 Paige, 158.

[1] House *v.* House, 10 Paige, 158; 4 Kent, 74; Mosely *v.* Marshall, 22 N. Y., 200.

[2] 1 Inst., 539, 54 b.

[3] Loomis *v.* Wilbur, 5 Mass., 13; Simmons *v.* Norton, 7 Bing., 640.

the injury of the estate. Timber may be cut for use in mining and for staves and shingles, if the lands were used for that purpose.[4] But timber improperly cut becomes the personal property of the reversioner or remainderman, and he may maintain trover for it against any one in possession[5] and may maintain an injunction against any one colluding with the tenant in committing waste.

61. The tenant for life is liable for permissive waste. If the house or other building is destroyed by fire through his carelessness, he will be required to build at his own expense and within a convenient time.[6] It has been held that a tenant for life was amenable for waste committed by a trespasser, upon the principle that the law gives him an action of waste, and therefore he is bound to see that trespassers do not injure the estate.[7]

62. Any person seised of an estate in remainder or reversion, may maintain an action of waste or trespass for any injury done to the inheritance, notwithstanding any intervening estate for life or years.[8]

63. One joint tenant or tenant in common may maintain an action for waste against his co-tenant or co-tenants.[9] And an heir, whether within age or of full age may maintain an action for waste done in the time of his ancestor, as well as his own time.[1]

64. The tenant for life may take reasonable *estovers*,

[4] Jackson *v.* Brownson, 7 Johns., 227; Harder *v.* Harder, 26 Barb., 409; Neel *v.* Neel, 19 Penn. St., 324.

[5] Moores *v.* Wait, 3 Wend., 104; Rodgers *v.* Rodgers, 11 Barb., 595.

[6] Co. Litt., 53 b.

[7] Fay *v.* Brewer, 3 Pick., 203, 205; Cook *v.* Ch. T. Co., 1 Denio, 91.

[8] Code, § 1665.

[9] Code, § 1656.

[1] Code, § 1652.

such as wood for fuel, fences, agricultural repairs, erections and such purposes, but not for the purpose of sale or exchange, nor so as to commit waste; and he may clear portions of the land for cultivation.[2] It is not absolutely necessary that the wood should be burned on the premises.[3]

65. For the purpose of fuel he should take the dry, perishing or fallen wood, not such as is fitted for timber or building purposes. Nor should he cut down timber or trees which serve for ornament or shelter. He should cultivate in a good husbandlike manner and so as not to injure the inheritance.[4]

66. The tenant for life is entitled to the *emblements*. These are the crops which are produced annually by cultivation, extending to roots, as when a man plants hops of old roots, for they are such things as grow by annual manurance and cultivation of the owner; but do not extend to grass or fruits being the natural growth of the soil. The law in regard to emblements is founded on the strictest equity. As the termination of the estate is uncertain, public policy requires that the inducement of the tenant to cultivate should not be weakened by the fear of losing the fruits of his labor. The same reason does not apply where the termination of the tenancy is fixed by the contract of the parties, or where the estate is terminated by the act of the tenant himself.[5]

[2] Harder *v.* Harder, 26 Barb., 409; Sarles *v.* Sarles, 3 Sand. Ch., 601; 4 Kent, 73; White *v.* Cutter, 17 Pick., 248; Padelford *v.* Same, 17 Pick., 152.

[3] Gardener *v.* Dering, 1 Paige, 573.

[4] Harder *v.* Harder, 26 Barb., 409; Sarles *v.* Sarles, 3 Sand. Ch., 601; Jackson *v.* Brownson, 7 Johns., 227; 4 Kent, 73.

[5] Willard's Real Est., 77.

67. The tenant for life may lease a part or all of the premises, or may assign his whole estate.[6] But he can grant no greater estate than what himself possesses. The rent falling due after the termination of the life estate goes to the remainderman and not to the tenant for life.

68. The tenant for life, on the termination of his eatate is bound to deliver up the property at once to the reversioner or remainderman, and if he holds over he is liable, as a trespasser, and for the full value of the profits received during such wrongful possession.[7]

[6] Jackson *v.* Mancius, 2 Wend., 357 ; Grout *v.* Townsend, 2 Hill, 554

[7] 1 R. L., 107 ; Livingston *v.* Tanner, 14 N. Y., 64 ; Torrey *v.* Torrey, 14 N. Y., 430

CHAPTER VI.

ESTATES FOR YEARS.

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1. Of estates less than freehold, there are three sorts:

1*st.* Estate for years;

2*d*. Estates at will, or Tenancies from year to year;
3*d*. Estates at sufferance.

1. *Estate for years.*

2. An estate for years is a contract for the possession and profits of real estate for a determinate period with the recompense of rent.

3. The contract is technically called a lease, whereby one man, the lessor, lets to another, the lessee, the possession and profits of real estate for a term of time, and for a consideration fixed and agreed upon by the parties. It is not essential to the estate that its duration should be limited to one or more years. An agreement for the possession of real property for half a year, a quarter of a year, a month or a week, or any less time, is treated as an estate for years.[1]

4. The period of the letting being fixed and determined is called a terminus or term, and the person who holds it a termor. The word *term* is used sometimes to express the estate or interest that passes, as well as the time for which it passes.

5. This estate is created by the parties and not by the act of the law. It is usually created by a written lease, but not always so. A parol lease for one year or for a less period is valid, even though the term should commence in the future.[2] If the lease be for a longer term than one year, it must be created by deed or instrument in writing subscribed by the party creating it, or by his lawful agent thereunto author-

[1] Litt., §§ 58, 67.

[2] Young *v.* Dake, 1 Seld., 463; McGune *v.* Palmer, 5 Rob., 607; Hurlbut *v.* Post, 1 Bos., 28.

ized by writing.[3] And in most of the counties of the State, when the lease is for more than three years, it should be recorded.

6. Letting land upon shares for a crop is not a lease,[4] and the possession of the land remains in the owner. The occupant and the owner of the soil are joint owners of the crop and so continue until the tenancy be severed by division.[5] But if the contract be, that the lessee possess the land with the usual privileges of exclusive enjoyment, it is the creation of a tenancy for a year, though the land be taken to be cultivated upon shares.[6]

7. There is no limit to the number of years for which a lease may be granted, except that leases for agricultural lands cannot be for more than twelve years.[7]

8. The lease should determine not only the day but the hour of the day at which it is to commence and terminate. If the lease be from a particular day, that day will be excluded.[8] A lease for a term of years from the first day of July begins the term on the second day.[9] If no day of commencement is named in the creation of the estate, it begins from the making or delivery of the lease. If a man make a lease to another for so many years as J. S. shall name, it is a

[3] 2 R. S., 134, § 6.

[4] Austin *v.* Sawyer, 9 Cow., 39 ; Bradish *v.* Schenck, 8 Johns., 151 ; Dinehart *v.* Wilson, 15 Barb., 595 ; Harrower *v.* Heath, 19 Barb., 331.

[5] Forbes *v.* Shattuck, 22 Barb., 568.

[6] Jackson *v.* Brownell, 1 Johns., 267.

[7] Const., art. I, sec. 14.

[8] Wilcox *v.* Wood, 9 Wend., 346.

[9] Atkins *v.* Sleeper, 7 Allen, 487.

good lease for years; for though it is at present uncertain, yet when J. S. hath named the years it is then reduced to a certainty. A lease for twenty or more years, if J. S. shall so long live, is good: for there is a certain period fixed beyond which it cannot last, though it may determine sooner.[1]

9. To preserve a uniformity in business transactions the statute provides, that whenever the term "year" or "years" is used in any statute, deed, verbal or written contract, or any public or private instrument whatever, the year intended shall be taken to consist of three hundred and sixty-five days; a half year of one hundred and eighty-two days; and a quarter of a year of ninety-one days; and the added day of leap year, and the day immediately preceding, if they shall occur in any period so to be computed, are to be reckoned together as one day. Whenever the term "month" or "months" is used in any statute, act, deed, verbal or written contract, or any public or private instrument whatever, it shall be construed to mean a calendar and not a lunar month, unless otherwise expressed.[2]

10. An estate for years is denominated a chattel real. It savors of the realty, because it has the quality of immobility. The estate goes to the executors or administrators of the owner on his death, and not to his heirs at law, even though it be limited in the lease to the heirs.[3]

11. The tenant for years is never said to be seised

[1] 2 Black. Com., 143.
[2] 1 R. S., 606, §§ 3, 4.
[3] 2 R. S., 82, 83.

of the leased premises, nor does the delivery of the lease vest in him any estate therein. He acquires by the lease a right of entry upon the land, and when he has entered, he is said to be possessed not of the land, but of a term for years, while the seisin of the fee or of the freehold remains in the original owner, and the possession of the lessee is the possession of the owner of the fee.[4]

12. The only covenants implied in leases for years is a covenant for quiet enjoyment, which means that the tenant shall not be evicted by paramount title, and it relates only to the title and not to the actual occupation.[5] If there be no agreement the landlord is not bound to repair, or allow the tenant for repairs made without his authority, and the tenant is bound to make such repairs at his own expense so as to avoid the charge of permissive waste.[6]

13. There is no implied warranty that the buildings are safe, well built or fit for any particular use;[7] nor that the landlord shall keep them in tenantable condition:[8] nor that the land shall remain in the same condition.[9] If the landlord agrees to make repairs before possession by the tenant, it is a condition precedent; and the tenant's entry before the stipulated day

[4] Cruise's Dig., 224.

[5] Burr *v.* Stenton, 43 N. Y., 462; Howard *v.* Doolittle, 3 Duer, 464.

[6] Eakin *v.* Brown, 1 E. D. Smith, 36; City of N. Y. *v.* Corlies, 2 Sandf., 301; City of Lowell *v.* Spalding, 4 Cush., 277.

[7] Cleves *v.* Willoughby, 7 Hill, 83; Dutton *v.* Gerrish, 9 Cush., 89.

[8] Post *v.* Vetter, 2 E. D. Smith, 248.

[9] 1 Sneed (Tenn.), 613.

is no waiver.[1] But parol promise to repair is void[2] if the lease is in writing.[3]

14. If the premises are made untenantable by the action of the landlord, before the tenancy begins, covenant for rent will not be sustained;[4] but otherwise if the premises become untenantable after the term begins.[5]

15. Formerly when the building was injured by fire, the landlord could not be compelled to repair for the benefit of the tenant, unless under an express covenant to repair; and the tenant was bound to pay rent for the premises even if the buildings were entirely destroyed;[6] but the statute now provides that, the lessees or occupants of any buildings which shall, without fault or neglect on their part, be destroyed, or be so injured by the elements or any other cause, as to be untenantable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof, after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessees or occupants may thereupon quit and surrender possession of the leasehold and of the land so leased or occupied.[7]

16. If the tenant has covenanted to surrender the

[1] Strohecher *v.* Barnes, 21 Geo., 430; but see Mumford *v.* Brown, 6 Cow., 475; Howard *v.* Doolittle, 3 Duer, 464; Bloomer *v.* Warren, 29 How., 259.

[2] Davis *v.* Banks, 2 Sweeny, 184.

[3] Cleves *v.* Willoughby, 7 Hill, 83.

[4] Cleves *v.* Willoughby, 7 Hill, 83.

[5] Davis *v.* Banks, 2 Sweeny, 184.

[6] Howard *v.* Doolittle, 3 Duer, 464; Warner *v.* Hitchins, 5 Barb., 666.

[7] Laws 1860, ch. 345; see Graves *v.* Berdan, 26 N. Y., 498; Bloomer *v.* Merrill, 29 How., 262.

premises in the same condition, natural wear and tear excepted, he is not bound to rebuild after a fire.[8]

17. The tenant is estopped from controverting the title of the one from whom he holds or from whom he has acquired the right of possession;[9] but he may set up that the landlord's title has expired or been extinguished;[1] and he can controvert any assignment of the lease;[2] or he may set up that he has acquired a subsequent title;[3] or he can show that the title has passed from the landlord to some other person subsequent to the time that he entered as tenant.[4]

18. Covenants for renewal are frequently inserted in leases for years. But the landlord is not bound to renew without a covenant for that purpose. A covenant to "renew a lease under the same covenants" is satisfied by a renewal omitting the covenant to renew.[5] A covenant to renew the lease implies the same term and rent, and perhaps the same conditions. But a covenant to renew upon such terms as might be agreed on is void for uncertainty.[6] Covenants for renewal beyond the twelve years, in the leases of agricultural lands, would be void, though the lease would be good for the twelve years.[7]

[8] Warner *v.* Hitchius, 5 Barb., 666.

[9] Jackson *v.* Spear, 7 Wend., 401; Jackson *v.* Whedon, 1 E. D. Smith, 141.

[1] Jackson *v.* Rowland, 6 Wend., 666.

[2] Despard *v.* Walbridge, 15 N. Y., 374.

[3] Nellis *v.* Lathrop, 2 Wend., 121.

[4] Ryers *v.* Farwell, 9 Barb., 615.

[5] Carr *v.* Ellison, 20 Wend., 178; Abeel *v.* Radcliff, 13 Johns., 297.

[6] Rutgers *v.* Hunter, 6 Johns. Ch., 215; Whitlock *v.* Duffield, 1 Hoff. Ch., 110.

[7] Hart *v.* Hart, 22 Barb., 606.

19. The lessor must give, or offer to give possession of the premises, in order to create a liability for the rent. And if he cannot or will not do this, he has not any claim for the rent reserved.[8] Where A. leased to B. a hotel for a term of years, from a future day, and before that day it burned down, it was held that the lease never took effect so as to make the lessee liable for rent. It is no answer to the claim for rent, that the premises are in possession of another unless held by a title paramount to that of the lessor, as the lessor does not warrant against the acts of strangers.[9]

20. The failure or neglect of the lessee to take possession of the premises, will not affect his liability for rent, where there is no fault on the part of the lessor, for the rent becomes due by virtue of the lease, and not by entry or occupation.[1]

21. It is the duty of the tenant to perform all the covenants and agreements entered into to be done by him or he will forfeit his estate. He is liable to third persons for damages, resulting from his negligence, whether he has covenanted to repair or not.[2]

22. The lessor may assign the lease, or he may pledge it as a security. He may sever the rent from the reversion and assign that alone; or he may keep the rent and assign or sell the reversion; or he may sell the rent to one and the reversion to another.[3]

[8] Wood *v.* Hubbell, 10 N. Y., 487.

[9] Mechan. Ins. Co. *v.* Scott, 2 Hilton, 550.

[1] Mechan. Ins. Co. *v.* Scott, 2 Hilton, 550; Whitney *v.* Allaire, 1 Comst., 311.

[2] Eakin *v.* Brown, 1 E. D. Smith, 36.

[3] Demarest *v.* Willard, 8 Cow., 206; Willard *v.* Tillman, 2 Hill, 274.

23. The lessee, unless restrained by covenant, may assign or grant over his whole interest; he may underlet for any fewer or less number of years than he himself holds; and he may incumber the land with rent and other charges. If the deed of the original lessee passes all his estate, it is an assignment; but if for a less portion of time than for the whole remaining term it is an under lease, and there is a reversion in the termor.[4] But if the under lease reserves the right to re-enter it is not an assignment.[5] And the covenant not to underlet is not broken by underletting a portion of the premises unless the lease specify he shall not let any portion of the premises;[6] nor will it restrain the lessee from making an assignment.[7] If the subletting is with knowledge of the original lessor, and he receives rent from the sublessee, it will be a waiver of any breach of the covenant as to subletting.[8] When the lessees are a co-partnership a change in the members of the firm, by the withdrawal of one, and the substitution or addition of another member does not violate the provision against subletting.[9]

24. The lessee can convey no greater estate than he possesses, and should he attorn to a stranger such attornment would be absolutely void,[1] unless made

[4] Lynde *v.* Hough, 27 Barb., 415; Bedford *v.* Terhune, 30 N. Y., 453; Jackson *v.* Silvernail, 15 Johns., 278; Jackson *v.* Harrison, 17 Johns., 66.

[5] People *v.* Robertson, 39 Barb., 9; Post *v.* Kearney, 2 N. Y., 514.

[6] Jackson *v.* Silvernail, 15 Johns., 278; Roosevelt *v.* Hopkins, 33 N. Y., 81; People *v.* Robertson, 39 Barb., 9.

[7] Lynde *v.* Hough, 27 Barb., 415.

[8] Ireland *v* Nichols, 46 N. Y., 413.

[9] Roosevelt *v.* Hopkins, 33 N.Y., 81.

[1] 1 R. S., 744, § 3.

with his landlord's consent, or in consequence of a judgment or decree, or to a mortgagee after a forfeiture of the mortgage. When the reversioner assigns, the attornment of the tenant to his assignee is unnecessary.[2]

25. The lessee after the assignment still remains liable to the lessor upon all his covenants to the lessor, by reason of his privity of contract. And the assignee of the termor will be liable to the lessor upon such covenants only, while he remains in possession as tenant, and his liability arises from privity of estate and not privity of contract.[3] But he is not liable for breaches of covenant before he got the estate.[4] And the sublessee is liable only on such covenants as run with the land,[5] although not expressly named, and he is not liable upon the personal covenants of the original lessee unless he has assumed them. And such covenants only run with the land as relate to the premises leased.

26. Where the tenant is actually evicted from the demised premises by title paramount, he is discharged from the payment of the rent, or if he surrenders on account of a judgment for its recovery; but if he is ejected from only a portion of the premises by paramount title he is liable for a portion of the rent.[6] So too when the tenant is evicted by the

[2] 1 R. S., 739.

[3] Post *v.* Jackson, 17 Johns., 239; Carter *v.* Hammett, 18 Barb., 608; Van Schaick *v.* Third Ave. R. R. Co., 30 Barb., 189.

[4] Astor *v.* Hoyt, 5 Wend., 603; Tillotson *v.* Boyd, 4 Sandf., 516.

[5] The Importers Ins. Co. *v.* Christie, 5 Robt., 169.

[6] The Home Ins. Co. *v.* Sherman, 46 N. Y., 370; Hurlbut *v.* Post, 1 Bosw., 28; Christopher *v.* Austin, 11 N. Y., 216; Blair *v.* Claxton, 18 N. Y., 529.

acts of the landlord, if the acts of eviction happen before the rent falls due; such eviction need not be forcible, but may be made indirectly, as where the lessor creates a nuisance, or is guilty of any acts which preclude the tenant from a beneficial enjoyment of the premises, but the nuisance or injurious acts must be such as to warrant the tenant's abandoning the whole premises, for if he continues to occupy a portion of the premises he will be liable to pay rent for such use and occupation. If he continue to occupy the whole premises he will be liable to pay the full rent, though he may have an action against the lessor on account of his injurious acts.[7] When the interference of the tenant's beneficial enjoyment has been occasioned by the permission of the landlord, although not by his direct act, the premises may be abandoned.[8]

27. Where a mortgagor leases property subject to a previous mortgage, the foreclosure of the mortgage will work an eviction of the tenant, and although the lessor assigns the lease to the purchaser at the mortgage sale, the tenant may go out of possession and refuse to pay the subsequent rents.[9] If the tenant is not made a party to the foreclosure his tenancy would not be disturbed, and the lessor might assign his lease to the purchaser.

28. When the lessee fails to perform the covenants

[7] Edgerton *v.* Page, 20 N. Y., 281; Cohen *v.* Dupont, 1 Sandf., 260; Dyett *v.* Pendleton, 8 Cow., 728; Giles *v.* Comstock, 4 Com., 270; Christopher *v.* Austin, 1 Kern., 217; Ogilvie *v.* Hull, 5 Hill, 52.

[8] Rogers *v.* Ostrom, 35 Barb., 523; Gilhooley *v.* Washington, 4 Com., 217.

[9] Lane *v.* King, 8 Wend., 584; Sinners *v.* Saltus, 3 Den., 214.

contained in the lease, it may become voidable and the lessor may re-enter for breach of the conditions. The lessor may waive the forfeiture, and if the act of forfeiture is not a continuing act, the waiver cannot be retracted.[1] The courts will sometimes relieve against a forfeiture on account of a breach of a covenant to pay rent or taxes, even after judgment in ejectment, where the case is one which admits of compensation.[2]

29. The incidents of an estate for years, unless otherwise provided in the lease, are analogous to those of tenants for life as mentioned in the preceding chapter. The tenant is entitled to *estovers* and is liable for waste; he cannot cut down timber trees, and must keep the houses, buildings and fences in tenantable repair, and if he occupies a farm for agricultural purposes he is bound to cultivate the farm in a good husbandlike manner.[3]

30. The tenant for years is not entitled to *emblements*, provided the lease be for a certain period, and does not depend upon any contingency; for it is his own folly to sow when he knows for a certainty that his lease must expire before harvest time. If, however, the lease for years depends upon an uncertain event, as if a tenant for life should lease the estate for five years, and die before the expiration of the term, by reason whereof the lease is determined, the lessee would be entitled to his emblements, on the same principle that the representatives of a tenant for life take them, if

[1] Clark *v.* Jones, 1 Denio, 516; Manice *v.* Millen, 26 Barb., 41.

[2] Garner *v.* Hannah, 6 Duer, 262.

[3] Middlebrook *v.* Corwin, 15 Wend., 170.

there would have been time to have reaped what had been sowed, provided the lessor had lived.[4]

31. A term for years may be defeated by a condition or by a provision on the happening of a specified event, or by a release to the disseisor of the reversion.

2. *Of estates at will.*

32. An estate at will is where one man lets land to another to hold at the will of the lessor; and although the estate may be terminated at the will of either party, yet neither can terminate it in a wanton manner, and contrary to equity and good faith. The lessor cannot determine the estate after the tenant has sowed, and before he had reaped, so as to prevent the necessary ingress and regress to take the emblements. Nor can the tenant determine the estate before the period of payment arises so as to cut off the landlord of his rent.[5]

33. Such was the old common law as to tenancies at will; which in a strict sense, have become almost extinguished, under the operation of judicial decisions. The language of the courts is, that a tenancy at will arises from grant or contract, and that general tenancies are constructively taken to be tenancies from year to year. If the tenant holds over by consent given, either expressly or constructively, after the determina-

[4] Co. Litt., 56 a; 4 Kent's Com., 109; Whitmarsh *v.* Cutting, 10 Johns., 360.

[5] Jackson *v.* Wheeler, 6 Johns., 272; Phillips *v.* Covert, 7 Johns., 1; Bradley *v.* Covel, 4 Cow., 349; Walker *v.* Furbush, 11 Cush., 366; 4 Kent's Com., 111.

tion of a lease for years, it is held to be evidence of a new contract, without any definite period, and is construed to be a tenancy from year to year.[6] A lease for one year "and an indefinite period thereafter with annual rent and continued occupation" makes a tenancy from year to year.[7]

34. To guard against litigation upon leases imperfectly drawn the statute provides that if lands or tenements be occupied in the city of New York, without any specified time of duration, the occupation is deemed valid until the first day of May next after the possession, under the agreement commenced; and the rent is deemed payable at the usual quarter days, if there be no special agreement to the contrary.[8]

35. The reservation of an annual rent is the leading circumstance that turns leases for uncertain terms into leases from year to year.[9]

36. The resolutions of the courts, turning the old estates at will into estates from year to year, are founded in equity and sound policy, as they put an end to precarious estates, which are very injurious to the cultivation of the soil, and subject to the abuses of discretion: they temper the strict letter of the law by the spirit of equity.[1] They determine the period when the tenancy terminates, and both parties are

[6] 4 Kent's Com., 112; Jackson *v.* Salmon, 4 Wend., 327; Webber *v.* Shearman, 3 Hill, 547.

[7] Pugsley *v.* Aikin, 1 Kernan, 494.

[8] 1 R. S., 744; Wolfe *v.* Merrit, 21 Wend., 338; Marquat *v.* La Farge, 5 Duer, 559; Clark *v.* Richardson, 4 E. D. Smith, 173; Taggard *v.* Roosevelt, 2 E. D. Smith, 100.

[9] 2 Black. Rep., 1173.

[1] 4 Kent's Com., 115.

apprised when the estate terminates, and when a new agreement should be made.

37. It is settled that notice to quit is not requisite to a tenant, whose term is to end at a certain time; for in that case both parties are apprised of their rights and duties. The lessor may enter on the lessee when the term expires, without further notice.[2]

38. Except for the purpose of notice to quit, tenancies at will seem even still to retain their original character. The statute authorizes a summary proceeding to regain the possession, when the tenant for one or more years, or for a part of a year, or at will, or sufferance, holds over wrongfully against his landlord, but it requires one month's notice to be given to a tenant at will, or sufferance, created by holding over or otherwise to remove, before application be made for process under the act.[3] When the demise is expressly at will, the notice may be given at any time;[4] but the tenant from year to year is not entitled to notice to quit when proceedings are taken under the statute to remove him before application for process under the act, though in an action of ejectment against him he would be entitled to notice.[5] A tenant, who disclaims his landlord's title, is not entitled to a notice to quit.[6] Some estates are held in such a manner, that although the rent is payable yearly, it requires some act on the

[2] Jackson *v.* Bradt, 2 Caines, 169; Jackson *v.* Parkhurst, 5 Johns., 128; Bedford *v.* McElherron, 2 Serg. & Rawle, 49; Ellis *v.* Page, 1 Pick., 43.

[3] Laws of 1820, ch. 194.

[4] Post *v.* Post, 14 Barb., 253; Vrooman *v.* Shepperd, 14 Barb., 453.

[5] Nichols *v.* Williams, 8 Cow., 13; Phillips *v.* Covert, 7 Johns., 4.

[6] Woodward *v.* Brown, 13 Peters, 1.

part of the landlord or tenant to terminate them; these are terminated by a notice given one month before the termination of the year from which the rent is reckoned, while the notice in a tenancy at will can be given at any time of the year.[7]

Hence it becomes a question of some importance to determine under the facts in each particular case, whether the tenancy is one at will, or from year to year. The courts have decided that, a tenant in possession at or after a sale on execution, is tenant at will to the purchaser, and cannot set up an outstanding title;[8] so also would be the former owner holding over.[9] A party entering under an agreement to accept a lease, and subsequently refusing to accept, becomes a tenant at will or sufferance;[1] so too if he is in peaceable possession with the knowledge and acquiescence of the owner.[2] A parol gift of lands creates a tenancy at will.[3] A tenant without any term prescribed or rent reserved is a tenant at will.[4] Also one holding during the will and pleasure of the lessor.[5]

39. Holding over, after the expiration of a lease for a year or more, is a continuation of the former tenancy which becomes one from year to year under the terms of the original lease.[6] A tenancy for one year and an

[7] Post *v.* Post, 14 Barb., 253; Livingston *v.* Tanner, 4 Kern., 64.

[8] Colvin *v.* Baker, 2 Barb., 206; Dickinson *v.* Smith, 25 Barb., 102.

[9] Nichols *v.* Williams, 8 Cow., 13.

[1] Anderson *v.* Prindle, 23 Wend., 616.

[2] Marquat *v.* La Farge, 5 Duer, 559.

[3] Jackson *v.* Rogers, 2 Ca. Cases, 314.

[4] Sarsfield *v.* Healy, 50 Barb., 245.

[5] Post *v.* Post, 14 Barb., 253; Doe *v.* Wood, 14 Mees. & W., 682.

[6] Conway *v.* Starkweather, 1 Denio, 113; Hill *v.* The Mayor, 6 Robt., 441; Weber *v.* Shearman, 3 Hill, 547; 6 Hill, 32.

indefinite period thereafter is a tenancy from year to year.[7]

40. Notice is not necessary to a tenant where the terms on which a lease is to terminate are fixed by the agreement of the parties;[8] nor in cases where the relation of landlord and tenant does not exist as in case of a trespasser.[9] A disclaimer of the tenancy dispenses with the notice to quit, as taking a deed from a stranger.[1]

41. A tenancy at will is also terminated by any act of the landlord done upon the land, in assertion of his title to the possession, as notice to quit, demand of possession, doing any act on the premises for which the lessor would, otherwise, be liable to an action of trespass, at the suit of the tenant, carrying off stones or trees from the premises against the tenant's will, threatening to take legal measures to recover the land, or selling or leasing it.[2] The death of either party determines the estate.

42. An acceptance of rent after the expiration of notice to quit is a waiver of the notice.[3]

43. If the tenant has given notice of intention to quit, and does not deliver up possession thereof at the

[7] Pugsley *v.* Aikin, 11 N. Y., 494.

[8] Allen *v.* Jaquish, 21 Wend., 628.

[9] Torry *v.* Torry, 14 N. Y., 430; Doolittle *v.* Eddy, 7 Barb., 74; Phillips *v.* Covert, 7 Johns., 1.

[1] Sharp *v.* Kelley, 5 Denio, 431; Jackson *v.* Wheeler, 6 Johns., 272; Woodward *v.* Brown, 13 Peters, 1.

[2] Jackson *v.* Aldrich, 13 Johns., 106; Post *v.* Post, 14 Barb., 254; Phillips *v.* Covert, 7 Johns., 4; Jackson *v.* Vincent, 4 Wend., 633; Sharp *v.* Kelley, 5 Denio, 431; Jackson *v.* Wheeler, 6 Johns., 272.

[3] Prindle *v.* Anderson, 19 Wend., 391; S. C., 23 Wend., 616; see also People *v.* Darling, 47 N. Y., 666.

time specified in the notice, he or his executor or administrators are made liable to pay to the landlord, his heirs or assigns, double the rent which he should otherwise have paid, at the same time and the same manner as the single rent. And such double rent shall be continued to be paid during all the time such tenant shall continue in possession as aforesaid.[4]

44. When the tenant holds over after the end of his term, without any new agreement, he may be treated by his landlord, either as a trespasser or as a tenant from year to year, and holding in all other respects upon the terms of the original lease.[5] The tenant has no such election. If he holds over, he cannot deny that he is a tenant if the landlord elects to treat him as such, and if the landlord treats him as a trespasser, he cannot show a legal right to the possession.

45. It is the duty of the landlord however to determine whether he will hold the tenant as a trespasser or a tenant at an early day, as otherwise it will be held to be a holding as tenant for another year on the same terms as before.

46. The tenant at will is entitled to emblements if the estate is determined by the landlord, but not when it is determined by his own act.[6] The tenant is liable for wilful but not permissive waste;[7] for by the commission of voluntary or permissive waste he forfeits the estate.[8]

[4] 1 R. S., 745; Hall *v.* Ballentine, 7 Johns., 536.

[5] Conway *v.* Starkweather, 1 Denio, 113.

[6] Stewart *v.* Doughty, 9 Johns., 108.

[7] Starr *v.* Jackson, 11 Mass., 519.

[8] Phillips *v.* Covert, 7 Johns:, 1.

47. The tenant at will has no assignable interest, his interest is a mere chattel real and cannot be sold on execution; and should he attempt to assign or to underlet, the person coming in under him would be a trespasser.

3. *Estates at sufferance.*

48. A tenant at sufferance is one who comes into the possession, and by lawful title, but holds over by wrong after the determination of his interest. He has only a naked possession, and no estate which he can transfer or transmit, or which is capable of enlargement by release; he stands in no privity to his landlord, and formerly was not entitled to notice to quit. He holds by the laches of the landlord, who may enter, and put an end to the tenancy when he pleases.[9]

49. The distinction between a tenancy at will and sufferance is, the former is created by the *consent*, and the latter by the *laches* of the landlord. When the laches of the landlord has continued so long that the tenancy might be deemed a tenancy at will, it becomes necessary to serve a notice to quit and the statute has made provision for such cases like those in cases of tenants at will.

50. Where the tenant *pur auter vie* continues in possession after the death of the *cestui que vie*, or a tenant for years holds over after the expiration of his term: in both these cases the original entry was lawful, but the holding over unlawful, the creating an estate

[9] 4 Kent's Com., 117; Jackson *v.* Parkhurst, 5 Johns., 128; Jackson *v.* McLeod, 12 Johns., 182; Livingston *v.* Tanner 12 Barb., 481.

at sufferance. The original entry was by the act of the party and not by the act of the law. And it is to estates of this kind that the above mentioned statute refers.[1]

51. The tenant at sufferance has no estate that can be granted to a third person, nor sold on execution; and one who enters under a lease or assignment from him is a trespasser.[2]

52. Independent of any statute provision, the landlord may re-enter, upon the tenant holding over, and remove him and his goods, with such gentle force as may be requisite for the purpose; and the tenant would not be entitled to resist or sue him. The plea of *liberum tenementum* would be a good justification, in an action of trespass, by the party, for the entry and expulsion. But the landlord would, in the case of an entry by force and with strong hand, be liable to an indictment for a forcible entry, either under the statutes of forcible entry, or at common law.[3] But it would be safer for the landlord to take the summary proceedings for re-entry by the statute.

Fixtures.

53. Fixtures are defined to be chattels or articles of a personal nature, which have been affixed to the land, and when so attached to the realty become part of it and cannot in general be severed from it, and

[1] Jackson *v.* Parkhurst, 5 Johns., 128; Jackson *v.* McLeon, 12 Johns., 182; Livingston *v.* Tanner, 4 Kernan, 67.

[2] Rickhon *v.* Schanck, 43 N. Y., 448.

[3] 4 Kent's Com., 118; Jackson *v.* Farmer, 9 Wend., 201; Taylor *v.* Cole, 3 Term Rep., 292; Taunton *v.* Costar, 7 Term Rep., 431.

reinvested with their ordinary legal attributes of personal property, save by the acts of the party to whom such inheritance belongs; and on the sale of the realty pass with it to the vendee.[4]

54. Questions respecting the right to fixtures arise principally between three classes of persons:

1*st*. Between heir and executor or administrator; and in this class the rule obtains the most rigor in favor of the heir against the executor or administrator, even so much that a restraining statute has been enacted declaring that things annexed to the freehold, or to any building for the purpose of trade or manufacture, and not fixed into the wall of a house so as to be essential to its support, go to the executor or administrator as assets.[5] And the same rule applies equally as between vendor and vendee, and mortgagor and mortgagee.

2*d*. Between the executor or administrator of the tenant for life and the remainderman or reversioner; and in this the rule is more rigorously enforced in favor of the executor or administrator.

3*d*. Between landlord and tenant; and in this the rule favors the tenant, and this is especially the case, where the fixtures have been erected for the purpose of trade.

55. Thus the tenant may remove trees and shrubs, which he has planted for the purpose of sale, but not when they are planted for any other purpose; but he cannot remove his own erections for mere agricultural purposes, even though he leaves the premises

[4] Tomlin's Law Dict.

[5] 2 R. S., 83.

just precisely as he found them; as for instance a beast house, carpenter shop, or cart house.[6]

56. It has been held that the tenant may at any time remove from the premises things affixed by him to the building, for the convenience of his trade as coppers, etc., for distilling,[7] stoves, cooling coppers, mash-tubs, water tubs and blinds; a cider mill and press, erected at his own expense, and for his own use, though fixed to the soil, and these latter he was allowed to remove after the termination of his term.[8] So too he may remove matters of ornament, as ornamental marble, chimney pieces, pier glasses, hangings, wainscot fixed only by screws and the like.[9]

57. The right of the tenant to remove fixtures will depend somewhat upon the main purpose for which the premises are hired. A tenant who hires a large farm for agricultural purposes and erects thereon a small mill as a cider mill, stands in a different relation to his landlord, so far as the fixtures of the cider mill are concerned, from the tenant who hires a cider mill only, when the making of cider is the main business for which the premises are leased. The removal of fixtures in the latter case would be a much greater comparative injury to the freehold than the former. Engines and machinery, though firmly fixed to the building by the tenant for the carrying on business of a personal nature, are the personal property of the tenant and re-

[6] Lee *v.* Risdon, 7 Taunt., 188; Amo & Ferrard on Fix., 66.

[7] Reynolds *v.* Streeter, 5 Cow., 323; Colegrave *v.* Dias Santos, 1 Barn. & Cress., 77.

[8] Holmes *v.* Tremper, 20 Johns., 29; Mott *v.* Palmer, 1 Com., 570.

[9] Lee *v.* Risdon, 7 Taunt., 188.

movable by him. If destroyed by a third person, the tenant and not the owner of the freehold can maintain an action for damages.[1] And should the landlord sell the premises the tenant would hold them against the grantee.[2]

58. Gardeners and nurserymen may remove trees cultivated in the necessary course of their trade, while tenants of green houses and hot houses would be more restricted as to what they may remove.[3] Articles such as engines, pans, furnaces, boilers, etc., procured by a tenant for the purposes of his trade, and which he is authorized by the landlord to introduce into the premises, are trade fixtures and may be removed by the tenant though affixed to the land.[4] A brick chimney sunk three feet in the ground for a foundation and pierced the roof, and could not be removed without being taken down, together with the machinery put in for the purpose of trade, was held not fixtures but removable by the tenant.[5]

59. The tenant of a farm, let for agricultural purposes, would have no right to remove the manure resulting from the consumption of the crops on the farm, unless such removal was stipulated in the lease;[6] while the manure in a livery stable would belong to the tenant. A building called a shanty, with a chimney, door and windows, divided into rooms and occupied by a family, was held a part of the realty,

[1] Cook *v.* The Champlain Trans. Co., 1 Denio, 91.

[2] Raymond *v.* White, 7 Cow., 319.

[3] Penton *v.* Robart, 2 East, 90 ; Elwes *v.* Maw, 3 East, 56.

[4] Kelsey *v.* Durkee, 33 Barb., 410.

[5] Moore *v.* Wood, 12 Abb. Pr., 393.

[6] Middlebrook *v.* Corwin, 15 Wend., 171 ; Goodrich *v.* Jones, 2 Hill, 145.

and not a personal chattel, it not appearing that it merely rested on the soil, or that it was held upon terms giving the tenant liberty to remove it.[7]

60. Fences and trees on agricultural lands are real estate to the same extent as houses, barns and other structures on the land; but by the agreement of the parties may be treated as the personal property of the tenant, and not as a part of the soil.[8] Should the fixtures like fences, hop poles and the like, be removed temporarily it would not destroy their character as part of the realty.[9]

61. If the tenant intends to remove the fixtures he should do so during the continuance of the term; as the omission to do so would afford strong evidence of his intention to relinquish them to the owner of the soil, and after the termination of his term, his entry to remove them would constitute a trespass.[1] And when the tenant, having a right to remove fixtures, accepts a new lease, without the reservation of, or making claim to the buildings, his right of removal is lost, although his possession may have been continuous.[2]

Merger.

62. A term for years may be defeated by way of *merger*, when it meets another term immediately ex-

[7] Fisher *v.* Saffer, 1 E. D. Smith, 611.

[8] Mott *v.* Palmer, 1 Comst., 564; Herlakenden's Case, Part 4, Coke, 63 b.

[9] Goodrich *v.* Jones, 2 Hill, 142; Bishop *v.* Bishop, 1 Kern., 123; Walker *v.* Sherman, 20 Wend., 655.

[1] Poole's Case, 1 Salk., 368; *Ex parte* Quincy, 1 Atk., 477

[2] Loughlar *v.* Ross, 45 N. Y., 792.

pectant thereon. Whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be *merged*, that is, sunk or drowned in the greater. Thus if there be a tenant for years, and the reversion in fee-simple descends to, or is purchased by him, the term of years is merged in the inheritance and shall never exist any more. But they must come to one and the same person in one and the same right. If tenant for years dies, and makes him who has the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he has the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies.[3]

63. As a general rule equal estates will not merge in each other. The merger is produced either from the meeting of an estate of a higher degree with an estate of inferior degree, or from the meeting of the particular estate and the immediate reversion in the same person. When the purchaser of an estate in fee, subject to a rent charge, or subject to a term of years, afterwards purchases the rent charge or the term for years, the less estate will merge in the fee. Or should he purchase one-half of the rent charge or one-half the term for years it will merge *pro tanto*.[4] But when A. purchases an estate in fee subject to a term of years to B., and also subject to another term of years to C., which follows B.'s term, and purchases B.'s term, the two estates will not merge because the merger

[3] 4 Black. Com., 177.

[4] Lansing *v.* Pine, 4 Paige, 639.

is prevented by C.'s intermediate term. If A. be tenant for life, with remainder to B. for life with remainder to A. in fee: here the intermediate estate of B. prevents the union of the several estates in A. If B. conveys his life estate to A. the whole becomes one interest. A. is no longer a tenant for his own life or a tenant for B.'s life, but a tenant in fee.

64. When the two estates are successive, and not concurrent, there is no merger, as where A. has an estate for one hundred years, and B. an estate in remainder for fifty, and B. acquires A.'s estate he thereby becomes in effect tenant for one hundred and fifty years.

65. When the legal and equitable estates in land are coextensive and unite in the same person, the equitable is merged in the legal estate; as for example if the legal estate descend on the part of the father and the equitable estate on the part of the mother, the equitable estate is merged in the legal, and both go in the line of descent of the legal estate.[5] And this would be the same if the inheritance descends on the part of one parent, and a lien upon such inheritance comes to the same individual on the part of the other parent.

66. As *merger* is the annihilation of one estate in another by the conclusion of law, the law will not allow it to take place to the prejudice of creditors, infants, legatees, husbands or wives. If an inheritance burdened with a mortgage, or a lien of any kind, come to an infant by inheritance, gift or purchase, and

[5] Nicholson *v.* Halsey, 1 Johns. Ch., 417; Roberts *v.* Jackson, 1 Wend., 484; James *v.* Morey, 2 Cow., 246.

a lien upon the same inheritance should come to the same infant, they will not merge until the infant becomes of age so as to determine, by some act of his own, that it is his intention that the two estates should merge. The infant not being able to dispose of his real estate without the intervention of a court, cannot by any act of his or his guardian's change his personal into real estate, or his real into personal, as by so doing, on his decease before he becomes of age, he would change the inheritance. And the same rule applies to lunatics and persons not of sound mind.

67. A court of equity will interfere to prevent a merger, where such merger would be to the injury of creditors, infants, legatees, husbands or wives.[6] Where the owner of the equity of redemption pays off an existing mortgage and takes an assignment, he will not be allowed to keep the mortgage on foot to the prejudice of a *bona fide* purchaser under him. But the mortgage might be kept on foot for the benefit of an infant's estate.[7]

68. An estate may merge for one part of the land and continue in the remaining part, or it may merge in an undivided share and continue in the remainder.

69. In determining the circumstances of merger we must remember the gradation of estates, having reference to their quantity as well as their quality. With respect to quantity the highest is a fee simple,

[6] 4 Kent's Com., 101.

[7] Cooper *v.* Whitney, 3 Hill, 96 ; Matter of De Kay, 4 Paige, 403 ; Purdy *v.* Huntington, 42 N. Y., 334 ; James *v.* Morey, 2 Cow., 246 ; Gardner *v.* Astor, 3 Johns. Ch., 53 ; Starr *v.* Ellis, 6 Johns. Ch., 393.

which comprehends all other interests. Next in order are determinable fees, qualified fees, and conditional fees, and of these three no superiority can be given to one over the other, except where one of them is derived out of the other. Next follow estates for life, including

1*st.* Estate for the life of the party;

2*d.* For several lives;

3*d.* For the life of another person, and

4*th.* For the joint lives of several persons.

Next, estates for years, which are all of the same nature though differing in extent. Then other chattel interests and finally estates at will and sufferance.

Surrender.

70. Another incident of tenancy for years is that of *surrender.*

71. Surrender is the yielding up of an estate for life or years to him that hath the next immediate estate in reversion or remainder, whereby the lesser estate is drowned by mutual agreement. The under lessee cannot surrender to the original lessor, but he must surrender to his immediate lessor, or his executor or assignee. The surrender, if the remainder of the term is for more than one year, should be in writing, but the surrender may be implied in law; as where an estate, incompatible with the existing estate, is accepted; or the lessee takes a new lease of the same lands.[8] Leases for years cannot be surrendered

[8] Livingston *v.* Potts, 16 Johns., 28; Lawrence *v.* Brown, 1 Selden, 394; Murray *v.* Shave, 2 Duer, 182.

by merely cancelling the indenture,[9] as a parol surrender is of no validity, nor is evidence of such surrender competent.[1] Where a tenant quitted the premises during the term, and the landlord accepted the key stating that he received the key but not the premises, it was held not to be an acceptance.[2] But if the key was accepted without remark or objection it might operate as a surrender.[3] A surrender will not be implied or presumed if evidently against the intent of the parties and the rules of common sense.[4]

72. When the land is leased in fee there cannot be a surrender, because there is not any party having the reversion or remainder who can take.[5]

73. If the tenant who has leased to sub-tenants surrenders his lease and takes a new lease of the same premises from his landlord, such new lease shall be valid without surrender of the under leases derived from the surrendered lease, and the chief landlord, his lessee and the holders of the under leases shall enjoy all their rights and interests in the same manner and to the same extent as if the original lease had been continued; and the chief landlord has the same remedy for the rents and duties secured by such new lease, so far as the same do not exceed the rents and duties reserved in the original surrendered lease.[6]

[9] Allen *v.* Brown, 60 Barb., 39.
[1] Bailey *v.* Wells, 8 Wisc., 141.
[2] Townsend *v.* Albers, 3 E. D. Smith, 560.
[3] Dodd *v.* Acklom, 6 Mann. & Gr., 673.
[4] Van Rensselaer *v.* Penniman, 6 Wend., 569.
[5] Springstein *v.* Schermerhorn, 12 Johns., 357.
[6] 1 R. S., 744; Laws of 1846, ch. 274; Conkey *v.* Hart, 4 Kern., 22.

74. Where the landlord leases the premises to a third party with the consent of the tenant a surrender will be implied; but there must be an actual change of possession.[7] Where the tenant assigns his lease to a third party, and the landlord accepts rent from such third party and recognizes such third party as his own tenant, a surrender will be implied, or a release of the original tenant, from the performance of the condition agreed to be performed by him.[8]

75. *Extinguishment* is a term of general application to rights as well as estates. It is the annihilation of a collateral thing or subject, in the subject itself out of which it is derived. A rent or a common may be extinguished. It is sometimes confounded with merger. But *merger* is only a mode of extinguishment; and applies to estates only under particular circumstances.

76. *Suspension* is a partial extinguishment, or extinguishment for a time only.

77. *Remitter* is the act of the law which puts an end to the seisin under a wrongful or newly acquired title, and restores the rightful owner to the ancient seisin and better title. It proceeds on the ground that the possession is cast on an innocent person, who has an existing title to the possession; or that the fee or the freehold is cast on a person who has a right which is remediable, and who has done no act by which he is estopped to insist on his ancient title; and then when

[7] Murray *v.* Shave, 2 Duer, 183; Springstein *v.* Schermerhorn, 12 Johns., 357; Lawrence *v.* Brown, 1 Seld., 394; Schiffelin *v.* Carpenter, 15 Wend., 400; Van Rensselaer *v.* Penniman, 6 Wend., 569.

[8] Bailey *v.* Deleplaine, 1 Sandf., 5.

actual possession or lawful entry, or the immediate freehold devolves upon him by act of law, or is vested in him by act of parties, the law of itself restores the party to that estate to which he had a subsisting right of possession at the time when he entered; it supplies the place of an entry, when an entry is lawful; and of an action, when an action might be maintained. The remitter revives the seisin under the ancient title, in the favor of the person in whom the possession of the freehold becomes vested, under a defeasible estate. And the party is said to be in possession under the ancient title rather than under by virtue of the possession latterly acquired.[9]

[9] Preston on Merger, 12, 13.

CHAPTER VII.

ESTATES UPON CONDITION.

1. Estates upon condition.
2. How created.
3. Conditions in deed.
4. General or special.
5. Precedent or subsequent.
6. Precedent conditions.
7. Subsequent conditions.
8. Kind of conditions.
9. Subsequent not favored.
10. Entry avoids incumbrances.
11. Differs from a limitation.
12. Condition for whose benefit.
13. Conditional limitation.
14. Subsequent, construed strictly.
15. Forfeiture waived.
16. Tender of performance.
17. Mutual covenants.
18. Conditions in law.
19. How they arise.
20. Implied covenants.
21. Performance of precedent and subsequent.
22. When courts relieve.
23. Once waived.
24. When not sustained.
25. Restraining conditions.
26. What conditions valid.
27. May be conveyed.

1. Estates upon condition are such as have a qualification annexed to them, by which, upon the happening or not happening of some uncertain event, the estate may be either created or enlarged or defeated.[1]

2. They may be created by express words and are called conditions in deed, or they may arise by implication of law, and are called conditions in law.

[1] 4 Black. Com., 152; 4 Kent's Com., 121.

1. *Of conditions in deed.*

3. Conditions in deed should be distinctly set forth in the contract between the parties, and properly created by the words "upon condition"—"if it should so happen"—"provided always"—or "so that he the grantee pay, etc.," or the like. Other words may make a condition, and especially if there be added a conclusion with a clause of re-entry, or instead of such a clause, if they declare that the grantee or devisee does or does not do such an act, his estate shall cease or be void.[2]

4. A condition in deed is either general or special. The former puts an end altogether to the tenancy, on entry for breach of the condition; but the latter only authorizes the reversioner to enter upon the land, and take the profits to his own use, and hold the land by way of pledge until the condition be fulfilled.[3]

5. Conditions are either *precedent* or *subsequent.*

6. *A precedent* condition is one which must take place before the estate can vest or be enlarged. If an estate be limited to A. upon his marriage with B., the marriage is a precedent condition, and till that happens no estate is vested in A. Or if a man grant to his lessee for years, that upon payment of a hundred marks within the term he shall have the fee, this also is a condition precedent, and the fee simple passeth not till the hundred marks be paid.[4] Precedent con-

[2] Co. Litt., 201 a.

[3] Co. Litt., § 325, 327; Co. Litt., 203 a; 4 Kent's Com., 124.

[4] 2 Black. Com., 154.

ditions must be literally performed, and a court of equity will never vest an estate, when by reason of a condition precedent, it will not vest in law. It cannot relieve from the consequences of a condition precedent unperformed.[5]

7. *Subsequent* conditions are those which operate upon estates already created and vested, or which do not prevent the vesting of the estate, but may enlarge or defeat them after they have been created. No precise words are required to make a stipulation a condition precedent or subsequent, neither does it depend in what part of the deed the condition is inserted, so that it operates as a proviso or a covenant; for the same words have been construed to operate as either the one or the other, according to the intention of the parties and the nature of the transaction.[6] The precedency of the conditions depends on the order of time in which the intent of the transaction requires performance. And the rules of construction for finding the intent of the parties are the same as those in regard to covenants.[7]

8. A grant to one so long as she remains a widow, is a good condition and takes effect upon her marriage. A condition annexed to a conveyance in fee, that the grantee shall pay the grantor or his heirs an annual rent, and in default the grantor or his heir may enter, is a good condition.[8]

[5] Harvey *v.* Aston, 1 Atk., 361 ; Reynish *v.* Martin, 3 Atk., 330 ; Wells *v.* Smith, 2 Edw. Ch., 78.

[6] Parmelee *v.* Oswego & Syracuse R. R. Co., 2 Seld., 80.

[7] Nicoll *v.* N. Y. & Erie R. R. Co., 2 Kernan, 121.

[8] Van Rensselaer *v.* Ball 19 N. Y. 100.

9. Conditions subsequent are not favored in law, because they tend to destroy estates, and are therefore construed strictly. Conditions can be reserved for the benefit of the grantor and his heirs and assigns only, and a stranger cannot take advantage of the breach of them.[9] There must be an actual entry for the breach of the condition, or an action in the nature of ejectment for a breach of non-payment of rent.[1]

10. One who enters for a condition broken becomes seised of his first estate, and he avoids all intermediate charges and incumbrances.[2]

11. A condition differs from a limitation. The limitation marks the period which is to determine the estate, but the words of condition render the estate liable to be defeated in the intermediate time, if the event expressed in the condition happens before the determination of the estate. The one specifies the utmost time of continuance, and the other marks some event, which, if it takes place, will defeat the estate. The difference between a condition and a limitation is mainly in this, a condition does not defeat the estate until entry by the grantor or his heirs, when the grantor is in of his former estate; while the happening of the circumstance upon which the limitation depends determines the estate, without entry or claim.

12. Conditions can be reserved for the benefit only of the grantor and his heirs.[2] A stranger cannot take

[9] Garrett *v.* Scouten, 3 Denio, 334; Ludlow *v.* New York & Harlem R. R. Co., 12 Barb., 440.

[1] 2 R. S., 505.

[2] Garrett *v.* Scouten, 3 Denio, 334; Ludlow *v.* N. Y. & Harlem R. R. Co., 12 Barb., 440.

advantage of the breach of the conditions.[3] But he may compel any enforcement of the conditions, where he has purchased real estate on the faith that the conditions will be performed. As where an owner of land divided it into several parcels, which he sold, from time to time, to different persons, inserting conditions in each deed making void the conveyance if certain trades should be permitted on the premises: *held*, that one of the grantees, though unable to sue at law for the condition broken, might through a court of equity, enforce against another grantee the observance of the conditions.[4]

13. A *conditional limitation* is of a mixed nature, and partakes of a condition and of a limitation; as if an estate be limited to A. for life, provided that when C. returns from Rome, it shall thenceforth remain to the use of B. in fee; it partakes of the nature of a condition, inasmuch as it defeats the previous estate; and is so far a limitation, and to be distinguished from a condition, that upon the contingency taking place the estate passes to the stranger without entry, contrary to the ordinary principle of law, that a stranger cannot take advantage of a condition broken.[5]

14. Conditions subsequent not being favored in law are construed strictly, because they tend to destroy estates. And although the courts cannot control the lawful contracts of parties or the law of the land,[6]

[3] Ives *v.* Van Auker, 34 Barb., 566.

[4] Barrow *v.* Richard, 8 Paige, 351; Bleeker *v.* Bingham, 3 Paige, 246.

[5] 2 Kent's Com., 127.

[6] Martin *v.* Ballow, 13 Barb., 119.

they will give such an interpretation to them as is in accordance with equity and good conscience, and will not so construe a contract as to enable the lessee to put an end to it at pleasure by his own improper conduct.[7] Where the condition is possible at the time of making it, and afterward it becomes impossible of performance, either by the act of God, or of the law, or of the grantor; or if it be impossible at the time of making it, or against law, the estate of a grantee being once vested, is not thereby divested but becomes absolute.[8] For the estate, which by the grant has been vested in him, shall not be defeated afterwards by a condition either impossible, illegal, or repugnant.[9] But if the condition be precedent, or to be performed before the estate vests, as a grant to a man that, if he kills another, or goes to Rome in a day, he shall have an estate in fee; here the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant, for he hath no estate until the condition be performed.[1]

15. The forfeiture may be waived when the condition has been broken, if the party who has the right to avail himself of the same waives this right, which he may do by acts as well as by an express agreement. If the condition in the lease be that the lessee shall not assign, and he does assign, and the landlord accepts rent from the assignee; or if he failed to pay an annuity on a particular day and the annuity was

[7] Clark *v.* Jones, 1 Denio, 516.

[8] 2 Black. Com., 156; McLachlan *v.* McLachlan, 9 Paige, 534.

[9] Co. Litt., 206.

[1] 4 Black. Com., 157; Wells v. Smith, 2 Edw. Ch., 78.

accepted afterwards, the forfeiture would be waived.[2] Where there is a right of re-entry reserved on the non-payment of rent, and the landlord sues for and recovers the rent, he waives the forfeiture; or if he voluntarily accepts the rent,[3] and especially if he accepts rent which comes due after the breach.[4] Where the condition is to be performed by a particular day, and the grantor allows the grantee to go on and fulfil the condition afterwards, he waives the breach of the condition.[5] A grant was made to a company on condition that the company erect on the estate a *bloomary* by a certain time, and the grantor afterwards waived that and gave the company permission to erect a *blast furnace*, and extended the time for its erection. It was held that a failure to erect a furnace within the extended time was no ground of forfeiture.[6] Where a lease was given to three lessees conditioned that they or their assigns should not alien, without license, a license given to one of the three lessees, dispenses with the condition as to all, as the condition being entire it cannot be divided or apportioned.

16. A tender of performance on the day and at the place will save a condition, and if it is refused the land may be discharged from the lien as in the tender of payment of a mortgage, though the debt may remain as a personal claim.[7]

17. Where the covenants in an instrument on both

[2] Jackson *v.* Crysler, 1 Johns. Cas., 126.
[3] Jackson *v.* Crysler, 1 Johns. Cas., 126.
[4] Hunter *v.* Osterhoudt, 11 Barb., 33.
[5] Ludlow *v.* N. Y. & Harlem R. R. Co., 12 Barb., 440.
[6] Sharon Iron Co. *v.* City of Erie, 41 Penn. St., 349.
[7] Kortright *v.* Cady, 21 N. Y., 343.

sides go to the whole consideration they are held to be mutual conditions, the one precedent of the other; but if the covenants go to only a part of the consideration, the remedy is by damages, and the covenant is held not a condition precedent.[8] For the purpose of sustaining the agreement, the courts are inclined to hold a clause a covenant rather than a condition; and the dependence or independence of covenants is determined by the order of time of their performance.[9]

2. *Of conditions in law.*

18. Estates upon condition in law are such as have not any conditions specified in the deed, but have conditions impliedly annexed to them.[1]

19. The most frequent cases of implied conditions arise in grants by the government, of franchises to corporations. It is a tacit condition of a grant of incorporation, that the grantees shall act up to the end or design for which they were incorporated.[2] The mere omission by a corporation to exercise its powers does not of itself, work a forfeiture of its charter; but there must be something wrong arising from wilful abuse or improper neglect, something more than accidental negligence, excess of power, or mistake in the mode of exercising the power.[3] Even these negligent and wilful acts do not produce the dissolution; that

[8] McCullough *v.* Cox, 6 Barb., 387; Boone *v.* Eyre, 1 H. Black., 254.

[9] Grant *v.* Johnson, 1 Seld., 247.

[1] Co. Litt., 201 a.

[2] People *v.* Utica Fire Ins. Co., 15 Johns., 382; The N. Y. Fire Ins. Co. *v.* Ely, 2 Cowen, 709; The People *v.* Manhattan Co., 9 Wend., 384.

[3] The People *v.* Kingston, etc., Turnp. Co., 23 Wend., 193; People *v.* Hillsdale & C. T. R., 23 Wend., 254.

is produced by the judgment of the appropriate tribunal in a regular judicial proceeding in which the people are a party. The forfeiture cannot be taken advantage of collaterally, or incidentally, but only in the mode prescribed by the statute, and on application made on behalf of the government to have the charter adjudged forfeited.[4]

20. Some of the implied covenants in leases are that the tenant shall not commit waste and shall manage the premises in a husbandlike manner, or not do any act prejudicial to the interests of the landlord or the reversion.

21. With regard to the performance of a compliance with conditions, there is a manifest difference between conditions precedent and conditions subsequent, as to what will excuse from performance. A precedent condition must be performed before the estate will vest: and if the performance becomes impossible by the act of God the estate cannot vest.[5]

22. As to subsequent conditions, the courts will relieve parties if possible against the result of non-performance, especially when it is the result of accident or omission: but they will not relieve against acts of commission directly in the face of the instrument,[6] and will relieve only in such cases as where compensation can be awarded in damages.[7]

[4] Bank of Niagara *v.* Johnson, 9 Wend., 645; People *v.* Manhattan Co., 9 Wend., 351; Nicoll *v.* N. Y. & Erie R. R., 2 Kern., 121.

[5] Taylor *v.* Bullen, 6 Cowen, 627; Van Horne *v.* Dorrance, 2 Dall., 317.

[6] Newkirk *v.* Newkirk, 2 Caines, 345; De Peyster *v.* Michael, 2 Seld., 468; Jackson *v.* Delancy, 13 Johns., 537; Jackson *v.* Robins, 16 Johns., 537.

[7] Hill *v.* Barclay, 18 Vesey Jr., 56; Schermerhorn *v.* Negus, 1 Denio, 450.

23. If the forfeiture is once waived, it cannot afterward be reclaimed.[8]

24. Conditions are not sustained when they are repugnant to the nature of the estate granted, or infringe upon the essential enjoyment and independent rights of property, and tend manifestly to public inconvenience.[9] A general condition in restraint of marriage is not good, excepting with respect to the testator's widow.[1] It is not good when attached to the estate of a daughter.[2] So too a bequest to a daughter, with a proviso that if she attempted to sell or dispose of it, it should be void, the restriction was held to be void.[3]

25. A condition restraining a tenant for years in subletting or selling or assigning his estate may be good while the same condition in leases in fee or in perpetuity will be void.[4] A devise of all my right in certain real estate to my children in case the same continue to inhabit the town of H., otherwise not, passes the fee and the condition is void as repugnant to the grant.[5] A devise to three children on condition not to sell or convey to any one except to some of the devisees vests an estate in fee and the condition is void.[6]

26. The following limitations, or conditions, on fees have been held valid in this State. On condition that

[8] Chalker *v.* Chalker, 1 Conn., 79.

[9] 4 Kent's Com., 131.

[1] Lloyd *v.* Lloyd, 10 Eng. Land. Eq., 132.

[2] William *v.* Conden, 13 Missouri, 211.

[3] Newton *v.* Reid, 4 Sim., 141.

[4] Jackson *v.* Schultz, 18 Johns., 174; Jackson *v.* Groat, 7 Cowen, 285; Livingston *v.* Stickles, 8 Paige, 398; De Peyster *v.* Michael, 6 N. Y., 467.

[5] Newkirk *v.* Newkirk, 2 Caines' Rep., 345.

[6] Schermerhorn *v.* Negus, 1 Denio, 448.

the grantee, his heirs and assigns, shall not at any time manufacture or sell intoxicating liquors, etc., on the premises:[7] that the grantee should support the grantors:[8] not to build on the land under penalty of forfeiture:[9] to a public corporation of land to be appropriated and used for a public square:[1] on a condition to build and maintain a certain dam:[2] to erect salt works:[3] a devise to a person until Gloversville shall be incorporated as a village.[4]

27. All conditional estates are capable of being transferred in the same manner as estates in fee simple absolute.[5]

[7] Plumb *v.* Tubbs, 41 N. Y., 442.

[8] Spaulding *v.* Hallenbeck, 35 N. Y., 204.

[9] Gibert *v.* Peteler, 38 N. Y., 165.

[1] Stuyvesant *v.* Mayor of N. Y., 11 Paige, 415; Mayor *v.* Stuyvesant, 17 N. Y., 34.

[2] Underhill *v.* S. & W. R. R. Co., 20 Barb., 455.

[3] Parmelee *v.* O. & S. R. R. Co., 2 Seld., 74.

[4] Leonard *v.* Burr, 18 N. Y., 96.

[5] Grout *v.* Townsend, 2 Denio, 336; Mayor *v.* Stuyvesant, 17 N. Y., 34; 4 Kent's Com., 10.

CHAPTER VIII.

ESTATES IN EXPECTANCY.

1. Estates as to time of enjoyment.
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3. Estates in expectancy.
4. Future estates.
5. Remainders.
6. Reversions.
7. Future estates are vested or contingent.
8. Vested estates.
9. Contingent estates of two kinds.
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47. Power to sell with consent of two is void if only one consent.
48. A devise to three for life remainder in fee.
49. Devise to executors to accumulate for three years void.
50. An annuity to two, remainder to heirs, with restraint as to division, restraint void.
51. Term of years, to three persons, remainder in fee with power of sale.
52. Devise to H. in fee if he has children, if not then to others, an executory devise.

1. Estates when considered with respect to the time of their enjoyment are divided into

1*st.* Estates in possession; and

2*d.* Estates in expectancy.[1]

Estates in expectancy are divided into

1*st.* Estates commencing at a future day; and

2*d.* Reversions.[2]

2. An estate in possession is where the owner has an immediate right to the possession of the land; it is sometimes called an estate *executed* whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates *executory*.[3] In this sense it applies to vested estates as distinguished from such as are contingent.

[1] 1 R. S., 722.
[2] 1 R. S., 723.
[3] 4 Black. Com., 163.

3. An estate in expectancy is where the right to the possession is postponed to a future period.[4]

4. 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.[5]

5. 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.[6]

6. 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.[7] Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over.[8] The fee simple of all lands must abide somewhere, and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never therefore created by deed or writing, but arises from a construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferrible, when actually vested, being both estates *in praesenti*, though taking effect *in futuro*.[9] Like all other expectant estates a reversion is descendible, de-

[4] Tracy et al. *v.* Ames et al., 4 Lans., 505.
[5] 1 R. S., 723.
[6] 1 R. S., 723.
[7] 1 R. S., 723.
[8] 1 Inst., 142.
[9] 2 Black. Com., 175.

visable and alienable, in the same manner as estates in possession.[1]

7. Future estates are 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.[2]

8. Thus a grant to A. for life, and after his decease to his heirs and assigns forever, gives to the children of A. a vested interest in the land; although liable to open and let in after born children of A., and also liable, in respect of the interest of any child to be wholly defeated by his death before his father. The interests of the children are alienable during the life of A., who is a mere tenant for life, and pass by deed or mortgage subject to open by birth of another child, or be defeated as to each child by his death before his father.[3] Where a testator devised to his wife and daughter, each, the equal one-half part of his estate, share and share alike, subject to the restriction that each devisee was vested with a power of testamentary disposition, unaffected by any trust or limitation; but in case of the death, intestate and without issue, of either devisee, whatever might remain of the said property, was devised to the survivor, it was held that each devisee might, during her lifetime, dispose

[1] 1 R. S., 725; Nicoll v. N. Y. & E. R. R. Co., 2 Kern., 133.

[2] 1 R. S., 723, § 13.

[3] Moore *v.* Littel, 41 N. Y., 66; Mead *v.* Mitchell, 17 N. Y., 210.

of the entire fee of the estate devised to her for her own benefit: and the devisees having united in a conveyance to a purchaser with covenants of warranty such conveyance passed all the title of the grantor either vested or contingent, any executions of the power of testamentary disposition after the conveyance could not affect the estate conveyed.[4]

9. The statute recognizes the two general contingencies upon which contingent estates depend. The first is where they are limited to a dubious or uncertain person; and second is where the event upon which it is to take effect is vague and uncertain. Where a grant or devise is to A. for life, with remainder to B.'s eldest son (then unborn), this is a contingent remainder of the first kind, for it is uncertain whether B. will have a son born or no: but the instant that a son is born, the remainder is no longer contingent but vested. Should B. die without issue the remainder would be absolutely gone, and the remainder, unless otherwise disposed of by the grant or devise, would descend to the heir at law. But where the grant or devise is to A. for life, remainder to B. in fee if he survives A., this is a contingent remainder of the second kind, because it depends upon the event whether B. survives A. During the joint lives of A. and B. it is contingent: and if B. dies first it can never vest in his heirs but is forever gone. But if A. dies first, the remainder to B. becomes vested. If the grant or devise were to B. and his heirs then the contingency would be of the first

[4] Freeborn *v.* Wagner, 49 Barb., 43.

kind as during the life of A. it would be uncertain which would take, B. or his heirs.

10. Previous to the adoption of the Revised Statutes, there was no restraint placed upon the number of conditions and contingencies upon which future estates might depend. Hence there grew up a system of creating future estates, contingent remainders, cross-remainders and the like, which was not only intricate and uncertain, but was effectual in the tying up of estates and hindering the power of alienation to such an extent as to be injurious to the ready sale and conveyance of real estate.

11. To remedy these evils and adapt the law of real property to the spirit and genius of our institutions a limitation was placed upon many of the conditions and contingencies which prevailed before that time. The object of the statute being to so adapt the law of real property that no portion of the title to any land should be in abeyance for any great length of time: or so situated that it could not be aliened or conveyed. Those provisions are as follows:

12. 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 that ;[5]

13. 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

[5] 1 R. S., 723, § 15.

upon any other contingency by which the estate of such persons may be determined before they attain their full age.[6]

14. Successive estates for life shall not be limited unless to persons in being at the creation thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto shall be void, and upon the death of those persons the remainder shall take effect in the same manner as if no other life estates had been created.[7]

15. No remainder shall be created upon an estate for the life of any other person or persons than the grantee or devisee of such estate, unless such remainder be in fee; nor shall a remainder be created upon such an estate in a term for years unless it be for the whole residue of such term.[8]

16. When a remainder shall be created upon any such life estate, and more than two persons shall be named, as the persons during whose lives the life estate shall continue, the remainder shall take effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced.[9]

17. 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

[6] 1 R. S., 724, § 16; Manice *v.* Manice, 43 N. Y., 304, 374.
[7] 1 R. S., 723, § 17.
[8] 1 R. S., 724, § 18.
[9] 1 R. S., 724, § 19.

than two lives in being at the creation of such remainder,[1] or upon the termination thereof.

18. 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.[2]

19. 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.[3]

20. All the provisions in this chapter mentioned, relative to future estates, shall be construed to apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years, shall not be suspended for a longer period than the absolute power of alienation can be suspended, in respect to a fee.[4]

21. Subject to the rules established in the preceding sections of this chapter, 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,

[1] 1 R. S., 724, § 20.
[2] 1 R. S., 724, § 21.
[3] 1 R. S., 724, § 2.
[4] Id., § 23.

must happen within the period mentioned in this chapter.[5]

22. Two or more future estates may also be created to take effect in the alternative, so that if the first in order shall fail to vest, the next in succession shall be substituted for it, and take effect accordingly.

23. No future estate, otherwise valid,[6] shall be void on the ground of the probability or improbability of the contingency on which it is limited to take effect.[7]

24. A remainder may be limited on a contingency, which in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder shall be construed a conditional limitation; and shall have the same effect as such a limitation would have by law.[8]

25. 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.[9]

26. When a remainder or an estate for life, or for years, shall not be limited on a contingency defeating or avoiding such precedent estate, it shall be construed as intended to take effect, only on the death of the first

[5] 1 R. S., 724, § 24.
[6] Id., 25.
[7] Id., 26.
[8] 1 R. S., 725, § 27.
[9] Id., § 28.

taker, or the expiration, by lapse of time, of such term of years.[1]

27. When a future estate shall be limited to heirs or issue, or children, posthumous children shall be entitled to take, in the same manner as if living at the death of their parent.[2]

28. A future estate depending on the contingency of the death of any person without heirs or issue, or children, shall be defeated by the birth of a posthumous child of such person, capable of taking by descent.[3]

29. No expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseisin, forfeiture, surrender, merger or otherwise.[4]

30. 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.[5]

31. No remainder, valid in its creation, shall be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder is limited to take effect; but should such

[1] 1 R. S,, 725, § 29.
[2] Id., § 30.
[3] Id., § 31.
[4] Id., § 32.
[5] 1 R. S., 725, § 33.

contingency afterwards happen, the remainder shall take effect, in the same manner and to the same extent, as if the precedent estate had continued to the same period.[6]

32. Expectant estates are descendible, devisable and alienable, in the same manner as estates in possession.[7]

33. Disposition of the rents and profits of lands, to accrue and be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules as laid down in this chapter in relation to future estates in lands.[8]

34. 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*st.* 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*d.* 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 chapter mentioned 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.[9]

[6] 1 R. S., 725, § 34.

[7] Id., § 35; Savage *v.* Pike, 45 Barb., 464.

[8] 1 R. S., 725, § 36.

[9] 1 R. S., 726, § 37; Manice *v.* Manice, 43 N. Y., 305.

35. If in either of the cases mentioned for the accumulation for infants, 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 the real estate, except such as are herein mentioned, shall be void.[1] Accumulations may be directed for a posthumous child.[2]

36. Where such rents and profits are directed to be accumulated for the benefit of infants entitled to the expectant estate, and such infants shall be destitute of other sufficient means of support and education; the Supreme Court, upon the application of their guardian, may direct a suitable sum out of such rents and profits to be applied to their maintenance and education.[3]

37. When in consequence of a valid limitation of an expectant estate there shall be a suspense of the power of alienation, or of the ownership, during the continuance of which the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate.[4]

38. The delivery of the grant, when an expectant estate is created by a grant, and when it is created by devise, the death of the testator shall be deemed

[1] 1 R. S., 726, § 38; Robison *v.* Robison, 5 Lans., 165.

[2] Manice *v.* Manice, 43 N. Y., 305.

[3] 1 R. S., 726, § 39.

[4] 1 R. S., 726, § 40; Robison *v.* Robison, 5 Lans., 165; Haxtun *v.* Corse, 2 Barb. Ch., 518; Schettler *v.* Smith, 41 N. Y., 340.

the time of the creation of the estate.[5] All expectant estates, except such as are enumerated and defined in this chapter, are abolished.[6]

39. Every future estate is void in its creation which suspends the power of alienation for a longer period than above mentioned. Such power of alienation is suspended when there are no persons in being, by whom an absolute fee in possession can be conveyed.[7]

40. A testator devised certain real estate to his wife for life, and after her death, in case his daughter Elizabeth, his only child, should die without having married or without leaving any child or children, one parcel to his nephew William, and the other to his nephew Henry. The daughter survived the mother, but afterwards died without issue; it was held that by the will, the nephews took contingent remainders in fee, which would take effect only in case the daughter died childless during the life of the widow; that the daughter in the meantime took the fee by descent; and on her surviving the widow, that the remainders fell and she became entitled to the premises absolutely.[8]

41. Where a testator devised certain real estate to trustees in fee, for and during the life of his grandson Matthias, the eldest son of the testator's son Dick, to permit and suffer his grandson Matthias to receive the rents and profits for his own use during his natural life, and from and after his decease, he devised the same to the first son of the body of the said Matthias, and to

[5] 1 R. S., 726, § 41.
[6] 1 R. S., 726, § 42.
[7] 1 R. S., 723, § 14.
[8] Wolfe *v.* Van Nostrand, 2 Com., 436.

the heirs male of the body of such son, and in default of such issue, then to the second, third and every other son of said Matthias. Matthias had a son Dick who died intestate, unmarried, and before his father. The grandson Matthias had other sons younger than Dick who survived Matthias. It was held that Dick M., although dying in the lifetime of his father, took a vested remainder in fee simple, which upon his death descended to his father, who conveyed the property, thus defeating the estate claimed by the younger sons of Matthias.[9]

42. Where a limitation is made to take effect in two alternative events, one of which is too remote, and the other valid as within the prescribed limits, although such limitation is void, so far as it depends on the remote event, it will be allowed to take effect on the happening of the alternative one.[1]

43. 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.[2]

44. Infants unborn are not seised, hence courts cannot sell their interests, because such interests do not exist, they can sell only interests existing. If a child should be born, it will be vested with the interest in the estate formerly held by his co-heirs.[3]

[9] Vanderheyden *v.* Crandall, 2 Denio, 9; Wendell *v.* Crandall, 1 Com., 291.

[1] Schettler *v.* Smith, 41 N. Y., 328; Burrill *v.* Boardman, 43 N. Y., 254.

[2] Harrison *v.* Harrison, 36 N. Y., 543; Norris *v.* Beyea, 3 Kern., 273; Gilman *v.* Reddington, 24 N. Y., 9.

[3] Bowman *v.* Tallman 27 How., 213.

45. A trust to receive the rents and profits or income of property, and to accumulate the same for the benefit of an infant who is not in esse at the creation of the trust, must, in order to be valid, be so limited that the accumulation will commence and terminate within the compass of some two lives in being at the creation of the trust. A future estate or interest in property may be valid if it is so limited as to vest in interest so as to be alienable, at the termination of two lives in being at the time of the creation thereof, although it will not vest in possession immediately upon the termination of two such lives.[4]

46. Upon a devise to A. for fifty years, remainder to B. for life if he should marry C., and remainder in fee to the children of such marriage. The remainder to B. is contingent upon his marriage with C., but must vest in interest, if ever, during the period of his own life, although it will never vest in possession if he dies within the term. The ultimate remainder in fee to the children of the marriage must vest in interest, if ever, within the period of one life in being at the death of the testator. The first child of the marriage would, upon its birth, take a vested interest in the ultimate remainder in fee, subject to open and let in after-born children. And it would be no objection to the validity of the contingent remainder, that a child might not be born in the lifetime of the father, although begotten before his death, and it might be brought into existence by the Cæsarian operation after the death of the mother.[5]

[4] Gott *v.* Cook, 7 Paige, 523.

[5] Hawley *v.* James, 5 Paige, 464. See Marsellis *v.* Thalhimer, 2 Paige, 35; Mason *v.* Jones, 2 Barb., 231.

47. When 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; it was held that no title passed by virtue of the power.[6]

48. A testator devised his lands to his sons George and Joseph and his housekeeper Jane for their use during their natural lives, and after their decease to the heirs of John Bill. Bill died in the lifetime of the testator; it was held that George, Joseph and Jane took estates for life as tenants in common, and that the heirs of Bill took a contingent remainder in fee vesting in interest on the death of the testator, and vesting in possession as to an undivided third on the death of each of the life tenants.[7]

49. A devise to executors as trustees, for the term of three years to accumulate the rents and profits, and at the expiration of three years to apply the same towards the erection of a statue of Washington, and if found inadequate for that, then to be distributed among three charitable institutions; it was held that the gift was void, it not being dependent upon two lives in being at the death of the testator.[8]

50. A testator gave to his two daughters an annuity of twelve thousand dollars during their lives; he gave to one granddaughter one-fourth of all his real estate and the remaining three-fourths to be divided among

[6] Barber *v.* Cary, 11 N. Y., 397.

[7] Campbell *v.* Rawden, 18 N. Y., 412.

[8] Morgan *v.* Masterson, 4 Sand., 442.

nine other granddaughters, but that no division should be made until after the death of his daughters; it was held that the estate vested on the death of the testator, subject to the payment of annuities and that the restriction as to the division was inoperative and void.[9]

51. A testator devised to his wife and two youngest children the use of his farm until June 29th, 1890, and directed his executors, within two years from that date, to sell the farm and divide the proceeds among certain persons named in the will; it was held that the widow and children took an estate for years in the farm and that the remainder therein vested in the residuary devisees named in the will, subject to the execution of the power of sale, and that a conveyance from them and the devisees of the term would pass the whole estate.[1]

52. A. devised to his son H. all his real estate in the town of C., in fee, provided that if said H. shall die without child or children, then the real estate shall be divided equally among all his grandchildren; it was held that the limitation over was good by way of executory devise, and that on the death of H., without child or children, the grandchildren took the real estate by virtue of such executory devise.[2]

[9] Lovett *v.* Gillender, 35 N. Y., 617.

[1] Blanchard *v.* Blanchard, 4 Hun, 287.

[2] Sherman *v.* Sherman, 3 Barb., 385.

CHAPTER IX.

JOINT ESTATES IN LAND.

1. Estates as to ownership, how divided.
2. Estates in severalty.
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39. Land held by partners.
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1. Estates as to their ownership are divided into those held in

1*st.* Severalty;

2*d.* In joint tenancy; and

3*d.* Tenancy in common.

1. *Severalty.*

2. He that holds lands in severalty, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein.[1]

2. *Joint tenancy.*

3. An estate in *joint tenancy* is where lands or tenements are granted to two or more persons, to hold in fee simple, for life, for years, or at will.

4. The creation of the estate in joint tenancy depends on the wording of the deed or devise, by which tenants claim title, for this estate can only arise by purchase, grant or devise, that is, by the act of the parties, and never by mere act of the law.

5. The properties of a joint estate are derived from its unity, which is fourfold: the unity of interest, the unity of title, the unity of time and unity of possession.

[1] 2 Black. Com., 179.

6. The joint tenants must have one and the same interest. One joint tenant cannot be entitled to one period of duration, or quantity of interest in lands, and the other to a different; one cannot be a tenant in fee, and another tenant for life, or tenant for years..

7. Joint tenants must also have a unity of title; their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant or by one and the same disseisin. Joint tenancy cannot arise by descent or act of law; but merely by purchase, or acquisition by the act of the party; and unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure.

8. There must also be a unity of time; their estates must be vested at one and the same period, as well as by one and the same title. Hence where lands were granted to A. and B. to hold as joint tenants, conditioned that upon the death of A., his moiety or share should go to his heirs, and also conditioned that upon the death of B., his share or moiety should go to his heirs, then A. and B. would hold as joint tenants, while the respective heirs of A. and B. would hold as tenants in common for one moiety or share vested in the heirs of one at one time, and the other moiety vested in the heirs of the other at another time.

9. There must be unity of possession. Each of them has the entire possession, as well of every parcel as of the whole. They have not, one of them a seisin of one part or moiety, and the other of the other part or

moiety; neither can one be exclusively seised of one acre, and his companion of the other; but each has an undivided part of the whole, and not the whole of an undivided part.

10. Upon these principles, or upon a thorough and intimate union of interest and possession, arise the following incidents to the joint tenants' estate. If two joints tenants let their land by verbal lease, reserving rent to be paid to one of them, it will enure to both; and if the lessee surrenders his use to one it enures to both, because of the privity or relation of their estate. Entry or re-entry made by one joint tenant is as effectual as if it were the act of both. In all actions relating to the joint property, one joint tenant cannot sue or be sued without joining the other. One joint tenant cannot have an action against another for trespass in respect to his land, for each has a right to enter on any part of it.[2]

11. If one joint tenant purchases in an adverse title to the joint estate, or acquires an older legal title, it will enure to the benefit of his co-tenants, if they contribute towards the expense of the same. But one co-tenant may purchase and take the assignment of an outstanding mortgage upon the common property and hold it against his co-tenant.[3]

12. One joint tenant cannot create a charge upon his co-tenant's share, like a rent or a right of way, so as to affect the property as against his co-tenant, if the co-tenant survives him.

[2] 2 Black. Com., 183.

[3] Blodgett *v.* Hildreth, 8 Allen, 188.

13. The remaining grand incident of joint tenancy and which makes it to differ most from tenancy in common is the doctrine of survivorship; by which when two or more persons are seised of a joint estate, the entire tenancy upon the death of any of them remains to the survivors, and at length to the last survivor, who has the whole estate, whatever it be, to hold, enjoy and dispose of the same, in severalty, free from any liens, charge or incumbrances created by the others on their interests. Hence a joint tenant cannot devise his interest, because each has only a life estate, and a contingent remainder depending upon his surviving all his co-tenants, and there is nothing upon which a tenancy in dower or curtesy can attach.

14. The joint tenancy may be destroyed either by an actual partition of the property, or by their dividing the property and holding it in severalty; or by one releasing to the other, or by selling his portion to a stranger, or by leasing his share for his own life.

15. If A., B. and C. are joint tenants, holding each one-third, and A. should convey to B., then B. would hold one-third as a joint tenant and one-third as a tenant in common, and C. would hold his third as a joint tenant. And if A. should sell his share to B. and C., then each would hold one-third as joint tenant, and they would hold the remainder as tenants in common.

16. The policy of our law is opposed to the doctrine of survivorship, as it makes no provision for the heirs of a portion of the joint tenants, and as early as 1782 and 1786, estates by joint tenancy were abol-

ished, except in the case of executors and trustees, or unless the estate was expressly declared in the will or deed to pass in joint tenancy.[4] But these statutes did not destroy the doctrine of joint tenancy as between husband and wife, and it remained in force till 1860, when the statute provided that a married woman might take by purchase or devise in the same manner as if she were a feme sole.[5]

17. Previous to 1860 in this respect, a married woman and her husband constituted but one person in law; and where land was conveyed or devised to them together they did not take by moieties; both were seised of the *entirety*, and not as joint tenants or tenants in common, and the survivor took the whole; and the deed of one without the other, if living, was inoperative.[6] If a grant were made to a husband and wife and a third person, the husband and wife had only one moiety, and the third person the other.[7] And on the death of the husband or wife, the surviving wife or husband took the moiety which had previously belonged to them jointly.

18. An alien husband would take by survivorship lands conveyed jointly to him and his wife, subject to being dispossessed by the people.[8]

19. When the estate so held by the husband and wife, as an *entirety*, was sold by the husband and wife,

[4] 1 R. S., 727.

[5] Laws of 1860, ch. 90.

[6] Doe *v.* Howland, 8 Cow., 277; Torrey *v.* Torrey, 14 N. Y., 430; Barber *v.* Harris, 15 Wend., 615; Jackson *v.* Stevens, 16 Johns., 510; Jackson *v.* McConell, 19 Wend., 175.

[7] Barber *v.* Harris, 15 Wend., 615.

[8] Wright *v.* Saddler, 20 N. Y., 320.

and converted into money, the proceeds belonged to the husband exclusively, by virtue of his marital rights.[9]

20. Executors and trustees are said to hold the estate as joint tenants, and not as tenants in common. The estate held by executors and trustees differs from the estate held by joint tenants in this, that in the former case the estate is one and indivisible; they cannot denude themselves of their character as trustees, they cannot divide the estate among themselves to be managed or disposed of, and if it becomes necessary to alien the whole or any portion of the estate they must all join in the conveyance; and although one of the executors or trustees should die, such death would not affect the estate, it would only decrease the number of the managers, and the survivors would manage the estate in the same manner as if all the executors or trustees were living. While in a joint tenancy, the death of one joint tenant increases the interest of the survivors in the joint property by so much as is the value of the estate of the deceased joint tenant.

Tenancy in common.

21. Tenants in common are such as have a unity of possession, but a distinct and several title to their shares. The shares in which tenants in common hold are by no means necessarily equal. Thus, one tenant in common may be entitled to one-third or one-fifth, or any other proportion of the profits of the land, and the other tenant or tenants in common to the residue.

[9] The Farmers, etc., *v.* Gregory, 49 Barb., 155.

So one tenant in common, may have but a life or or other limited interest in his share, another may be seised in fee of his, and the owners of another undivided share may be joint tenants as between themselves, whilst as to the others they are tenants in common. Between a joint tenancy and a tenancy in common, the only similarity that exists is therefore the unity of possession. A tenant in common is as to his own undivided share, precisely in the position of the owner of an entire and separate estate;[1] and has in contemplation of law, a distinct tenement, a distinct freehold.

22. The estates may be created by one and the same instrument or by different instruments. One may hold by grant, another by devise and still another by descent; the only requisite is unity of possession.

23. Joint tenants have one estate in the whole, and no estate in any particular part. Tenants in common have several and distinct estates in their respective parts.

24. There is no survivorship among tenants in common, and each may dispose of his share by will, or if it be an inheritable estate, and he die intestate, it goes to his heirs, who thus become tenants in common with each other with respect to that share, and tenants in common with the survivors with respect to the whole estate. Tenants in common may convey to each other or to a stranger.

25. One tenant in common cannot convey a distinct portion of the estate by metes and bounds; but

[1] Williams' Real Property, 137.

he sells an undivided one-half or one-fourth, as his share may be, of the whole estate; nor can a judgment creditor of one tenant in common, sell by execution a distinct portion of the estate discharged of the right of the other tenants in common.[2]

26. The incidents to an estate in common are similar to those applicable to joint tenants. The owners can compel each other to partition, they are liable to each other for waste, and they are bound to account to each other for a due share of the profits of the estate in common.[3] The mere occupation of the premises by one joint tenant, or tenant in common, would not of itself entitle his co-tenant to call him to an account;[4] nor would one be liable to the other in trover if he had merely taken possession of the crop.[5] And when the property or crop is severable each tenant in common may take his appropriate share.[6]

27. One co-tenant is not responsible to another for permissive waste, although he is liable to contribute for necessary repairs, and would be liable if he suffered the common property to be destroyed by negligence.[7] But one co-tenant cannot compel the mortgagee of the common property to resort to his co-tenant for one-half of the joint debt secured by the mortgage.[8]

28. The possession of one tenant in common is the

[2] Bartless *v.* Harlow, 12 Mass., 348; Porter *v.* Hill, 9 Mass., 34.

[3] Hale *v.* Fisher, 20 Barb., 441; 1 R. S., 750.

[4] Woolever *v.* Knapp, 18 Barb., 265.

[5] Fobes *v.* Shattuck, 22 Barb., 568; Otis *v.* Thompson, Hill & Denio, 131.

[6] Fobes *v.* Shattuck, 22 Barb., 568; Kimberly *v.* Patchin, 19 N. Y., 340.

[7] Hall *v.* Fisher, 20 Barb., 441.

[8] Frost *v.* Frost, 3 Sandf. Ch., 188.

possession of all; and the taking of the whole profits by one, does not amount to an ouster of his companions. But if one tenant in common actually ousts the others, and shows by his acts that he claims to hold and use the property in severalty or in opposition to his co-tenant, the latter will be driven to his action of ejectment.[9] If one tenant occupies a particular part of the premises by agreement, and his co-tenant disturbs him in his occupation he becomes a trespasser.[1]

29. The growing crop, put in by one tenant in common, who took exclusive possession without contract, on partition made while the crop is growing, goes in severalty, as the property of each.[2] And one tenant in common cannot charge the other for improvements or for buildings placed upon the land;[3] but on partition subsequently made, he is entitled to that part on which his improvements are made, or to compensation.[4]

30. One tenant in common can compel the other to unite in the necessary repairs to a house or mill belonging to them, or contribute to the same; but to sustain the action, there must be a request to join in repairs and a refusal, and the expenditures must have been previously made.[5] The doctrine of contribution in such cases rests on the principle that where the

[9] Arnot *v.* Beadle, Hill & Denio, 181.
[1] Clowes *v.* Hawley, 12 Johns., 484.
[2] Calhoun *v.* Curtis, 4 Metcalf, 413.
[3] Taylor *v.* Baldwin, 10 Barb., 582.
[4] Robinson *v.* McDonald, 11 Texas, 385.
[5] Mumford *v.* Brown, 6 Cowen, 475.

interests of the parties are equal, equality of burthen becomes equity.[6]

31. One tenant in common cannot purchase in an outstanding title or incumbrance on the joint estate for his exclusive benefit, and use it against his co-tenant. The purchase enures in equity to the common benefit and the purchaser is entitled to contribution. The principle rests on the privity between the parties, and the fidelity and good faith which the connection implies.[7]

32. Tenants in common can make partition by their voluntary act, each conveying to the other by a deed of grant or release, the proportion to which each is entitled: or they may make partition by parol, provided each party is put into immediate possession.[8]

33. One tenant in common may receive the whole rent and discharge the lessee:[9] and he is liable to his co-tenants for their share of the money. When the lands of tenants in common were taken by the State and appropriated for the canal, and the appraised damages were paid to one, he was liable to account to the others for their proportion.[1]

34. A tenant in common, in possession, accounting with his co-tenants, is chargeable only with the net rents and profits, after deducting for necessary repairs, and taxes and assessments.[2]

[6] Campbell *v.* Meiser, 4 Johns. Ch., 334.

[7] Van Horne *v.* Fonda, 5 Johns. Ch., 407; Lee *v.* Fox, 6 Dana (Ken.), 176.

[8] Jackson *v.* Harder, 4 Johns., 202; Folger *v.* Mitchell, 3 Pick., 396.

[9] Decker *v.* Livingston, 15 Johns., 479.

[1] Brinkeroff *v.* Wemple, 1 Wend., 470.

[2] Hanna *v.* Osborn, 4 Paige, 336.

35. There may be a tenancy in common of chattel interests. When one hires land of another upon shares in the crop, the parties are tenants in common of the crop.[3] To make them tenants in common, the remuneration to the landlord must come from the specific crop raised, for if he is to receive a certain number of bushels of grain, the tenant owns the crop in severalty and may pay his landlord out of any other grain: and the owner of the land has no lien upon the specific crop raised upon his land.

36. As each tenant in common is entitled to the possession of the joint property, one tenant in common cannot maintain trespass against his co-tenant to obtain possession of the property; but if the common property is destroyed or sold by one, the other may bring his action to recover his share of the value of the property.[4] The sale by one tenant in common of the joint property is a conversion, and entitles his co-tenant to an action.[5] And the bringing the action to recover the proceeds, ratifies and confirms the sale; as such a ratification is equivalent to an original authority; and the sale by one becomes a sale by all.[6]

37. Where several persons voluntarily or accidentally mingle their grain in a common bin, or in such other manner that it cannot be separated, they become tenants in common, and the sale of the whole by one

[3] Demott *v.* Hagaman, 8 Cowen, 220; Caswell *v.* Districh, 15 Wend., 379; Putnam *v.* Wise, 1 Hill, 234.

[4] Cochran *v.* Carrington, 25 Wend., 409; Mersereau *v.* Norton, 15 Johns., 179; Selden *v.* Hickock, 2 Caines, 166; St. John *v.* Standring, 2 Johns., 168; Wilson *v.* Reed, 3 Johns., 175.

[5] White *v.* Osborn, 21 Wend., 72.

[6] Putnam *v.* Wise, 1 Hill, 234.

renders him liable to an action.[7] And if one is unwilling to sever his interest he can be compelled by the others, in an action at law, to divide or sell the property.[8]

Partnership lands.

38. Tenancy in common frequently arises in regard to real estate purchased by, or which comes into the possession of partners in the transaction of their business, as the same may be purchased out of the surplus earnings of the partnership, or taken by them in payment or settlement of claims due the partnership.

39. Where real property is held by the partners for the purpose of the partnership, they do not hold it as they do personal partnership property; but it is held by them as tenants in common, and the rules of partnership property do not apply in regard to the selling the same. One partner can sell only his individual interest in the land, and not the whole property, and if upon the sale of the realty a conveyance is made by all, and one receives the whole of the purchase-money, he must account to the others.[9]

40. Real estate purchased with partnership funds, on partnership account, or taken in liquidation or settlement of claims due the partnership, will be deemed partnership property and liable for partnership debts, in preference to debts of the individual partners, no matter in whose name the purchase may have been made, or the conveyance taken. If the title is taken in the

[7] Nowlen *v.* Colt, 6 Hill, 461.

[8] Smith *v.* Smith, 10 Paige, 470.

[9] Coles *v.* Coles, 15 Johns., 159.

name of only one he will be considered as a trustee holding for the benefit of the partnership.[1]

41. Upon the death of one of the partners his share of the real estate, held jointly, is subject to dower of the surviving widow, and if he dies intestate, his share of the realty does not go to the survivor, but the title vests in the heirs of the decedent, subject however to partnership debts, in case there is not sufficient personal property to pay the same;[2] and the legal title descends to the heirs without reference to the equitable rights of the several partners to use the real property for the payment of partnership debts.

42. The investment of personal partnership property in real estate shows an intention on the part of the partners to change so much of the partnership property in such a way, that the management and disposition of the same, is to be changed and thereafter to be conducted in accordance with the rules of law having reference to tenants in common, as distinguished from that of partnership. But should the partners agree at the time of the purchase that such lands are to be considered as part of the partnership capital, it will remain so as between themselves;[3] but as to third parties it will be considered as held as tenants in common. A *bona fide* purchaser or mortgagee obtaining title to partnership lands, or to an undivided part thereof, from the person who holds the

[1] Story's Eq., § 1206; Rigeler *v.* Vallier, 2 Ves., 328.

[2] Smith *v.* Jackson, 2 Edw. Ch., 28; Buchanan *v.* Sumner, 2 Barb. Ch., 165; Collumb *v.* Read, 24 N. Y., 505.

[3] Smith *v.* Jackson, 2 Edw. Ch., 28.

legal title, and without notice of the equitable rights of the other partners in the property, will be protected in his right to the property so acquired by him.[4]

43. Although one partner may bind his co-partner by acts within the scope of their mutual business, yet he cannot bind him by deed as to real estate held jointly by them.

44. When it becomes necessary to apply to the court to make partition of the real property of joint tenants, tenants in common, or of partners, the courts are authorized to take such steps as may be necessary for the equal division of the same, having jurisdiction to protect the rights of infants and absentees; and when equal division cannot be made, they may divide a portion of the property and sell the remainder; or they may sell the whole property and divide the proceeds; or they may divide the property making a cash additional allowance to one or more of the joint owners, and charge such allowance upon the other owners as equity may require; or they may set off one portion of the property, like a mill dam, to two persons, prescribing in the judgment, how such joint property is to be held and used,[5] and may pay for improvements made by one co-tenant,[6] and pay off all liens or incumbrances upon the joint property, or the several property of each individual.[7]

[4] Buchanan *v.* Sumner, 2 Barb. Ch., 165.

[5] Smith *v.* Smith, 10 Paige, 470; Braker *v.* Deveraux, 8 Paige, 513; Larkin *v.* Mann, 2 Paige, 27; Haywood *v.* Judson, 4 Barb., 228.

[6] Town *v.* Neidham, 3 Paige, 545.

[7] Code, § 1565, &c.

CHAPTER X.

USES AND TRUSTS.

1. What is a trust estate.
2. An express trust.
3. Trust ceases, when.
4. Death of one of the trustees.
5. Trustee may resign.
6. Trustee may be removed.
7. Supreme Court may appoint trustee.
8. Trust should be defined in the deed of trust.
9. Trust defined is notice to all persons.
10. Purchaser must examine as to the power of trustee.
11. Person paying trustee not liable to acts of the trustee.
12. Implied or resulting trusts not to injure.
13. Express vests what.
14. When a trust may be valid as a power.
15. Use given to one, power of sale to another.
16. Accumulations applied to pay debts.
17. A use.
18. Uses introduced in England.
19. Uses, their advantages and disadvantages.
20. Uses and trusts once regulated by statute.
21. One who is entitled to possession is deemed the owner.
22. Title to be vested in one who has right to possession.
23. Deed of trust must designate the trustee.
24. Title vests in the alienee though another pays the consideration.
25. Fraudulent alienee not protected.
26. Trusts created for what purposes.
27. Trust to receive rents to apply for one's own family.
28. New trusts created by statute.
29. Trust not authorizing receipt of rents, or limiting alienation, void.
30. Trustee must be authorized to receive and apply rents.
31. Delivery must be shown, with no power of revocation.
32. Resulting trust, how shown.
33. Such rights only as are specified vest in trustee.
34. Trustee brings suits in his own name.
35. Every trustee must join in conveyance of land.
36. Purchaser of trust estate, liable to duties of trust.

37. Liability of trustees.
38. Liability of trustee, after resignation.
39. What court may remove trustee.
40. Beneficiary may elect as to remedy.

1. A trust estate is a right of one or more persons to take the rents and profits of land, whereof the legal estate is vested in some other person; to compel the person thus seised of the legal estate, who is called the trustee, to execute such conveyances of the land, or of the products thereof as the person entitled to the profits, who is called the *cestui que trust* shall direct; and to defend the title to the land. But when the trust is for the benefit of persons laboring under disability, as infants, lunatics, &c., no direction can be made by the *cestui que trust*, except through the medium of a proper tribunal having equity powers.[1] (The enforcement of the rights, duties and obligations of trustees, and the management of trust estates, do not fall within the scope of this treatise, but only so much of the law regarding trusts as have reference to the conveyance and title to real property.)

2. An express trust is one which is defined in the instrument by which it is created, or the tribunal by which it is established; and it must be created by deed, by will, or by the determination of some judicial tribunal.

3. When the purposes, for which an express trust shall have been created, shall have ceased, the estate of the trustee shall also cease;[2] and when the estate has been conveyed for the benefit of creditors, such

[1] Cruise, tit. 12, ch. 1.
[2] 1 R. S., 730, § 67.

trust shall be deemed to be discharged at the end of twenty-five years from the creation of the same; and if the estate has not been sold or conveyed it shall revert to the grantor or his heirs.[3]

4. Upon the death of one of several trustees, of an express trust, the trust is to be managed by the survivors, and upon the death of the surviving trustee, 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 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.[4]

5. Upon the petition of any trustee, the Supreme Court may accept his resignation and discharge him from the trust, under such regulations as shall be established by the court for that purpose, and upon such terms as the rights and interests of the person interested in the execution of the trust may require.[5]

6. Upon the petition or complaint of any person interested in the execution of the trust, and under such regulations as for that purpose shall be established, the Supreme Court may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or who, for any other cause, shall be deemed an unsuitable person to execute the

[3] Laws 1875, ch. 545; Matter of Livingston, 34 N. Y., 555; Selden *v.* Vermilyea, 3 Com., 525.

[4] 1 R. S., 730, § 68; Clark *v.* Crego, 51 N. Y., 647; Ross *v.* Roberts, 2 Hun, 90.

[5] 1 R. S., 730, § 69.

trust.[6] The removal of the trustee is proper when the relations between him and his co-trustee are such that they will not probably co-operate in carrying out the trusts beneficially to those interested, and a majority of the beneficiaries ask for such removal.[7]

7. The Supreme Court has full power to appoint a new trustee, in place of a trustee resigned or removed; and when in consequence of such resignation or removal, there shall be no acting trustee, the court, in its discretion may appoint new trustees or cause the trust to be executed by one of its officers under its direction.

8. The instrument, whether a deed or a will, by which a trust is created, should contain all the powers, duties, limitations and provisions having reference to the trust, as otherwise the trustee, either from inadvertence or design, may thwart the whole object of the trust. If the trust is not contained or declared in the conveyence to the trustees, the conveyance shall be deemed absolute, as against the subsequent creditors of the trustee, not having notice of the trust, and as against purchasers from such trustees, without notice and for a valuable consideration.[9]

9. Where the object of the trust is expressed in the instrument creating it, it is notice to all persons who have any dealings either with the trustee or with the beneficiary; because every conveyance or other act of the trustee, in contravention of the trust is absolutely

[6] 1 R. S., 730, § 70.

[7] Quackenboss *v.* Southwick, 41 N. Y., 117.

[8] 1 R. S., 730, § 71.

[9] 1 R. S., 730, § 64.

void.[1] And no person beneficially interested in a trust for the receipt of the rents and profits of lands, can assign or in any manner dispose of such interest; but the rights and interests of every person for whose benefit a sum in gross is created are assignable.[2]

10. A purchaser cannot rely upon the statement of the trustee that the trust has ceased, but must ascertain at his peril that such is the fact.[3]

11. Although it is the duty of one who deals with a trustee to know what are his powers and authority, and whether he is acting within the scope of his authority, yet he is not bound to inquire or to learn what is to be the application of the funds by the trustee, for no person who shall actually and in good faith pay a sum of money to a trustee, which the trustee, as such, is authorized to receive, shall be responsible for the proper application of such money, according to the trust; nor shall any right or title derived by him from such trustee, in consideration of such payment, be impeached or called in question, in consequence of any misapplication by the trustee of the moneys paid.[4]

12. No implied or resulting trust shall be alleged or established, to defeat or prejudice the title of a purchaser, for a valuable consideration, and without notice of the trust.[5] But if the purchaser knew that

[1] 1 R. S., 730, § 65; Russell *v.* Russell, 36 N. Y., 581.

[2] 1 R. S., 730, § 63; Noyes *v.* Blakeman, 6 N. Y., 567; Graff *v.* Bonnett, 31 N. Y., 9.

[3] Briggs *v.* Davis, 20 N. Y., 15; Griswold *v.* Perry, 7 Lans., 98.

[4] 1 R. S., 730, § 66.

[5] 1 R. S., 728, § 54.

the estate was held in trust, though the object was not expressed in the deed or instrument, he would be estopped to the same extent as if the trust was inserted in the deed.

13. When an express trust is created, every estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in, or revert to the person creating the trust.[6] But if 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.[7] Every express trust, valid as such in its creation, unless otherwise provided, vests the whole estate in the trustees in law and in equity, subject only to the execution of the trust. The persons for whose benefit the trust is created, take no estate or interest in the lands, but may enforce the performance of the trust in equity.[8] But this does not prevent the person creating the trust from declaring to whom the lands to which the trust shall relate belong, in the event of the failure or termination of the trust; nor shall it prevent him from granting or devising such lands, subject to the execution of the trust. Every such grantee or devisee shall have a legal estate in the lands, as against all persons, except the trustees and those lawfully claiming under them.[9]

14. A devise of lands to executors or other trustees, to be sold or mortgaged, when the trustees are not also

[6] 1 R. S., 729, § 62; White et al. *v.* Howard, 46 N. Y., 144.

[7] Briggs *v.* Davis, 21 N. Y., 57.

[8] 1 R. S., 729, § 60.

[9] 1 R. S., 729, § 61; Marvin *v.* Smith, 46 N. Y., 576.

empowered to receive the rents and profits, shall vest no estate in the trustees; but the trust shall be valid as a power, and the lands shall descend to the heirs or pass to the devisees of the testator, subject to the execution of the power.[1] In every case where the trust shall be valid as a power, the lands to which the trust relates, shall remain in, or descend to the persons otherwise entitled, subject to the execution of the trust as a power.[2]

15. Sometimes it becomes necessary for the protection of estates, that the use of the property should be given to a beneficiary, or a class of beneficiaries, when such persons are not fitted to have the charge of mortgaging or selling the property, as where the right to use and occupy real estate is given to a widow for her support and that of her infant children, and power is given to an executor or trustee to mortgage or to sell; in such cases the executor or trustee has no care or trust in the management of the estate and has none of the powers or rights of trustees, except that of mortgaging and selling. The statute declares that in such cases he has a power of sale which is to be enforced in accordance with the law having reference to powers.[3]

16. When a trust is created to receive the rents and profits of lands, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the support

[1] 1 R. S., 729, § 56.
[2] 1 R. S., 729, § 59.
[3] 1 R. S., 729, § 58.

and education of the person for whose benefit the trust is created, shall be liable in equity, to the claims of the creditors of such person, in the same manner as other personal property, which cannot be reached by an execution at law.[4] Such rents and profits can be reached only through an action in which the judgment debtor and the trustees are parties, and not under proceedings supplementary to execution.[5] And in such actions, any surplus may be reached beyond what is necessary for the support of a beneficiary in a trust created for his benefit by a third person.[6]

17. *A use* was a confidence reposed by one person in another, who was tenant of the land, that the latter should dispose of the land according to the intentions of him to whose use it was granted, and suffer him to take the profits. As if a feoffment was made to A. and his heirs, to the use of, or in trust for B. and his heirs; here, at the common law, A. had the legal property and possession of the land, but B. was in conscience and equity to have the profits and disposal of it. In such a case while the title of the person enfeoffed was good in a court of law, yet he derived no benefit from the gift, for a court of equity obliged him to hold entirely for the use of the other for whose benefit the gift was made.[7]

18. This device was introduced in England about the close of the reign of Edward the Third, by means of the foreign ecclesiastics to evade the statutes of

[4] 1 R. S., 729, § 57.

[5] Campbell *v.* Foster, 35 N. Y., 361; Genet *v.* Foster, 18 How., 50.

[6] Graff *v.* Bonnett, 31 N. Y., 13.

[7] 2 Black. Com., 328.

mortmain, by obtaining grants of lands, not to religious houses directly but to the use of religious houses.[8] In process of time, such feoffments to one person to the use of another became very common.

19. Uses had this advantage, that they were not liable to any of the feudal burdens, and did not escheat for felony or other defect of blood. They had this disadvantage that no wife could be endowed, or husband have his curtesy of a use.[9] Statutes were passed for the purpose of regulating uses and trusts, and they then became liable to dower, curtesy and escheat. As the legal title of the estate might be in one person and his heirs, and the use and occupation in another person and his heirs, conditions and limitations had to be introduced into this species of conveyance, and the law with reference to this subject became intricate and difficult, and the refinements and distinctions growing out of contingent uses, springing uses, secondary uses, shifting uses and resulting uses became bewildering to court and counsel. As there were no public records of the conveyances, and uses might be assigned by secret deeds between the parties, it might be impossible for others besides those immediately interested to determine in whom the right to use and occupy vested. And this shows the ground of Lord Bacon's complaint, that this course of proceeding was turned to deceive many of their just and reasonable rights. A man that had cause to sue for land, knew not against whom to bring his action, or who was the owner of it. The wife was defrauded of her thirds, the husband of his

[8] Williams' Real Prop., 156.

[9] 2 Black. Com., 331.

curtesy, the lord of his wardships, relief, heriot and escheat, the creditor of his extent for debt, and the poor tenant of his lease.

20. Uses and trusts of this kind at first were regulated in this State by statute; but to prevent all the intricacies and restraints which had grown up under the English system, the legislature abolished all uses and trusts; and declared that every estate and interest in lands shall be deemed a legal right, cognizable as such in the courts of law, except as otherwise provided by statute; and every estate which was held as a use, executed under any former statute of the State, was confirmed as a legal estate.[1]

21. Every person, who, by virtue of any grant, assignment or devise, now is, or hereafter shall be entitled to the actual possession of lands, and the receipts of the rents and profits thereof, in law or in equity shall be deemed to have a legal estate therein of the same quality and duration, and subject to the same conditions as his beneficiary interest.[2] But this shall not divest the estate of any trustees in any existing trust, where the title of such trustees is not merely nominal but is connected with some power of actual disposition or management in relation to the lands which are the the subject of the trust.[3]

22. The statute provides that every disposition of lands, whether by deed or devise, hereafter made, shall be directly to the person in whom the right to the possession and profits shall be intended to be in-

[1] 1 R. S., 727, §§ 45, 46.
[2] 1 R. S., 727, § 47; Adams *v.* Perry, 43 N. Y., 496.
[3] 1 R. S., 727, § 48.

vested, and not to any other, to the use of, or in trust for such person, and if made to one or more persons to the use of, or in trust for another, no estate or interest, legal or equitable, shall vest in the trustee. This does not apply to trusts expressly authorized by statute, or trusts resulting by implication of law.[4]

23. A trust in a deed to convey the premises to such person as the wife of the grantor shall appoint is void. If the trustee is not vested with the right to the possession, rents or profits of the land conveyed, either for himself or any other person, the deed of trust is void.[5]

24. When a grant for a valuable consideration shall be made to one person, and the consideration thereof 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, except that every such conveyance shall be presumed to be fraudulent, as against the creditors, at that time, of the persons paying the consideration; and where a fraudulent intent is not disproved, a trust shall result in favor of such creditors, to the extent that may be necessary to satisfy their just demands.[6]

25. To prevent fraud on the part of the person who may be entrusted with another's money for the purchase of land, the foregoing provisions do not extend to cases where the alienee, named in the convey-

[4] 1 R. S., 728, §§ 49, 50; Rawson *v.* Lampman, 5 N. Y., 456; Wright *v.* Douglass, 7 N. Y., 564.

[5] Hotchkiss *v.* Elting, 36 Barb., 88.

[6] 1 R. S., 728, §§ 51, 52; Ring *v.* McCown, 10 N. Y., 268; Garfield *v.* Hatmaker, 15 N. Y., 475.

ance, shall have taken the same as an absolute conveyance, in his own name without the consent or knowledge of the persons paying the consideration, or where such alienee, in violation of some trust, shall have purchased the lands so conveyed, with moneys belonging to another person.[7]

26. Express trusts may be created for any or either of the following purposes:

1*st.* To sell lands for the benefit of creditors;

2*d.* To sell, mortgage, or lease land for the benefit of legatees, or for the purpose of satisfying any charge thereon;

3*d.* 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 as to expectant estates;[8]

4*th.* To receive the rents and profits of lands, and to accumulate the same, provided such accumulation commence on the creation of the estate, out of which the rents and profits are to arise for the benefit of one or more minors then in being, and terminate at the expiration of their minority;[9]

5*th.* To establish and maintain an observatory;

6*th.* To found and maintain professorships and scholarships;

7*th.* For any specific purposes comprehended in the general objects authorized by the respective charters of

[7] 1 R. S., 728, § 53; Levy *v.* Brush, 45 N. Y., 595; Lounsbury *v.* Purdy, 18 N. Y., 515.

[8] Leggett *v.* Perkins, 2 N. Y., 297; Marvin *v.* Smith, 46 N. Y., 571.

[9] 1 R. S., 728, § 55; and id., 726, § 37; Downing *v.* Marshall, 23 N. Y., 377.

any incorporated college or incorporated literary institution;

8*th*. For the benefit of schools and educational purposes; and for public worship;

9*th*. To provide and keep in repair a place for the burial of the dead.[1]

27. A trust to apply rents to the use of a man's family;[2] to receive rents and pay annuities;[3] for the support and maintenance of one's wife,[4] is valid.

28. Statutes from time to time are passed by the legislature creating new trusts, which are in general subject to the provisions and regulations above mentioned.

29. A trust not authorizing the trustee to take possession or receive the rents and profits and not imposing any active duty on him is void.[5] A devise to apply rents and profits to beneficiaries for a term of years, and then to sell the lands, would be void as unduly suspending the power of alienation.[6]

30. To render a trust as to the rents and profits of real estate valid, it is necessary that the trustee be authorized to receive the rents and profits, and that he be empowered to apply the same.[7]

31. In order to sustain a trust, a complete and valid delivery of the subject thereof must be shown to have

[1] Laws of 1848, ch. 318.

[2] Rogers *v.* Tilley, 20 Barb., 639.

[3] Mason *v.* Jones, 2 Barb., 229; Kane *v.* Gott, 24 Wend., 641.

[4] Calkins *v.* Long, 22 Barb., 97.

[5] Jarvis *v.* Babcock, 5 Barb., 139.

[6] Beekman *v.* Bonsor, 23 N. Y., 298.

[7] Craig *v.* Craig, 3 Barb. Ch., 76; Wood *v.* Wood, 5 Paige, 596; Jarvis *v.* Babcock, 5 Barb., 139.

been made with no power left in the donor to revoke or annul such delivery, or to defeat its effect by making any other or different disposition of the subject-matter of the trust.[8]

32. In order to establish a resulting trust by parol evidence, it must appear that the price was paid with the proper funds of the alleged *cestui que trust* and the title taken in the name of another.[9]

33. The provisions of the statute of uses and trusts, 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 and not to an interest in the lands not embraced in the trust; it does not prevent a valid limitation of a remainder to the beneficiaries of the trust to take effect in possession upon its termination, and to vest in interest at the death of the testator.[1]

34. A trustee of an express trust may bring and maintain an action based upon a contract executed by him in that capacity.[2]

35. A trustee having once accepted the trust in any manner, a purchaser cannot safely dispense with his concurrence in a sale of the trust estate, notwithstanding he may have attempted to disclaim, and although he may have leased his estate to his co-trustees. All the trustees must unite in a disposal of the trust property, and a deed by two, while a third is

[8] Meiggs *v.* Meiggs, 15 Hun, 453.

[9] Mason *v.* Libby, 19 Hun, 119.

[1] Stevenson *v.* Lesley, 70 N. Y., 512.

[2] Arosemena *v.* Hinckley, 43 N. Y., Superior Ct., 43.

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.[3]

36. One who purchases a trust estate, with knowledge of the trust, is subject to all the duties respecting the same which vested upon the trustee from whom he made the purchase.[4]

37. Testamentary trustees authorized to invest funds belonging to the estate, in general terms, at their discretion, are not liable for losses where they acted, as a prudent owner of property would act in making an investment, for beneficiaries selected by himself.[5]

38. Where a trustee's resignation is accepted and his bond discharged, upon his transferring the trust estate, consisting of money and lawful securities, to his successor, he is exempt from all liabilities for any loss subsequently occurring to the estate. But when he has invested the trust property in, and transfers to his successor securities not recognized by the law as valid investments, such as promissory notes, he continues to be responsible until such investments are converted into money or lawfully invested.[6]

39. The Supreme Court, and not the surrogate, was vested with power to remove a testamentary trustee

[3] Brennan *v.* Wilson, 71 N. Y., 502.

[4] Gautier *v.* Douglass Manuf. Co., 13 Hun, 514; Budd *v.* Munroe, 18 Hun, 316.

[5] Roosvelt *v.* Roosvelt, 6 Abbott, N. C., 447.

[6] Matter of Foster, 15 Hun, 387.

previous to September, 1880;[7] but that power is now vested in the surrogate's court.[8]

40. Where a trustee has made improper investments of the trust fund, the *cestui que trust* has his election, to take the original fund and legal interest thereon, or to take the fund as invested at the time of the accounting, and all profits realized by the trustees. If he elects to take the latter, the whole period during which the trustee has held the funds is to be considered in estimating the profits to be realized. The beneficiary cannot take profits for a part of the time and interest for the remainder.[9]

[7] Blake *v.* Sands, 3 Redf., 168.

[8] Code, § 2472.

[9] Baker *v.* Disbrow, 18 Hun, 29; S. C., 79 N. Y., 631.

CHAPTER XI.

POWERS.

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3. Difference between a power and a trust.
4. Grantor of a power — grantee of a power.
5. Powers are general or special.
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7. Absolute power changed to a fee.
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9. Grants of the power, absolute owner when.
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1. A power is an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power, might himself lawfully perform.[1] The provisions referred to in this chapter do not extend to a simple power of attorney to convey lands in the name of, and for the benefit of the owner.[2]

2. No person is capable in law of granting a power, who is not, at the same time, capable of aliening some interest in the lands to which the power relates.[3]

3. The chief distinction between a naked power and a trust is that powers are never imperative unless trust powers; they leave the act to be done at the will of the party to whom they are given, while trusts and trust powers are always imperative and are obligatory upon the conscience of the party intrusted. When there is a power of disposing, and that power is not executed, a Court of Equity cannot execute it, but if the execution of a trust fails, by the death of the trustee, or by accident, a Court of Equity will execute the trust.[4] It is a trust if it is necessary for the executors to take an estate in the land in order to effectuate the intention of the creator of the trust.[5] That a party must have something himself before he can bestow upon others is quite manifest.[6]

[1] 1 R. S., 732, § 74; Smith *v.* Bowen, 35 N. Y., 89.
[2] 1 R. S., 738, § 134.
[3] 1 R. S., 732, § 75.
[4] Brown *v.* Riggs, 8 Ves., 570.
[5] Tucker *v.* Tucker, 1 Seld., 410.
[6] Selden *v.* Vermilyea, 3 Com., 536.

4. The term "grantor of a power" designates the person by whom a power is created, whether by grant or devise; and the term "grantee of a power" designates the person in whom a power is, whether by grant, devise or reservation.[7]

5. Powers are general or special, and beneficial or in trust. A power is general when it authorizes the alienation in fee by means of a conveyance, will, or charge of the lands embraced in the power, to any alienee whatever. A power is special, 1*st*. When the persons or class of persons, to whom the disposition of the lands under the power is to be made, are designated. 2*d*. When the power authorizes the alienation, by means of a conveyance, will, or charge, of a particular estate or interest less than a fee.[8]

6. A power is beneficial when no person other than the grantee has, by the terms of its creation, any interest in its execution.[9]

7. When an absolute power of disposition, not accompanied by any trust, shall be given to the owner of a particular estate, for life or years, such estate shall be changed into a fee, absolute in respect to the rights of creditors and purchasers, but subject to any future estate limited thereon, in case the power should not be executed, or the lands should not be sold for the satisfaction of debs; and when it is given to any person to whom no particular estate is limited, such person shall also take a fee, subject to any future estates that may be limited thereon, but absolute, in

[7] 1 R. S., 738, § 135.

[8] 1 R. S., 732, §§ 76, 77, 78; Kinnier *v.* Rogers, 42 N. Y., 534.

[9] 1 R. S., 732, § 79; Kinnier *v.* Rogers, 42 N. Y., 534.

respect to creditors and purchasers, if no remainder is limited on the estate of the grantee of the power, such grantee shall be entitled to an absolute fee.[1]

8. Where a general and beneficial power, to devise the inheritance, shall be given to a tenant for life or for years, such tenant shall be deemed to possess an absolute power of disposition, in respect to creditors and purchasers.[2]

9. The power of disposition is deemed absolute if the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit. But if the grantor reserves to himself, for his own benefit, an absolute power of revocation, the grantor is still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.[3]

10. 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 lands to which the power relates: To a tenant for life of the lands embraced in the power, to make leases for not more than twenty-one years, and to commence in possession during his life.[4] But no power can be executed by a married woman, until she attains full age;[5] and no lease of agricultural lands can be for a longer term than twelve years.

[1] 1 R. S., 732, §§ 81, 82, 83; Terry et al. *v.* Wiggins, 47 N. Y., 318; Am. Bible Soc. *v.* Stark, 45 How., 166.

[2] 1 R. S., 733, § 84; Tallmadge *v.* Sill, 2 Barb., 34.

[3] 1 R. S., 733, §§ 85, 86.

[4] 1 R. S., 733, § 87; Jackson *v.* Edwards, 22 Wend., 498; Rott *v.* Stuyvesant, 18 Wend., 270.

[5] 1 R. S., 735, § 111.

11. The tenant for life cannot assign as a separate interest his power to make leases, for it is annexed to his estate, and passes unless specially excepted by any conveyance of the estate. If it is specially excepted in any such conveyance it is extinguished. It may be released by the tenant to any person entitled to an expectant estate in the lands, and where released is extinguished.[6]

12. When a tenant for life having a power to make leases, executes a mortgage, it does not extinguish or suspend the power; but the power is bound by the mortgage, in the same manner as the lands embraced therein. The effects of such a lien by mortgage on the power are, 1*st*. That the mortgagee is entitled, in equity, to an execution of the power so far as the satisfaction of his debt may require; 2*d*. That any subsequent estate created by the owner, in execution of the power, becomes subject to the mortgage, in the same manner as if in terms embraced therein.[7]

Every special and beneficial power is liable, in equity, to the claims of creditors, in the same manner as other interests that cannot be reached by an execution at law, and the execution may be decreed for the benefit of the creditors entitled.[8]

13. 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

[6] 1 R. S., 733, §§ 88, 89.
[7] 1 R. S., 733, §§ 90, 91.
[8] 1 R. S., 734, § 93.

portion of the proceeds, or other benefits to result from the alienation of the lands according to the power.[9]

14. Special power is in trust, 1*st*. When the disposition which it authorizes, is limited to be made to any person or class of persons, other than the grantee of such power: 2*nd*. When any person or class of persons, other than the grantee, is designated as entitled to any benefit from the disposition or charge authorized by the power.[1]

15. Every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity, for the benefit of the parties interested. It does not cease to be imperative, when the grantee has the right to select any, and exclude others of the persons designated as the objects of the trust. If a disposition under a power is directed to be made to, or among, or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated, shall be entitled to an equal proportion. But if the terms of the power import that the estate or fund is to be distributed between the persons so designated, in such manner or proportions as the trustee of the power may think proper, the trustee may allot the whole to any or more of such persons in exclusion of the others. Should the trustee, with the right of selection die, leaving the power unexecuted, its execution shall be decreed in equity for

[9] 1 R. S., 734, § 94; Selden *v.* Vermilyea, 1 Barb., 58; Russell *v.* Russell, 36 N. Y., 583; Fellows *v.* Heermans, 4 Lans., 235.

[1] 1 R. S., 734, § 95; Smith *v.* Bowen, 35 N. Y., 89; Farmers' Loan & Trust Co. *v.* Carroll, 5 Barb., 613.

the benefit equally of all the persons designated as objects of the trust.[2]

16. A power is always in trust, when a disposition is limited to be made to a class, unless its execution is made to depend upon the mere discretion of the grantee. It is always imperative, when the property given, and the persons to whom it is given, are certain.[3]

17. Powers in trust are subject to the same rules and regulations with reference to the rights, duties and privileges growing out of them as express trusts. If created by will they will not fail though the devisor may not have appointed any one to execute them, as this execution will devolve upon the Supreme Court. They may be enforced by any one interested in them, and by the assignees and creditors of any person entitled, as an object of the trust, when the interest or the objects of such trusts are assignable. And every beneficial power, and the interest of every person entitled to compel the execution of the trust power under a legal assignment, passes to the assignee of the estate and effects of the person in whom such power or interest is vested.[4]

18. A power may be granted in one of two ways.

1*st*. By a suitable clause contained in a conveyance of some estate in the lands, to which the power relates;

[2] 1 R. S., 734, §§ 96–100; Hoey *v.* Kenny, 25 Barb., 396; Meakings *v.* Cromwell, 2 Sandf., 515.

[3] Dominick *v.* Sayre, 3 Sand., 555.

[4] 1 R. S., 734, §§ 101–104; Crocheron *v.* Jaques, 3 Edw. Ch., 212; Leggett *v.* Hunter, 25 Barb., 100; S. C., 19 N. Y., 445.

2*d*. By a devise contained in a last will and testament.

19. The grantor in any conveyance, may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another, and every power thus reserved is subject to the provisions referred to in this chapter.[5]

20. Every power is a lien or charge upon the lands which it embraces, as against creditors and purchasers in good faith and without notice, of or from any person having an estate in such lands only from the time the instrument containing the power shall be duly recorded. As against all other persons, the power shall be a lien from the time the instrument in which it is contained shall take effect.[6]

21. Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is granted or reserved in the instrument creating the power.[7]

22. A power may be vested in any person capable in law of holding, but cannot be exercised by any person not capable of aliening lands. If the power is vested in several persons, all must unite in its execution; but if previous to such execution one or more of such persons die, the power may be executed by the survivors. The power must be executed by some instrument in writing, which would be sufficient in law to pass the estate or interest intended to pass under the power, if the person executing the power were the actual owner. Every instrument, except a

[5] 1 R. S., 735, § 105; Belmont *v.* O'Brien, 12 N. Y., 404.

[6] 1 R. S., 735, § 107.

[7] 1 R. S., 735, § 108; Jackson *v.* Edwards, 22 Wend., 498.

will, in execution of a power, though the power may be a power of revocation only, shall be deemed a conveyance within the meaning and subject to the provisions of the law with reference to conveyances.[8]

23. The intentions of the grantor of a power as to the mode, time and conditions of its execution, are to be observed, subject to the powers of the Supreme Court to supply a defective execution, in such cases as may be required. But if the conditions annexed to the 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. If the formalities directed to be observed in the execution of the power, in addition to those which would be sufficient by law to pass the estate, the observance of such additional formalities shall not be necessary to a valid execution of the power; if directed to be executed by an instrument not sufficient in law to pass the estate, the power shall not be void, but its execution shall be governed by the rules mentioned in this chapter.[9]

24. The general instructions given in the instrument creating the power as to the manner of its execution shall be followed: that is, if it be a power to dispose of lands by devise or will, the instrument of the execution must be a will duly executed according to the laws of this State for devising real estate. Lands embraced in a power to devise, shall pass by a

[8] 1 R. S., 735, §§ 109, 112–114.

[9] 1 R. S., 736, §§ 121, 120, 119, 118.

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. If the power is confined to a disposition by grant, it cannot be executed by will, although the disposition is not intended to take effect until after the death of the party executing the power. If the disposition of the power has been more extensive than was authorized by the power, it shall not for that reason be void in law or in equity; but every estate or interest so created, so far as embraced by the terms of the power, shall be valid. If the instrument in execution of a power be affected by fraud, it will have the same effect as if the instrument had been executed by the owner or a trustee.[1]

25. When the consent of a third person to the execution of a power is requisite, such consent shall be expressed in the instrument by which the power is executed, or shall be certified in writing thereon. The instrument of execution or the certificate shall be signed by the party whose consent is required; and to entitle the instrument to be recorded, such signature must be proved or acknowledged, in the same manner as if subscribed to a conveyance of lands.[2]

26. Every instrument executed by the grantee of a power, conveying an estate or creating a charge, which such grantee would have no right to convey or execute, unless by virtue of his power, shall be

[1] 1 R. S., 736, §§ 115, 116, 123, 125, 126.
[2] 1 R. S., 736, § 122.

deemed a valid execution of the power, although such power be not recited or referred to therein.[3]

27. When a parent gives to a descendant any estate or interest by virtue of a beneficial power, or of a power in trust with a right of selection, such gift is to be deemed an advancement to such descendant within the provisions of law having reference to real property by descent.[4]

28. The period during which the absolute right of alienation may be suspended, by any instrument in execution of a power, shall be computed from the time of the creation of the power and not from the date of the instrument.[5]

29. No estate or interest can be given or limited to any person by an instrument in the execution of a power, which such person would not have been capable of taking, under the instrument by which the power was granted.[6]

30. If the execution of a power in trust shall be defective in whole or in part, its proper execution may be decreed in favor of the persons designated as the objects of the trust. Purchasers for a valuable consideration, claiming under a defective execution of any power, are entitled to the same relief as similar purchasers claiming under a defective conveyance from an actual owner.[7]

31. When a power to sell lands is given to a grantee or a mortgagee in any mortgage or other conveyance

[3] 1 R. S., 737, § 124.
[4] 1 R. S., 737, § 127.
[5] 1 R. S., 737, § 128; Blanchard *v.* Blanchard, 4 Hun, 290.
[6] 1 R. S., 737, § 129.
[7] 1 R. S., 737, §§ 131, 132.

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.[8]

32. By the common law a married woman could not make a valid contract relating to real estate, nor could she convey her real property by deed either with or without the concurrence of her husband. The common law in this respect was early modified in this State by statute, and she was enabled to convey her real property by joining with her husband in a conveyance. Until the statutes of 1848 and 1849 the husband upon marriage became entitled to the possession, rents, income and profits of all the real estate of the wife, and if a child was born to them alive, he was also entitled to such rents and income until his death. The rents and income were liable to be taken by the creditors of the husband or he could squander them at his pleasure. To remedy some of the evils growing out of such a system, and to preserve the property of the wife so that she might enjoy the benefit of the income, the property of the wife was sometimes placed in the hands of a trustee, to hold the same and pay over the income according to the provisions of the trust, sometimes to the wife directly, to be held and used by her without the direction or interference of her husband; and sometimes power was given her to dispose of the principal either by deed, or by direction to the trustee, or by will. Such provisions are called marriage settlements.

[1] 1 R. S., 737, § 133.

33. Although such settlements were in derogation of the principles of the common law so far as the marital rights of the husband were concerned, yet when properly drawn they have been upheld by the courts, even against creditors and purchasers; but if made secretly and without the knowledge of the future husband they might be set aside as void as to him. Since the statutes of 1848 and 1849, under and by which the wife was empowered to keep and maintain possession of her own real estate, such settlements are very rarely made.

34. In framing a marriage settlement the property was usually vested in a trustee, though this was not absolutely necessary. The validity in equity of an ante-nuptial agreement between husband and wife, without the intervention of a trustee, by which the wife reserves to herself the power of disposing of her own property, either real or personal during coverture, was not doubted. Such an agreement became extinguished at law by the subsequent marriage, but equity supported it and compelled the husband to perform it.[9]

35. Ante-nuptial contracts and settlements made in foreign countries occasionally come before our courts for construction and enforcement. In such cases the law of the government, where the contract is made, must control, and it is the duty of our courts to find out what that is and enforce it.

36. Where an ante-nuptial contract made in France provided that in case of the death of the wife, without having children, her husband surviving, the real

[9] Blanchard *v.* Blood, 2 Barb., 352; Bradish *v.* Gibbs, 3 Johns. Ch.; 523.

estate of which she should die possessed in the United States, should be immediately sold, and the proceeds remitted to her husband. It was held that this was a grant to the husband, contingent upon the event which happened. No trustee was appointed by the marriage articles, and as equity never suffers a trust to fail for want of a trustee, the property was directed to be sold and converted into money according to the ante-nuptial contract.[1]

37. Marriage articles often provide for vesting in the trustee for the benefit of the wife, property belonging to the husband. In such cases, both parties should join in the instrument, and if they or either of them are not of full age, then the father or guardian should join in the agreement.[2]

38. The marriage articles should be executed by parties able to contract; as the rule prevails almost universally that all deeds, or instruments under seal executed by an infant are voidable only, with the single exception of those which delegate a naked authority, which alone are void.[3] An objection to the validity of a marriage settlement, on the ground of infancy of the parties contracting, can be made only by the parties themselves. It cannot be raised by the trustees as such instrument is voidable only, not void.[4]

39. Although the whole real and personal estate of the wife be secured to her separate use, the husband is notwithstanding bound to maintain her and

[1] De Barrante *v.* Gott, 6 Barb., 492.

[2] McCartee *v.* Teller, 2 Paige, 511.

[3] Bool *v.* Mix, 17 Wend., 119; Gillette *v.* Stanley, 1 Hill, 121.

[4] Jones *v.* Butler, 30 Barb., 641; S. C., 20 How., 189.

the family during coverture.[5] And the statutes of 1848, 1849 and 1860, do not relieve the husband from his liability for the torts of his wife or diminish his power of personal control over her.[6]

40. Post-nuptial agreements and settlements for the support of the wife may be entered into, and when properly made will be protected and enforced in a Court of Equity. If the settlement is made after marriage in pursuance of a prior agreement, entered into, before marriage, it is valid not only between the parties, but as against creditors. Marriage itself is a sufficient consideration to uphold such a settlement.[7] A post-nuptial settlement or contract by which property is set apart to her separate use, is void at law, and void as against creditors whose debts existed at the time, yet if they arise out of considerations moving from her they will be sustained in equity. When the husband, who was about to sell his estate, agreed with his wife and with the knowledge of the purchaser, that if she would join in the deed so as to release her dower, she should receive a certain portion of the purchase-money as her separate property, free from the control of her husband, and the purchaser gave a note to the wife as her share of the purchase, it was held that the note and the proceeds thereof belonged to the wife for her separate use.[8] The wife joining in a deed with her husband so as to discharge her claim of dower in the land,

[5] Meth. Ep. Ch. *v.* Jaques, 1 Johns. Ch., 450.

[6] Hasbrouck *v.* Weaver, 10 Johns., 247.

[7] Reade *v.* Livingston, 3 Johns. Ch., 488.

[8] Garlick *v.* Strong, 3 Paige, 440; Searing *v.* Searing, 9 Paige, 289.

even before the late statutes, has been held sufficient to uphold such post-nuptial agreement.[9]

41. No particular form of words is necessary to create a trust for the separate use of a married woman. If the property is vested in a trustee, and the trust declared to be for her sole use and benefit, the money to be paid to her individually, her separate receipt for the money so paid will exclude any claim of the husband.[1]

42. Since the statutes of 1848, 1849 and 1860, there is no necessity to enter into a marriage settlement to protect the wife's individual property from the creditors of her husband; and if the husband is entirely free from debt, he can set apart property for the benefit of his wife in other modes than entering into a marriage settlement.

[9] Patridge *v.* Havens, 10 Paige, 618.

[1] Stuart *v.* Kissam, 2 Barb., 493.

CHAPTER XII.

TITLE BY DEED.

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1. A title is the means whereby the owner of lands

hath the just possession of his property.[1] It has reference not only to the instruments which convey and afford the evidence of title, but those acts of occupation or possession which attend it: including deeds, wills and other muniments of title and the actual and rightful enjoyment of property, whether gained by long and uninterrupted possession, by written transfer from the former owners or by descent.

2. There are several stages or degrees requisite to form a complete title to lands and tenements.

3. 1*st*. The lowest and most imperfect degree of title consists in the mere *naked possession*, or actual occupation of the estate; without any apparent right, or any shadow or pretence of right, to hold and continue such possession. This occurs when the owner dies or is absent, the property becomes vacant, and a stranger enters and occupies, without leave or license from any one. Or it may happen when a tenant at will from year to year holds over after the termination of his term, and the owner is absent or dies, and neither he nor his heir takes any steps to resume possession of the property; or when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands, which is termed a *disseisin*. In all which cases the wrongdoer has a mere naked possession, which the rightful owner may put an end to by insisting upon his own right of possession and enforcing it by the aid of the courts. Until some act be done by the rightful owner to divest this possession and assert his title, such actual possession is, *prima*

[1] 1 Co. Litt., 345 b.

facie, evidence of a legal title in the possessor, and by lapse of time and neglect of the true owner will ripen into a good and indefeasible title.[2] Even before it has ripened into a good title as against the true owner, it is good as against all the rest of the world, and will enable such occupant to maintain an action against a trespasser who has no actual title to the land or right of possession.[3] And trespass cannot be maintained against a stranger, except by the person who has the actual possession of the land.[4]

4. 2*d*. The next step to a good and perfect title is the *right of possession*, which may reside in one man, while the actual possession is not in himself but is in another. For if a man be disseised, or otherwise kept out of possession, though the *actual* possession be lost, yet he has still remaining in him, the *right* of possession; and may exert it whenever he thinks proper, by entering upon the disseisor, and turning him out of the occupancy which he has so illegally gained. This right of possession is of two sorts: an *apparent* right of possession, which may be defeated by proving a better one; and an *actual* right of possession, which will stand the test as against all opponents.[5] As if A. owning lands from which he had been disseised by a trespasser, should die, his heirs claiming the land by descent would be able to oust the trespasser and obtain possession, and should it afterward appear that A. had made a will devising this

[2] 2 Black. Com., 195.

[3] Hyatt *v.* Wood, 4 Johns., 157.

[4] Campbell *v.* Arnold, 1 Johns., 511.

[5] 2 Black. Com., 196.

same property to some third person, who by virtue of the devise became the actual owner, such actual owner by virtue of the will would enter and obtain possession against the former apparent owner.

5. The last requisite of a perfect title is the *right of property.* This may exist in one person, when the apparent right of possession is shown to be in another person and the actual possession is in a third person. When the actual possession, the right of possession and the right of property unite in one and the same person, the title becomes a perfect title.

6. The modes of acquiring title may be divided into two, by purchase and by descent.

7. Descent or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir therefore is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate, so descending to the heir, is in law called the inheritance.

8. Title by purchase includes all other modes of acquiring title, and embraces every mode whereby estates are voluntarily resigned by one person and acquired by another. It embraces not only such transfers as are made by deed, by grantor to grantee, but such transfers and sales as may be made by order of the appropriate tribunals, or under judgment and execution against the owner.

9. A *purchase* in the ordinary and popular acceptation of the term, is the transmission of property from one person to another by their voluntary act and agreement, formed on a valuable consideration.

10. And the instrument by which the transfer is made is called a *Conveyance* or *Deed.*

11. Of conveyances by the common law, some may be called *original* or primary conveyances; which are those by means whereof the benefit or estate is created or first arises; others are derivative or secondary; whereby the benefit or estate originally created, is enlarged, restrained, transferred or extinguished.

12. Original conveyances are, 1. Feoffment; 2. Gift; 3. Grant; 4. Lease; 5. Exchange; 6. Partition. Derivative conveyances are, 7. Release; 8. Confirmation; 9. Surrender; 10. Assignment; and 11. Defeasance.

13. 1*st.* A *feoffment* was the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. It was a gift of a corporeal hereditament. He that gave or enfeoffed was called the *feoffor* and the person enfeoffed was called the *feoffee.* A feoffment required a delivery of the corporeal possession of the land, actual or symbolical, called livery of seisin. The transfer at first was not accompanied by any written deed, but was afterward, specifying the purposes, limitations and subject-matter of the grant.

14. Livery of seisin was of two kinds: in deed, or in law.

15. Livery in deed is thus performed: The feoffor or his attorney, together with the feoffee or his attorney comes to the land or the house; and there in the presence of witnesses, declares the contents of the feoffment on which livery is to be made. And then the

feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the grounds, a clod or turf, or a twig or bough there growing, with words to this effect: "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But if it be of a house, the feoffor must take the ring, or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut the door, and then open it and let in the others.[6]

16. *Livery in law* is where the same is not made on the land, but in sight of it only; the feoffor saying to the feoffee: "I give you yonder land, enter and take possession." Livery in law could not be given or received by attorney, but only by the parties themselves.[7]

17. Conveyance by feoffment with livery has become obsolete, and has been abolished by statute.[8]

18. 2*d.* The conveyance by *gift* was applied to the creation of an estate tail. It differed in nothing from a feoffment except in the estate which it created.

19. 3*d.* *Grant* was the regular method of transferring the property of incorporeal hereditaments, or such things whereof no livery could be had, such as reversions, rents, commons and the like.

20. The Revised Statutes have given to deeds and conveyances of a fee and of a freehold, the denomination of grants; and, though deeds of bargain and sale, and of lease and release may continue to be used, they are to be deemed grants. A grant is made

[6] 2 Black. Com., 315.
[7] 2 Black. Com., 316.
[8] 1 R. S., 738.

competent to convey all the estate and interest of the grantor which he could lawfully convey; and it passes no greater or other interest.[9]

21. *4th.* A lease is properly a conveyance of any lands or tenements (usually in consideration of rent) made for life or years, or at will, but always for a less time than the lessor hath in the premises. Leases for one year and under need not be in writing, but for a longer period than one year they are void unless the contract or some memorandum or note thereof, expressing the consideration, be in writing, and be subscribed by the party by whom the lease or sale is to be made, or his lawful agent.[1] Leases, in fee or for life, must be sealed and witnessed or acknowledged;[2] for other leases no seal is necessary.[3]

22. Leases should be drawn in duplicate, one for the lessor and one for the lessee, and both are deemed originals.[4]

23. *5th.* An *exchange* is a mutual grant of equal interests, the one in consideration of the other. The estates exchanged must be equal in quantity; not of *value*, for that is immaterial; but of *interest;* as fee simple for fee simple, a lease for twenty years for a lease for twenty years, and the like.[5] The old method of exchange is not now in use, and an exchange must

[9] 1 R. S., 738.

[1] 2 R. S., 135.

[2] 1 R. S., 738, § 137.

[3] Jackson *v.* Wood, 12 Johns., 73.

[4] Lewis *v.* Paine, 8 Cow., 71.

[5] 2 Black. Com., 323; Wilcox *v.* Randall, 7 Barb., 638; Runyan *v.* Stewart, 12 Barb., 542.

now be made by deed and not by parol.[6] It is of importance now only in regard to questions of dower.

24. 6*th.* *Partition* is where two or more joint tenants or tenants in common, agree to divide the lands so held among them in severalty, each taking a distinct part.[7] It has been repeatedly held that a parol partition, between tenants in common, followed by immediate and continued possession, is valid and severs the possession;[8] and after twenty years no mistake or errors in the surveys will be corrected.[9]

25. The secondary, or derivative conveyances presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, or transfer the interest granted by such original conveyance.

26. 7*th.* Releases are a discharge or conveyance of a man's right in lands or tenements, to another that hath some former estate in possession. The words generally used therein, are "remised, released, and forever quitclaimed."[1]

27. Such a conveyance, merely remising, releasing and quitclaiming to another, his heirs and assigns forever, though technically a release, has been held to be a good conveyance by way of bargain and sale, and sufficient to pass the fee, though the relessee was

[6] Clark *v.* Graham, 6 Wheat., 577.

[7] 2 Black. Com., 324.

[8] Ryers *v.* Wheeler, 25 Wend., 437; Bool *v.* Mix, 17 Wend., 119; Jackson *v.* Luquere, 5 Cow., 221; Corbin *v.* Jackson, 14 Wend., 619; Jackson *v.* Livingstone, 7 Wend., 136; Jackson *v.* Vosburgh, 9 Johns., 270; Jackson *v.* Bradt, 2 Caines, 174; Jackson *v.* Harder, 4 Johns., 202.

[9] Jackson *v.* Hasbrouck, 3 Johns., 331.

[1] 2 Black. Com., 324.

not in possession.[2] Under the Revised Statutes a release is good as a grant. But formerly a release to a person out of possession was inoperative.[3]

28. Releases are classified as operating in five ways:

29. (*a.*) By way of enlarging an estate: as if there be a tenant for life or for years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee.[4]

30. The lease and release, when used as a conveyance of the fee, have the joint operation of a single conveyance. The first step was to create a small estate, as a lease for a year, and vest possession in the grantee. The release was a conveyance at common law, and operated by way of enlargement of the estate; and thus by the operation of the lease and the release the title was conveyed.[5] This was the mode of conveyance universally in practice in this State until the year 1788.

31. (*b.*) By way of passing an estate, as when one joint tenant or tenant in common releases to the other, this passes the fee simple of the whole. In both these cases, there must be a privity of estate between the relessor and relessee: that is, one of their estates must be so related to the other as to make when united but one and the same estate in law.

32. (*c.*) By way of passing a right: as if a man be

[2] Jackson *v.* Fish, 10 Johns., 456; Beddo *v.* Wadsworth, 21 Wend., 120; Lynch *v.* Livingstone, 2 Seld., 422.

[3] Bennett *v.* Irwin, 3 Johns., 363.

[4] 2 Black. Com., 324.

[5] 4 Kent's Com., 495.

disseissed, and releases to his disseisor all his right, whereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful.

33. (*d.*) By way of extinguishment: as if my tenant for life makes a lease to A. for life, remainder to B. and his heirs, and I release to A.; this extinguishes my right to the reversion, and shall enure to the advantage of B.'s remainder as well as of A.'s particular estate.

34. (*e.*) By way of entry and feoffment: as if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion.[6]

35. Livery of seisin was not necessary in releases, because the occupancy of the relessee was a matter of sufficient notoriety.

36. 8*th.* A *confirmation* is a conveyance whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased, and the words making it are "have given, granted, ratified, approved and confirmed."

37. 9*th.* A *surrender* is of a nature directly opposite to a release: for as that operates by the greater estates descending upon the less, a surrender is the falling of a less estate into a greater. The words used are "hath surrendered, granted and yielded up." The surrenderor must be in possession, and the surrenderee must have a higher estate, in which the estate surrendered may merge.

[6] 2 Black. Com., 324.

38. 10*th*. An *assignment* is a transfer or making over to another, of the right one has in any estate but is usually applied to an estate for life or years, or a bond and mortgage, judgment or other security. The usual words are "assign, transfer and set over."

39. 11*th*. A *defeasance* is a collateral deed made at the same time as the principal conveyance, containing certain conditions, upon the performance of which the estate created by such principal conveyance may be defeated.[7] They are sometimes used instead of a bond and mortgage, and for the purpose of covering up or avoiding the questions of usury. Where a deed has been given to secure a loan of money a defeasance may be executed, at the same time or afterward, by way of explaining or making safe the transaction.[8]

40. A writing to operate as a defeasance to a deed must be of as high a nature, and must therefore be under seal.[9]

41. Of the different methods used in colonial times for the conveyance of hereditaments the simplest instrument was a *grant*. But this was used only for the conveyance of incorporeal hereditaments, and such things whereof no livery could be had; and the most usual mode of the conveyance of land was by lease and release.

42. In 1788 an act was passed declaring that none of the statutes of England or of Great Britain, should operate or be considered as law of this State from and

[7] 2 Black. Com., 327.

[8] Dey *v.* Dunham, 2 Johns. Ch., 182; see Odell *v.* Montross, 68 N. Y., 500.

[9] Flagg *v.* Mann, 14 Pick., 479; Eaton *v.* Green, 22 Pick., 530.

after May 1st, 1788,[1] and from that time the old form of lease and release fell into disuse, and the conveyance by bargain and sale took its place, and has ever since been the most frequent mode for the alienation of or transferring real estate.

43. The statute provided that deeds of bargain and sale, and of lease and release, might continue to be used, and be deemed grants, and subject to all the provisions of the statute concerning grants. The statute gave a preference to a *grant* as the mode of passing title to the fee and freehold, so that there need be but one form of conveyance, which would be applicable to both corporeal and incorporeal hereditaments. The statute abolished feoffment and conveyance by fine and recovery, but allowed all other modes of conveyance to remain making them subject to all the provisions in the statute concerning grants. The statutes also provided that no covenants shall be implied in any conveyance of real estate, whether such conveyance contains covenants or not, and that lineal and collateral warranties should be abolished.[2]

44. The statute no where prescribes the manner or form of the instrument for the transfer of real property: but says that, no estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared unless by act or operation of law, or by a deed or conveyance in writ-

[1] 2 Greenl., 116, § 37.
[2] 1 R. S., 739.

ing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing;[3] exceptions are made in favor of wills and implied trusts. But with reference to the conveyance of estates, in fee and freehold, the statute provides that every grant in fee of a freehold estate shall be subscribed and sealed by the person from whom the estate or interest conveyed is intended to pass, or his lawful agent; if not duly acknowledged previous to its delivery, according to the provisions of the Revised Statutes, its execution and delivery must be attested by at least one witness; or if not so attested, it shall not take effect as against a purchaser or incumbrancer until so acknowledged.[4]

45. Parol acts and gifts may affect by way of estoppel an equitable possession of real estate which may ripen into a good title notwithstanding the statutes above referred to; but aside from that, all conveyances of estates in fee or freehold are to be created by *deeds*, or grants, or instruments in the nature of grants, which are denominated deeds.

Deeds.

46. A deed is a writing, signed, sealed and delivered: it must be written on paper or parchment; and to make it of avail against subsequent purchasers or incumbrancers it must be witnessed or acknowledged.

47. The following circumstances are essential to a deed:

1. Writing on paper or parchment;

[3] Laws of 1813, p. 78; 2 R. S., 134, § 6.

[4] 1 R. S., 738.

2. Words sufficient to express the agreement, legally and orderly set forth;
3. Proper parties, grantor and grantee;
4. Good and sufficient consideration;
5. Words defining the grant;
6. Description of the land conveyed;
7. Conditions to be performed by the grantee;
8. Covenants, if any;
9. The habendum clause;
10. The reading, date, sealing, signing and attestation;
11. Delivery and acceptance;
12. Recording.

1. *Writing on paper or parchment.*

48. The deed must be written or printed, for it may be in any character or any language; but it must be upon paper or parchment. For if it be written on stone, board, linen, leather or the like, it is no deed.[5] The common law has gone so far to regulate writings as to make it necessary that a deed should be written on paper or parchment, not on wood or stone. This was for the sake of durability and safety; and this is all the regulation that the law has prescribed. The instrument, or the material by which letters were to be impressed on paper or parchment, has never yet been defined.[6] It has been held that a memorandum written and subscribed with a lead pencil, was as valid as if written with pen and ink.[7] As to whether

[5] 2 Black. Com., 297.
[6] Classon *v.* Bailey, 14 Johns., 484.
[7] Merritt *v.* Classon, 12 Johns., 102; Davis *v.* Shields, 26 Wend., 354.

a deed written and signed with lead pencil is good has not yet been determined.

2. *Words sufficient to express the agreement, legally and orderly set forth.*

49. The matter written must be legally and orderly set forth; that is, there must be words sufficient to specify the agreement and bind the parties; which sufficiency must be left to the courts to determine. It is not absolutely necessary in law, to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning.

50. The orderly parts of a deed are first the premises containing the names of the parties, grantor and grantee, with their several places of residence; then the consideration with the receipt thereof; next the grant in proper words to indicate the estate transferred; then the description of the premises with reference to some previous conveyance, for the purpose of the better tracing the title; next the habendum clause; then follows the conditions, if any, to be performed by the grantee; then such covenants of warranty, if any, as agreed upon by the parties for assuring the title. Lastly comes the conclusion containing the date of the deed, unless it has been previously inserted.

3. *Proper parties, grantor and grantee.*

51. The parties to a deed may be natural persons, or artificial, as corporations. Every citizen of the United States is capable of holding lands within this

State, and of taking the same by descent, devise or purchase. And every person capable of holding lands (except idiots, persons of unsound mind and infants), seised of or entitled to any estate in lands, may alien such estate or interest at his pleasure.[8] In addition to these, as has been seen, foreigners, residing in this country, intending to become citizens on complying with certain statutes, may receive, hold and convey real property, and such corporations as by their charters are authorized to hold real property; so that all persons, including corporations, who are capable of holding may be grantees in deeds; and all but idiots, persons of unsound mind and infants may be grantors in deeds. The purpose of inserting the residence or description of the parties is that the grantors and grantees may be the more readily identified.

4. *Good and sufficient consideration.*

52. It is not absolutely necessary that the consideration should be expressed in the deed, for the seal is presumptive evidence of consideration.[9] If no consideration passes, the deed would be good as between the parties, but might be set aside on the application of the creditors of the grantor.[1]

53. Considerations are of two kinds, *good* and *valuable.*

54. A *good* consideration is that of blood or of nat-

[8] 1 R. S., 719, § 10.

[9] Hunt *v.* Johnson, 19 N. Y., 279; Cunningham *v.* Freeborn, 11 Wend., 248.

[1] Savage *v.* Murphy, 34 N. Y., 508; Dygert *v.* Remerschnider, 32 N. Y., 629; Baker *v.* Gilman, 52 Barb., 26; Lormore *v.* Campbell, 60 Barb., 62.

ural love and affection between relatives. A *valuable* consideration is such as money or other valuable things, services, goods, marriage, or promise of marriage.[2]

55. The non-payment of the consideration named in the deed will not render it void.[3]

5. *Words defining the grant.*

56. The usual words are "do hereby grant, sell and convey," or if it be a release or quitclaim the words "do remise, release and forever quitclaim."

57. If the grantor intends to convey a less estate than he himself possesses, the words of limitation should be inserted in or annexed to the clause granting the estate; unless there are words of limitation it will be considered as transferring all the estate of the grantor.

6. *Description of the land conveyed.*

58. The premises should be so described in the deed that a person of ordinary comprehension would be able by the deed to find the premises and trace the boundaries. If the description is illegible, or so as to leave it uncertain what is conveyed, the deed is inoperative.[4] But in an imperfect description if enough is given to locate with reasonable certainty the premises sought to be conveyed, it will be sufficient to pass the title.[5]

[2] Whelan *v.* Whelan, 3 Cow., 537; Verplanck *v.* Sterry, 12 Johns., 536.

[3] Barnum *v.* Childs, 1 Sand., 58.

[4] Jackson *v.* Ransom, 18 Johns., 107; Dygert *v.* Pletts, 25 Wend., 402; Mason *v.* White, 11 Barb., 173.

[5] Jackson *v.* Parkhurst, 4 Wend., 369; Corbin *v.* Jackson, 14 Wend., 619; Jackson *v.* Livingstone, 7 Wend., 136.

59. If there are certain particulars stated, sufficient to designate the premises to be conveyed, and there are additional circumstances which are false or mistaken, the latter will be rejected.[6]

60. Parol evidence may be given to explain and identify the description and to explain latent ambiguities;[7] but not apparent ambiguities.[8]

61. Maps may be referred to by designating the map and the number of the lot thereon; but if the lot is described in the deed as having a less number of acres than are laid down on the map, the number in the map must govern.[9] Whenever a description is given by referring to its number on a particular map other evidences of the boundaries should be inserted, as maps are so liable to be lost or destroyed. Many conveyances are made every year with no other description than by giving the number of the lot on some map where the map was lost or destroyed years ago. Great inconvenience and loss are occasioned by carelessness of this kind.

62. Where there are visible, known, and fixed boundaries, monuments or natural objects as a river, a spring, or marked tree, they should be mentioned in the description as they would control any error or mistake which may occur in the courses and distances.[1]

[6] Raynor *v.* Timerson, 46 Barb., 518; Finlay *v.* Cook, 54 Barb., 9; Jackson *v.* Clark, 7 Johns., 217.

[7] Seaman *v.* Hogeboom, 3 Barb., 215.

[8] French *v.* Carhart, 1 Com., 102; Swick *v.* Sears, 1 Hill, 17; Livingston *v.* Ten Broeck, 16 Johns., 14.

[9] Jackson *v.* Defendorff, 1 Caines, 493; Mann *v.* Pearson, 2 Johns., 37.

[1] Jackson *v.* Camp, 1 Cowen, 605; Wendell *v.* People, 8 Wend., 183; Jones *v.* Holstein, 47 Barb., 311; Northrop *v.* Sumney, 27 Barb., 196; Clark *v.* Baird, 9 N. Y., 183.

63. Lots or farms bounded by a highway or a stream will carry the lot to the centre of the highway or stream unless there are words limiting to the side of the highway or the stream.[2] On tide waters, arms of the sea and navigable rivers, the line of ordinary high-water mark is intended and inferred as the boundary line.[3]

64. Where the deed refers to other maps or plans for the purpose of fixing the boundaries the effect will be the same as if they were inserted in the deed and control the description.[4]

65. It is of advantage sometimes at the close of the description to refer to some former deed as being the same premises as by this deed conveyed, as it may afford some means of tracing the title, as well as furnishing some evidence to correct any mistake that may have occurred in the description.

66. It is of importance to determine what accessories to the principal thing conveyed, the parties desire to transfer at the same time. Whatever is essential to a beneficial use of the property is considered as passing by the conveyance, unless it is especially excepted.[5] Under the *appurtenances* will pass rights of way, the use of a mill dam and water, conduits of water from other lands of the grantor, raceways, com-

[2] Morgan *v.* King, 35 N. Y., 454; Luce *v.* Carley, 24 Wend., 451; People *v.* Seymour, 6 Cowen, 579; Jackson *v.* Hathaway, 15 Johns., 447.

[3] People *v.* Tibbets, 19 N. Y., 523; People *v.* Canal Appraisers, 33 N.Y., 461; The Champlain R. R. Co. *v.* Valentine, 19 Barb., 484.

[4] Kingsland *v.* Chittenden, 6 Lans., 15; Glover *v.* Shields, 32 Barb., 374; Noonan *v.* Lee, 2 Black., 499.

[5] Jackson *v.* Hathaway, 15 Johns., 447; Rood *v.* N. Y. & E. R. R. Co., 18 Barb., 80; Noyes *v.* Terry, 1 Lans., 219; Dubois *v.* Kelly, 10 Barb., 496.

mon of piscary and pasture; a right to use adjoining roads, and pass over other land of the grantor to the highway.[6] Appurtenances signify something appertaining to another which is the principal, it passes as incident to the principal thing, which is of a different though congruous nature. An easement in one piece of land may be appurtenant to another piece of land. Land cannot be appurtenant to land; nor can a right not connected with the enjoyment or use of a parcel of land be annexed to it as an appurtenance.[7]

67. If any reservations are to be made, they should be clearly and distinctly stated, because all reservations are construed strictly against the grantor in the deed.[8] And a reservation cannot be made in favor of a stranger to the deed.[9]

7. Conditions to be performed by the grantee.

68. Another of the terms upon which a grant may be made is a condition; which is a clause of contingency, on the happening of which the estate granted may be defeated.[1] Where the property is conveyed subject to some lien like a mortgage, which the grantee is to pay, sufficient words are to be introduced to show that the grantee assumes and agrees to pay such mortgage or lien, and then he becomes personally

[6] Oakley *v.* Stanley, 5 Wend., 523; Badeau *v.* Mead, 14 Barb., 328; Olmstead *v.* Loomis, 5 Seld., 423; Cromwell *v.* Selden, 3 Com., 253; Jordan *v.* Mayo, 41 Maine, 552; Child *v.* Chappel, 5 Seld., 246.

[7] Harris *v.* Elliot, 10 Peters, 25; Jackson *v.* Hathaway, 15 Johns., 447; Lawrence *v.* Delano, 3 Sand., 333; Tabor *v.* Bodley, 18 N. Y., 109; Badeau *v.* Mead, 14 Barb., 328.

[8] Ives *v.* Van Auken, 34 Barb., 566.

[9] Ives *v.* Van Auken, 34 Barb., 566; Bridger *v.* Pierson, 1 Lans., 481.

[1] 2 Black. Com., 299.

liable for the payment of it.[2] The acceptance of a deed with the words only "subject to the mortgage" does not show a personal obligation against the grantee in the deed.[3]

8. *Covenants, if any.*

69. The statute provides that no covenants shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not.[4] And this applies to all conveyances of real estate, whether they be grants in fee, for term of years, or by way of mortgage.[5]

70. A deed without covenants of warranty is a good conveyance, and will convey all of the grantor's estate in the premises.[6]

71. The covenants usually entered into by a vendor seised in fee, who parts with all his estate to a vendee, are of two sorts or kinds.

72. First. Personal covenants, which do not run with the land, and if broken are broken at the time of the conveyance.

73. Second. Covenants which run with the land, and are prospective in their operation.

74. The personal covenants are:

1*st.* That the grantor is lawfully seised;

[2] Hartley *v.* Harrison, 24 N. Y., 170; Marsh *v.* Pike, 10 Paige, 595; Jumel *v.* Jumel, 7 Paige, 591; Flagg *v.* Munger, 5 Seld., 483.

[3] Belmont *v.* Coman, 22 N. Y., 438; Dingledoin *v.* Third Av. R. R. Co., 37 N. Y., 575; Stebbins *v.* Hall, 29 Barb., 524; Plumb *v.* Tubbs, 41 N. Y., 442.

[4] 1 R. S., 738.

[5] Kinney *v.* Watts, 14 Wend., 40; Hone *v.* Fisher, 2 Barb. Ch., 569.

[6] Nixon *v.* Hyserott, 5 Johns., 58; Jackson *v.* Fish, 10 Johns., 456; Beddoe *v.* Wadsworth, 21 Wend., 120.

2*d*. That he has a right to convey;

3*d*. A covenant against the grantor's own acts;

4*th*. That the land is free from incumbrances.

75. The usual words composing the covenant of seisin are "the party of the first part, at the time of sealing and delivery of these presents, is lawfully seised, in his own right, of a good, absolute and indefeasible estate of inheritance, in fee simple, of, in and to all the above described premises." For the right to convey "the party of the first part has good right, full power and lawful authority, to grant, bargain, sell and convey the same in manner aforesaid." For the covenant against grantor "he has not done or suffered any act or thing, whereby the estate hereby released, quitclaimed and conveyed may be impeached, charged or incumbered, in any manner whatsoever." In covenants against incumbrances the words are "that the same and every part thereof are now free, clear and discharged of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature or kind soever."

76. The above covenants all have relation to the condition of the title at the time of the delivery of the deed, and when broken a cause of action arises at once against the grantor or his personal representatives, and can be maintained by the grantee only or his heirs,[7] unless the covenant is with the grantee, his heirs and assigns.[8]

77. If the covenant of seisin is broken the grantor

[7] Greenby *v.* Wilcox, 2 Johns., 1; Hamilton *v.* Wilson, 4 Johns., 72; Abbot *v.* Allen, 14 Johns., 248; Bingham *v.* Weiderwax, 1 Com., 509.

[8] Colby *v.* Osgood, 29 Barb., 339.

is liable for the consideration money or value of the land at the time of the sale, and interest from the time of the conveyance, not exceeding six years.[9] And the true consideration may be shown, and that part of it is still unpaid.[1]

78. Actions on these covenants must be brought within twenty years.

79. The following covenants run with land, and of course are prospective in their operation:

5*th*. Of quiet enjoyment;

6*th*. That the vendor will warrant and defend;

7*th*. For further assurance.

80. The usual words in a covenant for quiet enjoyment are "that the said party of the second part, his heirs and assigns, shall and may, at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises, and every part and parcel thereof, with the appurtenances, without any let, hindrance, molestation or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons lawfully claiming or to claim the same."

81. The words for the covenant to "warrant and defend" are "the said party of the first part, for himself and his heirs, the above described and hereby granted premises, and every part and parcel thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said

[9] Staats *v.* Ten Eyck, 3 Caines, 111; Pitcher *v.* Livingston, 4 Johns., 1; Bennett *v.* Jenkins, 13 Johns., 50.

[1] Bingham *v.* Weiderwax, 1 Com., 514.

party of the first part and his heirs, and against all and every person, and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant and by these presence forever defend." This is the covenant most generally used, and is known as the usual covenant of warranty.

82. The covenant for further assurance is: "that the said party of the first part, and his heirs, and all and every person or persons, whomsoever, lawfully or equitably deriving any estate, right, title, or interest, of, in, or to the herein granted premises by, from, under, or in trust from him or them shall and will at all time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said party of the second part, his heirs and assigns, make and execute, or cause to be made and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law, for the better and more effectually vesting and confirming the premises hereby granted, or intended so to be, in and to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs and assigns, or his or their counsel learned in the law, shall be reasonably advised, devised or required."

83. The covenants for quiet enjoyment and of warranty run with the land, and any assignee or grantee in the future may sue any one or more of the covenantors, whether immediate or remote;[2] and the

[2] Miller *v.* Watson, 5 Cow., 137; Baxter *v.* Byers, 13 Barb., 267; Hunt *v.* Amidon, 4 Hill, 345; Norman *v.* Wells, 17 Wend., 136.

assignee with warranty, or without warranty, can maintain even though he be a purchaser on a foreclosure sale, the action for breach of these covenants.[3] These covenants go to the possession and not to the title, and are broken only by a lawful entry and expulsion from, or some actual disturbance in the possession; however defective the title may be they are not broken till the possession is disturbed;[4] and an action for damages lies to recover for the failure both of possession and title according to the extent of such failure; and can be brought only by the party whose possession has been disturbed.[5] In an action upon these covenants the plaintiff must aver and prove that the person by whom he was evicted had a lawful title to the property; and that he had such title before or at the time of the conveyance by the defendant.[6] The usual measure of damages is not the value of the property at the time of the eviction, but of the value of the land at the execution of the deed; and the evidence of that value is the consideration money, with interest and costs.[7] If the eviction be from only a part of the land, the damages are a ratable part of the original price.[8]

84. The persons liable on breach of these covenants

[3] Garlock *v.* Closs, 5 Cow., 143 note; Beddoe *v.* Wadsworth, 21 Wend., 120.

[4] Andrews *v.* Wolcott, 16 Barb., 21.

[5] Kortz *v.* Carpenter, 5 Johns., 120; Whitbeck *v.* Cook, 15 Johns., 483; Webb *v.* Alexander, 7 Wend., 281.

[6] Kelly *v.* The Dutch Church, 2 Hill, 111; Fowler *v.* Poling, 6 Barb., 165.

[7] Bennett *v.* Jenkins, 13 Johns., 50; Delavergne *v.* Norris, 7 Johns., 358; Staats *v.* Ten Eyck, 3 Caines, 111; Pitcher *v.* Livingston, 4 Johns., 1.

[8] Morris *v.* Phelps, 5 Johns., 49; Dimmick *v.* Lockwood, 10 Wend., 142; Griffin *v.* Reynolds, 17 How. (U. S.), 609.

are the grantors, next, the personal representatives as executors and administrators, to the amount of the funds in their hands;[9] next, the heirs, to the amount of property received by them from the grantors.[1]

85. Upon breach of the covenant for further assurance, it is the duty of the covenantee, when he deems a further assurance necessary to prepare the same, and give notice to the covenantor, or the person to fulfil the covenant. This assurance must be prepared in accordance with the nature and purport of the original covenant. The party to whom this notice is given is entitled to a reasonable time to consider and examine it; and he is not in default and liable to an action until after a reasonable notice and time he neglects or refuses to give such further assurance.[2]

9. *The habendum clause.*

86. The *habendum* and *tenendum* clause commencing with the words to have and to hold was formerly used to set forth the kind of estate conveyed, and for what time and the tenure by which held. It is not an essential part of the deed if the quantity of interest has been already stated in the premises.

10. *The reading, date, sealing, signing and attestation.*

87. The deed should be read at the time of the execution if either party so require it. If it is not read, it is void as to the party who required it to be read. And if it be read falsely it will be void; but it will

[9] Beddoe *v.* Wadsworth, 21 Wend., 120.

[1] 2 R. S., 452.

[2] Miller *v.* Parson, 9 Johns., 336.

not be avoided on the ground of fraud or mistake, because the whole was not read by the grantor.[3]

88. The deed should be dated either at the commencement or the conclusion for the purpose of identifying at or about the time the title to the land passes. It is not essential that it be dated, because the deed takes effect only upon its delivery.

89. It should be sealed. A seal is an impression upon wax, wafer or other tenacious substance that will receive an impression and adhere to the paper; and a scrawl is not a seal.[4] One seal will answer for two or more persons if intended for the seal of all.[5]

90. The impression of the seal of any of the courts, of the public officers, of notaries public, and the common seal of corporations may be made directly upon the paper without wax.[6]

91. The real estate of a corporation can be conveyed by it only in its corporate capacity, by its corporate name, and not by the individual members of the corporation, or by its stockholders.[7] The seal to be used is the corporate seal of the corporation, and is to be affixed by the officer who has charge of it, and is to be affixed by virtue of the authority of the directors, trustees or managing officers of the corporation.[8]

92. It must be signed by the grantor opposite the seal, and if the grantor cannot write it can be signed

[3] Lansing *v.* Russell, 13 Barb., 510; Jackson *v.* Corey, 12 Johns., 427.

[4] Bank of Rochester *v.* Gray, 2 Hill, 227; Warren *v.* Lynch, 5 Johns., 239.

[5] Van Alstyne *v.* Van Slyck, 10 Barb., 383; Mackay *v.* Bloodgood, 9 Johns., 285.

[6] 2 R. S., 276; Laws of 1848, ch. 197.

[7] Wilde *v.* Jenkins, 4 Paige, 481.

[8] Jackson *v.* Campbell, 5 Wend., 575.

by some other person for him, his signature being witnessed by some one who saw him make his mark.

93. A deed will be good as between the parties, grantor and grantee, though not witnessed or acknowledged; but in order to have it of value as against subsequent purchasers or incumbrancers of the property, it must be attested by at least one witness or be acknowledged before some officer competent to take the acknowledgment thereof.[9] The witness should subscribe at the time, or be called in and requested to witness the deed by the parties immediately on execution.[1]

94. For the purpose of recording, the deed should be proven or acknowledged before the proper officer authorized to take acknowledgments of deeds and mortgages.

95. The officers authorized to take the acknowledgment of deeds and mortgages to be recorded are the following: if acknowledged or proven in this State; the justices of the Supreme Court, judges of county courts, mayors and recorders of cities, commissioners of deeds, justices of the peace,[2] and notaries public;[3] but no county judge, commissioner of deeds or notary public, can take such proof or acknowledgment out of the city or county for which they are elected or appointed; and if such deeds or mortgages are to be recorded in any other county than where such officer

[9] 1 R. S., 738; Wood *v.* Chapin, 3 Kern., 509; Morse *v.* Salisbury, 48 N. Y., 636; Voorhees *v.* Presbyterian Ch., 17 Barb., 103; Roggen *v.* Avery, 63 Barb., 65.

[1] Henry *v.* Bishop, 2 Wend., 575; Hollenback *v.* Fleming, 6 Hill, 305.

[2] 1 R. S., 757.

[3] Laws of 1859, ch. 360.

resides, there must be added to his certificate a certificate of the county clerk, under his official seal, certifying that the officer who took the proof or acknowledgment was duly authorized to take the same; that he is acquainted with the handwriting of such officer and believes that the signature to the said certificate is genuine.

96. If acknowledged or proved out of this State and within the United States, they may be taken before the chief justice, and associate justices of the Supreme Court of the United States, district judges of the United States, the judges or justices of the Supreme, Superior or Circuit Court, of any State or Territory within the United States, and the chief judge or any associate judge of the Circuit Court of the United States, in the District of Columbia, but such proof or acknowledgment must be taken within the district or territory over which the jurisdiction of the court to which such judge belongs shall extend; they may also be taken before the mayor of any city. And such proof or acknowledgment may also be taken before any officer of such State or Territory authorized by the laws thereof to take proof and acknowledgment of deeds; and may be recorded, provided there is attached to such proof or acknowledgment, signed by such officer, a certificate under the name and official seal of the clerk, register, recorder or prothonotary of the county in which such officer resides, or of the county or district court, or court of common pleas thereof, specifying that such officer was at the time of taking such proof or acknowledgment duly authorized to take the same,

and that such clerk, register, recorder or prothonotary is well acquainted with the handwriting of such officer, and verily believes that the signature to said certificate of proof or acknowledgment is genuine, and that said instrument is executed and acknowledged according to the laws of such State.[4]

97. The governor of this State is also authorized to appoint commissioners resident in the several States and Canada to take proof and acknowledgments of deeds and mortgages, the certificates of which commissioners are to be, when signed by them, certified to by the Secretary of State of this State, and when so certified may be recorded in any county of this State, where such lands so conveyed are situated.[5]

98. Proof of deeds and mortgages taken out of the United States may be taken before a judge of the highest court in Upper or Lower Canada, or before any consul of the United States, resident in any foreign port or country.[6]

99. The officer, who takes the acknowledgment of the grantor, must state in the certificate to be signed by such officer, that he knew the person making such acknowledgment to be the person described in and who executed said instrument, and that he acknowledged the execution thereof.[7]

100. The proof of the execution of any conveyance shall be made by the subscribing witness thereto, who shall state under oath, his own place of residence, and

[4] Laws of 1848, ch. 195, as amended.

[5] Laws of 1850, ch. 270, as amended.

[6] Laws of 1829, ch. 222.

[7] Wood *v.* Bach, 54 Barb., 134; The People *v.* Harrison, 8 Barb., 560.

that he knew the person described in and who executed such conveyance, and that he saw the said grantor execute the deed, and that he the said witness thereupon, then and there subscribed his name thereto as a witness to the execution thereof.[8]

101. When executed by a corporation the witness who proves the execution must state under oath his own residence; that the seal attached is the corporate seal of the corporation; that it was affixed to said instrument by the direction and authority of the board of directors or other authorized officers of the corporation; and that he signed the same by a like authority.[9]

102. In all these cases the subscribing witness must be known to the officer, or be identified by some person known to the officer.

103. Previous to 1848 it was necessary in taking the acknowledgment of a married woman in this State to a conveyance, to take her acknowledgment separate and apart from her husband, and for her to state that she executed the same freely and without any fear or compulsion of her said husband.

11. *Delivery and acceptance.*

104. Delivery is another incident essential to the due execution of a deed, for it takes effect only from the delivery. The delivery need not be by formal words or acts.[1] There must be an intention to deliver,

[8] Dibble *v.* Rogers, 13 Wend., 541; Norman *v.* Wells, 17 Wend., 136.

[9] Lovett *v.* Steam Saw Mill Asso., 6 Paige, 57; Johnson *v.* Bush, 3 Barb. Ch., 207.

[1] 1 R. S., 758; Gillett *v.* Stanley, 1 Hill, 121.

and acts showing such an intention are sufficient.[2] The deed may be delivered to the grantee himself, or to one of the grantees, or to any third person authorized by him or them to receive it. As a general rule the delivery is complete when the grantor has put it beyond his power to reclaim the deed.[3]

105. The deed may be delivered to a third person to keep till something be done by the grantee, and then delivered to the grantee. This kind of delivery is called an *escrow*. An escrow takes effect only from the performance of the condition; and until the condition is performed and the deed delivered over, the estate remains in the grantor.[4] If either party should die while the deed remains in escrow, and the condition is performed by the party in interest, the deed is valid and takes effect from the first delivery.[5]

106. Where the deed is delivered to a third person to be delivered on the death of the grantor, the title by relation passes at the time the deed was left for delivery.[6]

107. Two things are necessary in the delivery of a deed as an escrow. 1*st*. It must be delivered to a stranger, for if delivered to the party himself or to his agent, as an escrow upon conditions, the delivery is absolute, the title passes, and the grantee is not bound

[2] Jackson *v.* Catlin, 2 Johns., 248; Bracket *v.* Barney, 28 N. Y., 333; U. States *v.* Le Barron, 19 How. (U. S.), 73.

[3] Brown *v.* Austen, 35 Barb., 341.

[4] Green *v.* Putnam, 1 Barb., 500; Jackson *v.* Rowland, 6 Wend., 666; Frost *v.* Beekman, 1 Johns. Ch., 288; 18 Johns., 544.

[5] Ruggles *v.* Lawson, 13 Johns., 285; Arnold *v.* Patrick, 6 Paige, 310.

[6] Hathaway *v.* Payne, 34 N. Y., 92; Lawton *v.* Sager, 11 Barb., 349.

to perform the condition.[7] Proper words should be used indicating clearly and distinctly that the title shall not pass until the condition is performed. The conditions may be so drawn that no incumbrance can intervene between the delivery to the third party and the delivery to the grantee, that is while held in escrow.[8]

108. There must be an acceptance to make the delivery complete, not a merely physical taking, but an intention of retaining it for the purpose of making a transfer of title to the property.[9]

109. When the deed has been duly executed, delivered and accepted, a subsequent surrender or destruction of it will not divest the estate thereby conveyed.[1]

12. *Recording.*

110. The statute provides that every conveyance of real estate within this State, hereafter made, shall be recorded in the office of the clerk of the county where such real estate shall be situated; and every such conveyance not so recorded shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate,

[7] Worrall *v.* Munn, 1 Seld., 229.

[8] Jackson *v.* Catlin, 2 Johns., 248; S. C., 8 Johns., 120; Ruggles *v.* Lawson, 13 Johns., 285; Jackson *v.* Rowland, 6 Wend., 666.

[9] Brackett *v.* Barney, 28 N. Y., 333; Fonda *v.* Sage, 46 Barb., 109; Foster *v.* Beardsley, 47 Barb., 505.

[1] Schutt *v.* Large, 6 Barb., 373; Jackson *v.* Chase, 2 Johns., 84; Raynor *v.* Wilson, 6 Hill, 469.

or any portion thereof whose conveyance shall be first duly recorded.[2]

111. Different sets or series of books are provided by the county clerks for the recording of deeds and mortgages. Deeds are to be recorded in one series of books and mortgages in the other series. All instruments (except proof of foreclosure by advertisement) intended for the absolute conveyance of real property are to be recorded in one series: all mortgages and instruments intended to operate by way of mortgage (as a deed with its accompanying defeasance)[3] are to be recorded in the other series. Each deed or mortgage when recorded is to be properly indexed in the book in which it is recorded, as well as in a general index embracing a reference to the whole series, and to be indexed under the names of the several grantors and grantees and the several mortgagors and mortgagees for convenience of reference.[4] The affidavits and papers showing foreclosures by advertisement are to be recorded in the books with mortgages.

112. Conveyances are to be recorded in the order and as of the time of delivery to the clerk, who is to certify the time, book, and page in the record, and on the conveyance. Conveyances when properly recorded, with the accompanying certificates of proof or acknowledgment, may be read in evidence with the same force and effect as the originals.[5]

113. The object of the record is to give notice to all,

[2] 1 R. S., 756.

[3] Grimstone *v.* Carter, 3 Paige, 421.

[4] Laws of 1843, ch. 199.

[5] Morris *v.* Keys, 1 Hill, 540; Clark *v.* Noxon, 5 Hill, 36.

of the conveyance of the property therein described, and of the kind and quality of the estate so conveyed. But if the instruments be incorrectly or improperly recorded, they are not available as notice; and then there must be actual notice dehors the record to make it notice.[6]

114. The want of record does not avoid the deed. It is good as between the parties, and as to all persons who have actual notice that such instruments have been executed and delivered.[7]

115. The statute as to recording protects none but innocent and *bona fide* purchasers for value.[8] Those who take deeds or mortgages for a precedent debt are not considered innocent purchasers for value, except to the extent of the value they part with at the time of the conveyance.[9] Subsequent purchasers means purchasers from the same vendor.[1]

116. The object of the recording acts is to prevent fraud in the sale of pretended titles, as well as to furnish evidence to purchasers of real property as to the kind and character of the titles to the real property they may wish to purchase, and to point out and define the various liens and incumbrances thereon. And they serve to facilitate and cheapen the manner and methods of conveyance.

[6] Gillig *v.* Maas, 28 N. Y., 191; Cook *v.* Travis, 22 Barb., 338; S. C., 20 N. Y., 400; Frost *v.* Beekman, 1 Johns. Ch., 300; James *v.* Morey, 2 Cow., 246.

[7] Jackson *v.* West, 10 Johns., 466.

[8] Schutt *v.* Large, 6 Barb., 373; Harris *v.* Norton, 16 Barb., 264.

[9] Pickett *v.* Barron, 29 Barb., 505; Woodburn *v.* Chamberlain, 17 Barb., 446; Evertson *v.* Evertson, 5 Paige, 644; Ring *v.* Steele, 3 Keyes, 450.

[1] Raynor *v.* Wilson, 6 Hill, 469.

Entry.

117. For the purpose of completing the evidence of title it is important that the grantee enter and take possession. This he may do himself or by his agent duly authorized. Occupancy as has been shown is one of the first evidences of title. Another object of entry is to be convinced that the property at the time of the conveyance was not held by a stranger under a claim of title against the true owner. For unless the owner be in possession of the property, either by himself or his agent or tenant, he has no right or power to convey the property. The statute declares void every grant of land, if, at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor.[2] A man having a just title to lands, though not in possession, may execute and deliver a mortgage upon the same, which shall bind the property and have preference over any judgment or other instrument subsequent to the recording thereof.[3]

Deeds poll and indentures.

118. Formerly there were in use two kinds of deeds: one called a deed poll; the other an indenture. A deed poll was made by one party only, and an indenture made between two or more parties. When the deed was made by one party only it was polled or shaved even at the top, and for that reason called a *deed poll.*

119. It was usual where a deed was made between

[2] 1 R. S., 739.
[3] 1 R. S., 739.

two parties, to write two copies upon the same piece of parchment, with some word or letters of the alphabet written between them through which the parchment was cut in an indented line, so as to leave half the words on one part, and half on the other, thus serving the purpose of a tally.[4] Afterward indenting only came into use, and then every deed to which there was more than one party was cut with an indented or waving line at the top, and was called an *indenture*. The actual indenting of the deed afterwards ceased to be of any importance, and served no other purpose than to give a name to this species of deed. The omission of the indenting might be supplied by indenting the deed in court when it was offered in evidence.[5] Hence a deed is frequently called an indenture although nearly all of our deeds are deeds poll.[6]

120. It is still the practice in some countries for both parties, grantor and grantee, to sign the deed.

Avoidance and alteration of deeds.

121. When erasures or interlineations are made in a deed before delivery, they should be noticed in the margin by the subscribing witness, in order that such interlineation may not excite suspicion that the alteration was made after delivery to the grantee.[7]

122. If the erasure is made by the consent of the parties it does not invalidate the deed; and the

[4] Williams' Real Prop., 150.

[5] 4 Cruise's Real Prop., 11.

[6] Champlain Co. *v.* Valentine, 19 Barb., 484.

[7] Herrick *v.* Malin, 22 Wend., 388; Smith *v.* McGowan, 2 Barb. Ch., 119.

erasure may be proved by any person cognizant of it, whether he be the subscribing witness or not.[8] Where the alteration is made in a vital part of the instrument, after execution, it would be safer to have the deed re-acknowledged and re-certified.

123. The deed is not destroyed by the tearing off the seals or the cancellation of the instrument, by a stranger, without the consent of the parties:[9] nor by any unauthorized interlineation.[1]

124. The party in whose favor a covenant was made cannot maintain an action thereon against the covenantor, if the former has made a material alteration without authority, in the deed which contains the covenant.[2] And the party seeking to recover must show that the alteration was not made by him, or by those under whom he claims; or that it was made before execution, unless the alteration is against the interest of the party producing the deed, when he is not bound to account for the alteration.[3]

Construction of deeds.

125. The statutes recognize any deed clearly intended to transfer the ownership of real estate as sufficient for that purpose within the restrictions and provisions of law, provided the intentions of the parties are properly expressed. They provide that in the construction of the instrument creating or convey-

[8] Penny *v.* Corwithe, 18 Johns., 499; Woolley *v.* Constant, 4 Johns., 54.

[9] Every *v.* Mermin, 6 Cowen, 360; Rees *v.* Overbaugh, 6 Cow., 746.

[1] Waring *v.* Smith, 2 Barb. Ch., 133.

[2] Pigot's Case, 11 Co., 27 a.

[3] Jackson *v.* Jacoby, 9 Cow., 125; Acker *v.* Ledyard, 8 Barb., 514; Maybee *v.* Sniffen, 2 E. D. Smith, 1; S. C., 16 N. Y., 560.

ing, or authorizing the creation or conveyance of any estate or interest in lands, it shall be the duty of courts of justice to carry into effect the intent of the parties, so far as such intent shall be collected from the whole instrument, and is consistent with the rules of law.[a]

126. A deed is construed most strongly against the grantor; but the construction must be of the deed taken as a whole and not upon a particular part, and if possible so that every part of the deed shall take effect and every word operate. The judge will endeavor to construe the deed so that it will operate according to its meaning and intent as discernible from the words, although it may contravene the wishes or understanding of one or more of the parties.[4] The intent when not repugnant to any rule of law is to control technical terms, for the intent is the essence of the agreement.[5] The deed must receive its legal construction according to its language and its subject-matter;[6] and be made effective in all its parts if possible, giving it the same rules of construction as to a will.[7]

127. When the deed may enure several ways, the grantee may elect which way to take it, and every uncertainty is to be taken against the grantor and in favor of the grantee.[8]

128. An ambiguity which appears on the face of the instrument, called a patent ambiguity cannot be ex-

[a] 2 R. S., 148.

[4] Jackson *v.* Blodget, 16 Johns., 172; Jackson *v.* Myers, 3 Johns., 395.

[5] Westcott *v.* Thompson, 18 N. Y., 363.

[6] Jackson *v.* Tibbits, 9 Cow., 250.

[7] Fish *v.* Hubbard's Adm., 21 Wend., 654.

[8] Jackson *v.* Gardner, 8 Johns., 394; Jackson *v.* Hudson, 3 Johns., 375.

plained by extrinsic evidence. As if a grant were to one of the sons of A., and a blank were left to insert his name, and A. had several sons, it is not admissible to prove by parol which son of A. was intended.[9]

129. A latent ambiguity is such as arises from external circumstances, and these may be explained by parol, as a grant to John Smith, of Albany, and it appears that there are several John Smiths in Albany, it can be shown by parol which John Smith was intended.[1]

130. The rules of law must prevail against the apparent intention, for the contract must be controlled by the construction of the statute. As the law, enacted for the many, must prevail though in the particular instance some injury may result to the individual. If the words be neither ambiguous nor equivocal, evidence of usage is not admissible to control the effect or operation of the deed.[2] But where the words of an ancient deed are equivocal, the usage of the parties under the deed may be allowed to explain it.[3]

131. If the deed will bear more than one interpretation, the court will look to surrounding circumstances existing when the contract was made.[4]

132. Several instruments, between the same parties, relating to the same subject, of the same date, are to be construed as parts of one transaction; as a deed and a defeasance.[5]

[9] Fish *v.* Hubbard's Adm., 21 Wend., 659.

[1] Broom's Maxims, 468.

[2] Parsons *v.* Miller, 15 Wend., 561.

[3] Livingston *v.* Ten Broeck, 16 Johns., 14.

[4] Swick *v.* Sears, 1 Hill, 17; French *v.* Carhart, 1 Comst., 102.

[5] Stow *v.* Tifft, 15 Johns., 458; Jackson *v.* Dunsbaugh, 1 Johns. Cas. 91.

133. A general clause may be restrained by a special description following and explaining it; or a limited description may be enlarged by a general clause, provided both clauses be in the granting part of the instrument.[6]

Covenants running with the land.

134. The covenants which run with the land embrace all such as extend to the possession and not to the title.

The more common covenants running with the land are as follows:

1*st.* A covenant of warranty;[7]

2*d.* A covenant that neither the grantor nor his heirs shall make any claim to the land conveyed;[8]

3*d.* A covenant for quiet enjoyment;[9]

4*th.* A covenant by a tenant to repair;[1]

5*th.* A covenant to pay rent, as well as the condition of re-entry for its non-payment.[2] And it is no objection that the rent is a rent charge, or reserved in a grant in fee;[3]

6*th.* A covenant to pay all taxes and assessments;[4]

7*th.* A covenant not to erect a building in a common or public square owned by the grantor in front of

[6] Munroe *v.* Allaire, 2 Caines, 327; Wilkes *v.* Ferris, 5 Johns., 33.

[7] Suydam *v.* Jones, 10 Wend., 180; Withy *v.* Mumford, 5 Cow., 137.

[8] Fairbanks *v.* Williamson, 7 Greenl., 96.

[9] Whitney *v.* Lewis, 21 Wend., 131.

[1] Norman *v.* Wells, 17 Wend., 148; Demarest *v.* Willard, 8 Cow., 206.

[2] Van Rensselaer *v.* Hays, 19 N. Y., 68.

[3] Nicoll *v.* New York & Erie R. R. Co., 12 Barb., 460; aff'd., 2 Kern., 121.

[4] Post *v.* Kearney, 2 Com., 394; Oswald *v.* Gilfert, 11 Johns., 443; Bleecker *v.* Ballou, 3 Wend., 263.

the premises,[5] as well a covenant not to put up an obstruction;[6]

8*th*. A covenant for further assurance.[7]

135. Where the conveyance refers to another conveyance of the same premises, which is on record, containing a restrictive clause, the grantee is presumed to have notice of such restrictive covenant.[8] And a recital of facts forming a link in the title is constructive notice of any defect or incumbrance.[9]

136. Generally all parties to a deed are bound by the recitals therein; operating as an estoppel on the interests in the land, binding all parties and their privies, in blood, or in estate.[1] But they are not bound if the recital is not true in fact, or is a mistake.[2]

137. Covenants under seal must be discharged by instruments under seal, and cannot be discharged by a parol agreement.[3]

Estoppel.

138. *Estoppel* is a mode of preserving, rather than of acquiring property, inasmuch as a party is concluded by his own act from disputing the title of another. Estoppel is defined to be a conclusion, because a man's own act or acceptance stops or closes up his

[5] Trustees of Watertown *v.* Cowen, 4 Paige, 510.

[6] Gilbert *v.* Peteler, 38 N. Y., 165.

[7] Miller *v.* Parsons, 9 Johns., 336.

[8] Gilbert *v.* Peteler, 38 N. Y., 165.

[9] Acer *v.* Westcott, 46 N. Y., 384; Gilbert *v.* Peteler, 38 N. Y., 165.

[1] Reed *v.* McCourt, 41 N. Y., 435; Demeyer *v.* Legg, 18 Barb., 14; Hardenbaugh *v.* Lakin, 47 N. Y., 109; Tefft *v.* Munson, 63 Barb., 37; aff'd, 57 N. Y., 97.

[2] Stoughton *v.* Lynch, 2 Johns. Ch., 209.

[3] Wall *v.* Munn, 1 Seld., 239; Suydam *v.* Jones, 10 Wend., 180.

mouth to allege or plead the truth.[4] Estoppels are of three kinds: by matter of record; by matter of writing, and by matter *in pais*.

139. By matter of record as by letters patent, and by verdict and judgment. A decision of a court of competent jurisdiction is conclusive and binding on all courts of concurrent jurisdiction,[5] but it must be directly upon the point.[6] But to be a good bar between the parties it must have been between the same parties and for the same subject-matter;[7] and upon parties or persons claiming under them.[8]

140. Estoppels by matter of writing arise under wills and deeds.

An heir cannot take under and in hostility to a will: if he claim under the will he must give it effect.[9] A party, claiming through a deed which recites a will, is estopped from denying the validity or genuineness of the will.[1] The admission or assertion must be of a matter of fact, not a conclusion of law,[2] and must be under seal.[3]

Estoppel by way of recitals in deeds have been mentioned above.

141. The recital of a lease in a deed of release is conclusive upon parties in privity of estate.[4] And a

[4] Co. Litt., 352 a.

[5] Simpson *v.* Hart, 1 Johns. Ch., 91.

[6] Gardner *v.* Buckbee, 3 Cow., 120; Burt *v.* Sternburgh, 4 Cow., 559.

[7] Bruen *v.* Hone, 2 Barb., 586; Vail *v.* Vail, 7 Barb., 226.

[8] Kingsland *v.* Spaulding, 3 Barb. Ch., 343; Wright *v.* Butler, 6 Wend., 284; Young *v.* Black, 7 Cranch, 565.

[9] Hawley *v.* James, 16 Wend., 61.

[1] Jackson *v.* Thompson, 6 Cow., 178.

[2] Brewster *v.* Stryker, 2 Com., 19.

[3] Davis *v.* Tyler, 18 Johns., 492.

[4] Carver *v.* Jackson, 4 Peters, 1.

tenant cannot controvert the title of the landlord under whom he holds.[5] But after the termination of the tenancy he may dispute the title.[6]

142. *Estoppel in pais* is an admission by one person to influence the conduct of another with whom he is dealing, and leading him into a line of conduct which must be prejudicial to his interest, unless the person so admitting is cut off from the power of retraction.[7]

143. If a person who has title to a piece of land, looks on and suffers another to purchase and expend money on the land without making known his claim, he will not afterwards be permitted to assert his legal title against the innocent purchaser;[8] and this is especially the case if he has advised and encouraged the parties to the sale.[9]

144. Estoppels bind only the parties to them, and their *privies*—privies in blood, privies in estate, and privies in law.[1]

145. Every estoppel, because it concludes a man to allege the truth, must be certain to every intent, and not be taken by argument or inference.[2]

Sale of lands by a power of attorney.

146. Any person being the owner of real estate and able to sell and convey the same by deed, may

[5] Ingraham *v.* Baldwin, 12 Barb., 9; Affd., 5 Seld., 45.

[6] Child *v.* Chappel, 5 Seld., 246; Jackson v. Rowland, 6 Wend., 667.

[7] Dezell *v.* Odell, 3 Hill, 215.

[8] Wendell *v.* Van Rensselaer, 1 Johns. Ch., 344; Town *v.* Needham, 3 Paige, 545.

[9] Storrs *v.* Barker, 6 Johns. Ch., 166.

[1] Lansing *v.* Montgomery, 2 Johns., 382; Co. Litt., 352 b.

[2] Co. Litt., 352 b.

appoint by deed another person to mortgage or convey the same in his place and stead. The instrument by which this authority is granted is called a power of attorney.

147. A power of attorney to sell lands is an instrument in writing under seal, by which the party executing it appoints another to be his attorney, and empowers such attorney to act for him in accordance with the authority and conditions prescribed in the instrument. An agent may be orally empowered to make a contract to sell land, as the contract may be without seal.[3] But an authority to execute a deed must be a deed.[4]

148. The power of attorney should be acknowledged and recorded in the office of the clerk of the county where the land lies which the attorney is to sell. It may be revoked at any time by the party giving it; and the revocation should be executed and recorded in the same manner and in the same offices as the original power,[5]

149. A married woman in this State formerly could not execute a power of attorney to sell lands;[6] but, if living without the State, she could join with her husband in executing a power of attorney.[7]

150. The authority must be strictly pursued. If the authority be given to two or more, it cannot be

[3] Champlin *v.* Parish, 11 Paige, 405; McWhorter *v.* McMahon, 10 Paige, 386.

[4] Lawrence *v.* Taylor, 5 Hill, 113; Blood *v.* Goodrich, 9 Wend., 68.

[5] 1 R. S., 763.

[6] Laws of 1878, ch. 300; Hunt *v.* Johnson, 19 N. Y., 279.

[7] Laws of 1835, ch. 275.

executed by one alone, all must join. An authority to three cannot be executed by two.[8]

151. A power of attorney to authorize the sale and conveyance of lands does not give the attorney power to warrant; as any act varying from the terms of the power is void.[9]

152. The power must be executed in the name of the principal, as A. B. by C. D., his attorney. If the attorney fix only his own name and seal, although in the body of the instrument it be stated that it is the act of the principal by his attorney, it is void.[1]

153. It should appear upon the face of the instrument, that it was intended to be executed as the deed of the principal and with the seal of the principal, and not as the deed or seal of the attorney, and there should be as many seals as there are parties.[2]

154. A power to sell is not a power to mortgage.[3] But a power to sell for the purpose of raising money might imply a power to mortgage.[4] A power to mortgage includes a power to execute a mortgage with a power of sale.[5]

155. The decease of the attorney revokes the power of any sub-attorney appointed by him.[6] And

[8] Green *v.* Miller, 6 Johns., 39; Franklin *v.* Osgood, 14 Johns., 553; Sinclair *v.* Jackson, 8 Cow., 543.

[9] Gibson *v.* Colt, 7 Johns., 390; Nixon *v.* Hyserott, 5 Johns., 58.

[1] Townsend *v.* Corning, 23 Wend., 435; Townsend *v.* Hubbard, 4 Hill, 351; White *v.* Skinner, 13 Johns., 307.

[2] Townsend *v.* Hubbard, 4 Hill, 351; Wilks *v.* Back, 2 East, 142.

[3] Coutant *v.* Servos, 3 Barb., 128; The Albany Fire Ins. Co. *v.* Bay, 4 N. Y., 9; Bloomer *v.* Waldron, 3 Hill, 361.

[4] 4 Kent, 147.

[5] Wilson *v.* Troup, 7 Johns. Ch., 25.

[6] Watt *v.* Watt, 2 Barb. Ch., 371.

the death of the principal revokes the power of attorney; but not when such power is coupled with an interest.

156. All powers of attorney receive a strict interpretation, and the authority must not be stretched beyond that which the power authorizes or is necessary for carrying the authority into effect.[7] Whoever deals with the agent is chargeable with notice of the contents of his authority.[8]

Of leases.

157. A lease is a conveyance of lands or tenements to a person for life, for years, or at will, but always for a less time than the lessor hath in the premises; for if it be for the whole interest, it will be an assignment.[9]

158. In form, the *lease* is usually an indenture, executed in duplicate under the hands and seals of both parties, both parts of which are originals.[1] They are sometimes executed in parts, the obligation to be performed by the tenant in one part, which is signed by him and given to the landlord; and the other is signed by the landlord and given to the tenant. In such cases the two instruments have to be construed as one agreement. A lease for more than one year is to be by deed or writing subscribed by the party creating it.[2] An oral lease for one year is good; and an oral lease for

[7] Sandford *v.* Handy, 23 Wend., 260; Nixon *v.* Hyserott, 5 Johns., 58.
[8] Warwick *v.* Warwick, 3 Atk., 294.
[9] 2 Black. Com., 317.
[1] Lewis *v.* Payne, 8 Cow., 71.
[2] 2 R. S., 134.

more than one year, if entered upon by the lessee, would be good for one year.[3] Leases for three years and more should be sealed and acknowledged, and in most of the counties must be recorded.[4] Leases may be for any length of time, excepting that leases for agricultural lands cannot be for more than twelve years if the leases are those which reserve rents payable at stated periods.[5] Covenant for renewal at the end of the twelve years would be void, though the lease would be good for twelve years.[6] Where the covenant in the land binds the person only, and not the land, or if it is for the performance of duties not certain and periodical, as for a person's support and maintenance, the lease would be good.[7]

159. The lease should not only state the day at which it is to commence and terminate, but also the hour of the day, as a lease from April 1st to April 1st would commence on April 2.[8]

260. Letting land upon shares is not strictly a lease, as the parties are tenants in common of the crops.[9] An agreement for one to work for another at a stated price for a stated time and to be supplied with a house, is not a lease, but creates the relation of master and servant.[1] A person who enters upon land of another under a contract to purchase is not a tenant, and if

[3] The People *v.* Rickert, 8 Cowen, 226; Schuyler *v.* Legget, 2 Cow., 660.

[4] Laws of 1823, ch. 413.

[5] Constitution, art. 1, sec. 14; Parsell *v.* Stryker, 41 N. Y., 480.

[6] Hart *v.* Hart, 22 Barb., 606.

[7] Stephens *v.* Reynolds, 6 N. Y., 454.

[8] Wilcox *v.* Wood, 9 Wend., 346; Thornton *v.* Payne, 5 Johns., 74.

[9] Caswell *v.* Districth, 15 Wend., 279; Bradish *v.* Schenck, 8 Johns., 151.

[1] Haywood *v.* Miller, 3 Hill, 90.

after the arrival of the time to purchase he remains on the land, he is a trespasser.[2] A contract for rooms and board does not create a tenancy.[3]

161. Although a lease usually embraces such instruments only as convey to the lessee an estate less than that which the lessor possesses, yet it has been the practice in many portions of this State to grant permanent leases, reserving rent either in money, in kind, or in services. Such leases are called leases in fee, and durable leases.[4] So long as the tenant paid his rent promptly he had his estate in fee, subject, however, to the conditions in the grant. He could sell and dispose of it, and it was descendible to his heirs.[5] The indentures or grants had clauses of distress and re-entry, and the parties thereto, and their privies were subject to all the duties, liabilities and conditions of landlords and tenants, hence they were called leases. Such leases may still be made, excepting for agricultural lands, which cannot be leased for a period greater than twelve years.

162. The same conditions and covenants may be inserted in leases in fee, as in leases for years; except that covenants and conditions in any manner restraining the power of alienation in a lease in fee, are void in the same manner as they would be in a grant of an absolute fee.[6]

[2] Smith *v.* Stewart, 6 Johns., 46.

[3] Wilson *v.* Martin, 1 Denio, 602.

[4] 1 R. S., 748; De Peyster *v.* Michael, 2 Seld., 467; Jackson *v.* Collins, 11 Johns., 1; Van Rensselaer *v.* Hays, 5 Denio, 477.

[5] Hunter *v.* Hunter, 17 Barb., 25.

[6] De Peyster *v.* Michael, 2 Seld., 467.

163. A rent charge runs with the land, and binds the heirs and assigns of the covenantor; and an assignee of the rent and right of entry may maintain ejectment, and covenants will lie by the assignee of the lessor against the assignee of the lessee, independent of tenure and reversion.[7]

[7] Main *v.* Feathers, 21 Barb., 646; Van Rensselaer *v.* Hays, 19 N. Y., 68; Van Rensselaer *v.* Reed, 26 N. Y., 558.

CHAPTER XIII.

TITLE BY PRESCRIPTION; BY ADVERSE POSSESSION; DEDICATION; AND BY ESCHEAT AND FORFEITURE.

1. Prescription.
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3. Prescription differs from dedication.
4. Applies to easements.
5. Length of time.
6. User must be open, continuous, peaceable.
7. Right of drain and drip.
8. Right of deposit.
9. Adverse possession.
10. Statute of limitations.
11. Limitations against the people.
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13. Grantees from the State.
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63. Aliens hold against all but the State.
64. Escheated lands may be sold before entry.
65. State takes subject to condition.
66. Forfeiture.
67. No cases of forfeiture since the revolution.

I. *Title by prescription.*

1. A title by *prescription* is when a man can show no other title to what he claims, than that he, and those under whom he claims, have enjoyed it for a long time. In its more restricted sense it applies only to incorporeal hereditaments, and not to corporeal hereditaments. The corresponding title to corporeal hereditaments is adverse possession.

2. Prescription differs from custom in this: the latter is properly a local usage, and not annexed or belonging to any particular person.[1]

3. Prescription differs from dedication, in that the former belongs to the individual, and the latter belongs to the people, the public.[2] Prescription supposes that there was at some time a grant, but in a dedication to the public there can be no grantee.

4. The doctrine of prescription is applied to rights attached to or flowing out of land or corporeal hereditaments, such as easements, rights of way, rights of common, riparian rights and privileges, rights over waters, and watercourses.

5. The first essential requisite to form a prescription is the length of time which it has existed. A prescription cannot be predicated upon a user of less than twenty years.[3]

6. To create a title by prescription the occupancy or user of the right claimed must be open, continuous, peaceable, under a claim of right, and not by permission or indulgence,[4] and it must be certain and reasonable.[5] It may be lost by neglecting to claim or exercise it; but the non-user must have been continuous for twenty years to extinguish it. It takes as long to extinguish the right as it does to create it.[6]

7. The right of drainage over another's land gives

[1] 2 Black. Com., 263; Ferris *v.* Brown, 3 Barb., 105.

[2] Post *v.* Pearsell, 22 Wend., 425.

[3] Munson *v.* Hungerford, 6 Barb., 265.

[4] Colvin *v.* Burnett, 17 Wend., 568; Sargeant *v.* Ballard, 9 Pick., 251.

[5] Hart *v.* Vose, 19 Wend., 365; Brooks *v.* Curtis, 50 N. Y., 639.

[6] Corning *v.* Gould, 16 Wend., 531; Miller *v.* Garlock, 8 Barb., 153.

no right to the owner of the land to use the drain. The grant of such a right is a grant of an easement and not a right in the land. The existence of such an easement is an incumbrance, but not a breach of covenant for quiet enjoyment.[7] The servitude of drip is where water from the house or land of one is allowed to drip over on another's land.[8]

8. The right of deposit may be acquired by prescription, as where logs for a saw mill are deposited on land of another. Such a right would pass by a conveyance of the mill as an appurtenance, even if there might be parol evidence of a contrary intent.[9] The use of water in a particular way for twenty years without interruption, raises a presumption of title, although not used in the same precise manner, or to drive the same machinery. Where there is a spring of water on one man's land, and it flows on to another, the owner of the land, where the spring is, may use as much as is necessary for his family and cattle, but cannot appropriate the whole of it to his own use.[1] The same principle applies to subterraneous streams as well as to such as flow on the surface.[2]

II. *Title by adverse possession.*

9. Title by adverse possession is similar to title by

[7] McMullin *v.* Wooley, 2 Lans., 394; Butterworth *v.* Crawford, 46 N. Y., 349.

[8] Bellows *v.* Sackett, 15 Barb., 96; Child *v.* Chappel, 5 Seld., 246; Rose *v.* Bunn, 21 N. Y., 275.

[9] Voorhees *v.* Burchard, 6 Lans., 176; Belknap *v.* Trimble, 3 Paige, 577; Baldwin *v.* Calkins, 10 Wend., 167.

[1] Arnold *v.* Foot, 12 Wend., 230; Marshall *v.* Peters, 12 How., 222.

[2] Smith *v.* Adams, 6 Paige, 435.

prescription in this, that both require uninterrupted occupation, use and enjoyment for the period of twenty years. Prescription presumes a grant; adverse possession estops the original owner from enforcing his claim to the property. Adverse possession does not create a title in the occupant, but it deprives other persons from ousting him of his possession. The title is thus seen to be a negative one.

10. The statute, by which the holder by adverse possession is protected, is called the Statute of Limitations. It does not profess to take the property of one man and give it to another; but is intended to quiet the possession of the occupant; to repress the spirit of litigation, and to say to the person who has slept upon his rights so long, that he should not enforce a claim which, had it been presented within a reasonable time, might have been justly defeated, by proper evidences of title, which from the lapse of time may now be lost.

11. The statute provides, that the people of this State will not sue any person for, or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same, unless either: 1*st*. The cause of action accrued within forty years before the action is commenced; or 2*d*. The people, or those from whom they claim, have received the rents and profits of the real property or of some part thereof, within the same period of time.[3]

12. Under this section, as against the people, a de-

[3] Code, § 362.

fendant must show title in himself, or a continued possession of forty years.[4]

13. Grantees from the State are bound by the same limit of forty years.[5]

14. As to actions between individuals the statute is, that no action for the recovery of real property or the possession thereof, shall be maintained by a party other than the people, unless the plaintiff, his ancestor, predecessor or grantor, was seised or possessed of the premises in question within twenty years before the commencement of the action.[6]

15. The same rule is to prevail whether used in the prosecution or defence of the action, when founded upon the title to real property, or to rents or services out of the same; and neither is effectual unless it appears in the one case, that the persons prosecuting the action, and in the other, the party making the defence, or under whose title the action is prosecuted or defended, or the ancestor, predecessor or grantor of such person, was seised or possessed of the premises in question, within twenty years before the commencement of the act in respect to which such action is prosecuted or defence made.[7]

16. In order to define more particularly what is to be understood by what is and what is not adverse possession the statute says, that a person establishing a legal right to premises, in every action for the recovery of real property, shall be presumed to have been

[4] The People *v.* Van Rensselaer, 8 Barb., 189.

[5] Code, § 363.

[6] Code, § 365.

[7] Code, § 366.

possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of an action for the recovery thereof.[8]

17. Adverse possession may commence in many different ways. One finding property vacant may enter and take possession; another may enter by way of trespass; and a third may hold over after his term has expired; or on account of the decease of the true owner the heirs have not immediately asserted their right to the property. In each of these cases the occupant may claim that he is holding under and for the true owner; if he does this his possession is not an adverse possession, but the possession of the true owner; as every adverse possession must be hostile to the true owner.[9]

18. Or the adverse possession may be commenced by a person under a claim of title either by deed or the decree or judgment of some court. To maintain a claim in the latter cases, he must have supposed at the time of his entry that the said judgment or decree was such that he could rely upon it, as he cannot claim the advantage of any deed, judgment or decree if at the time he supposed it valueless or false or fictitious.[1]

[8] Code, § 368.

[9] Fosgate *v.* Herkimer M. Co., 12 Barb., 352.

[1] Jackson *v.* Case, 7 Wend., 152; Livingston *v.* Peru Co., 9 Wend., 511.

19. The different classes or kinds of title of holding adversely may therefore be reduced to two:

20. 1*st*. Where the occupant claims to have entered into, and to hold possession under some written instrument or judgment or decree of a competent court; and,

21. 2*d*. Where the occupant claims to hold under a claim of title not founded upon a written instrument or judgment or decree.

22. Questions in regard to the kind and character of the occupation have been before the courts frequently to determine what was the kind, character or quality of the holding which would constitute an adverse possession; and the statute is intended to embrace the decision of the courts in these particulars.

23. It is as follows: whenever it shall appear that the occupant, or those under whom he claims, entered into possession of the premises under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon a decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree or judgment, or of some part of such possession under such claim, for twenty years, the premises so included shall be deemed to have been held adversely, except that when the premises so included consist of a tract divided into lots, the possession of one lot shall not be

deemed a possession of any other lot of the same tract.[2]

24. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:

1*st*. Where it has been usually cultivated or improved;

2*d*. Where it has been protected by a substantial inclosure;

3*d*. Where although not inclosed, it has been used for the supply of fuel or of fencing timber for the purposes of husbandry or the ordinary use of the occupant;

4*th*. Where a known farm or a single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.[3]

25. Where it shall appear that there has been actual continued occupation of the premises under a claim of title exclusive of any other right, but not founded upon a written instrument or a judgment or a decree, the premises so actually occupied and no other, shall be deemed to have been held adversely.[4]

26. For the purpose of constituting an adverse pos-

[2] Code, § 369.
[3] Code, § 370.
[4] Code, § 371.

session by a person claiming title not founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only:

1*st*. Where it has been protected by a substantial inclosure;

2*d*. Where it has been usually cultivated or improved.[5]

27. Where the entry of the adverse possession is made under a deed or a judgment or decree of the court, there can be little doubt when such adverse possession commences; but when a tenant holds over after the termination of his lease the time is not so easily marked and defined, and the statute makes the following provision:

28. Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumption shall not be made after that period.[6]

29. The right of possession of any real property shall not be impaired or affected by a descent being cast

[5] Code, § 372.

[6] Code, § 373.

in consequence of the death of a person in possession of such property.[7]

30. The plaintiff was born on the 14th Dec., 1820. By well settled rules he was competent to bring suit as being of full age, on the 13th Dec., 1841. His disability to sue ended with the expiration, with the last moment of the 12th day of December, 1841. He had ten whole years after such disability was removed to bring his suit. He did not sue until the 18th of that month, and then his whole ten years had expired, and the statute barred his claim. The ten years' limitation applies where the person entitled to sue for the recovery of lands is under a disability when the right accrues, and dies before such disability terminates, and thus casts the same estate by devise or descent, upon heirs or devisees;[8] in which case the heirs or devisees must bring their action within ten years after the right of action accrued to them.[9]

31. As mere naked possession or occupancy is one of the evidences of title, and as a man may be in possession of lands without any shadow or evidence of right to such occupancy, the statute has defined that the presumption of law shall be, that such person shall be considered as holding in subordination to the legal title until it is proved to be otherwise.[1] The words of the statute are:

32. In any action for the recovery of real property

[7] Code, § 374.

[8] Phelan *v.* Douglass, etc., 11 How., 193.

[9] Carpenter *v.* Schermerhorn, 2 Barb. Ch., 314.

[1] Jackson *v.* Sharp, 9 Johns., 163; Wickham *v.* Conklin, 8 Johns., 228; Jackson *v.* Thomas, 16 Johns., 293.

or the possession thereof, the person establishing a legal title to the premises is, in every action for the recovery thereof presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of such action.[2]

33. The courts in their construction of this statute have said that the claim must be under some specific title and not a general one;[3] that the lands claimed must be fully identified or described in the instrument;[4] that the deed must include in its boundaries the exact land claimed.[5]

34. The title claimed must be such as *prima facie* will be considered a good title.[6] It should be absolute on its face, not admitting the existence of a higher title, for such an admission would show that it was not adverse to such higher title.[7] Where the defendant sets up adverse possession it may be considered an admission that his paper title is not valid, for if his paper title was valid he would not set up adverse possession, but he should show that his possession was taken in good faith not from a mere squatter without color

[2] Code, § 368.

[3] Crary *v.* Goodman, 22 N. Y., 170; Hallas *v.* Bell, 53 Barb., 247.

[4] Lane *v.* Gould, 10 Barb., 254; Jackson *v.* Woodruff, 1 Cow., 275; Jackson *v.* Camp, 1 Cow., 605.

[5] Hallas *v.* Bell, 53 Barb., 247; Sharp *v.* Brandaw, 15 Wend., 597.

[6] Jackson *v.* Frost, 5 Cow., 346.

[7] Jackson *v.* Johnson, 5 Cow., 74.

of title;[8] or one obtained while a suit was pending for the same premises and therefore void for champerty.[9] And he is not bound to produce his deed on the trial, though called for by the plaintiff.[1] Should he produce his deed under which he claims, it will not destroy the effect of the defendant's possession, even should the deed be defective, as, for want of a seal or otherwise, it will not destroy the effect of the defendant's possession.[2]

35. When the claim of adverse possession is not founded upon any written instrument or judgment or decree, the defendant is called upon to show more distinctly the kind of occupancy. If there is no paper title describing the land, temporary or occasional occupation of the lands is not sufficient;[3] there must be actual occupancy, measured by a distinct, visible and marked possession; actual occupancy of the bank of the stream will not carry constructive occupancy to the centre, there must be actual occupancy of the land under water.[4] The land must not only be cultivated but improved, mowing grass, cutting brush or keeping up an old fence is not sufficient; there must be sowing, ploughing or the erection of buildings.[5]

36. The inclosure means an inclosure of the lot

[8] Jackson *v.* Hill, 5 Wend., 532.
[9] Jackson *v.* Andrews, 7 Wend., 152.

[1] Jackson *v.* Wheat, 18 Johns., 40; Bradstreet *v.* Clarke, 12 Wend., 674.

[2] Bradstreet *v.* Clarke, 12 Wend., 674.

[3] Lane *v.* Gould, 10 Barb., 524.

[4] Corning *v.* Troy Nail Co., 44 N. Y., 577; S. C., 34 Barb., 529.

[5] Finlay *v.* Cook, 54 Barb., 9; Monroe *v.* Merchant, 28 N. Y., 4; Doolittle *v.* Tice, 41 Barb., 481; Jackson *v.* Woodruff, 1 Cow., 276; Jackson *v.* Camp, 1 Cow., 605.

alone, upon lines claimed, and not a fence far away embracing the lands; but portions of the inclosure may be natural barriers as cliffs and rocks.[6]

37. The possession of the tenant to be adverse must openly and distinctly claim to be adverse, accompanied with a claim of right or title, as a naked possession or intrusion without such claim would accrue to the benefit of the true owner.[7] If the property is owned by a corporation such adverse claim must be brought home to the knowledge of the officers of the corporation.[8]

38. The holding of one tenant in common enures to the benefit of all, and to make the holding of one tenant in common adverse to his co-tenants it must be such a holding as would amount to an ouster. If one co-tenant should convey away the property by a deed, purporting to convey the whole, the grantee would hold adversely to the other co-tenants.[9]

39. The limitations of twenty years for the time of commencing actions to recover real property or for using it as defence would act unequally, if there were no exceptions in favor of those who might be unable to protect themselves on acount of their infancy or for other reasons. Hence the statute makes the following exceptions:

40. If a person entitled to commence any action

[6] Doolittle *v.* Tice, 41 Barb., 181; Becker *v.* Valkenburgh, 29 Barb., 319.

[7] Humbert *v.* Trinity Church, 24 Wend., 587; Howard *v.* Howard, 17 Barb., 663; Jackson *v.* Frost, 5 Cow., 346.

[8] Thompson *v.* The Mayor, 11 N. Y., 155.

[9] Clapp *v.* Bromagham, 9 Cow., 530; Florence *v.* Hopkins, 46 N. Y., 182; Humbert *v.* Trinity Church, 24 Wend., 587; Siglar *v.* Van Riper, 10 Wend., 414; Town *v.* Needham, 3 Paige, 545.

for the recovery of real property, or to make an entry or defence, founded on the title to real property, or to rents or services out of the same, be at the time such title shall first descend or accrue either,

1*st.* Within the age of twenty-one years;

2*d.* Insane; or,

3*d.* Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence for a term less than for life.

41. The time during which such disability shall continue shall not be deemed any portion of the time (in this matter) limited for the commencement of such action, or the making of such entry or defence; but such action may be commenced, or entry, or defence made, after the period of twenty years, and within ten years after the disability shall cease, or after the death of the person entitled who shall die under such disability; but such action shall not be commenced or entry or defence made after that period.[1] If an action is commenced within the time limited therefor, and a judgment therein is reversed on appeal, without awarding a new trial, or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for a neglect to prosecute the action, or a final judgment upon the merits; the plaintiff, or if he dies, and the cause of action survives, his representative may commence a new action for the same cause, after the expiration of the time so limited, and within one year after such reversal or termination.[2] When the commencement of

[1] Code, § 375.

[2] Code, § 405.

the action has been stayed by injunction, or other order of a court or a judge, or by a statutory prohibtion, the time of the continuance of the stay is not a part of the time limited for the commencement of the action.[3]

42. It will be seen from this, that the person has ten years after he becomes twenty-one years of age to commence his action or to plead the statute in his defence, although he may not have been a year old at the time his right of entry or defence accrued.

43. Where the person, who is entitled to avail himself of this statute, dies during such disability, the heir claiming through or under him has only ten years after such death to avail himself of the benefits of the statute, even if such heir should be an infant.[4] But if the statute has begun to run in the lifetime of the ancestor, it continues to run, though the land descends to a person under disability.[5]

44. Where the time of commencing the action has begun to run, a disability accruing subsequently thereto will not suspend it; and culumative disabilities are not allowed;[6] and successive disabilities cannot operate to enlarge the time.[7]

45. The Statute of Limitations begins to run only from the commencement of the adverse possession and

[3] Code, § 400.

[4] Carpenter *v.* Schermerhorn, 2 Barb. Ch., 314.

[5] Jackson *v.* Moore, 13 Johns., 513; Jackson *v.* Robins, 15 Johns., 169; Fleming *v.* Griswold, 3 Hill, 85.

[6] Bradstreet *v.* Clarke, 12 Wend., 602.

[7] Carpenter *v.* Schermerhorn, 2 Barb. Ch., 314.

not from the commencement of the occupancy.[8] So if a party enters without claim of title, and afterwards obtains a good or colorable title, the adverse possession will commence from the latter period.[9]

46. As against a remainderman or a reversioner, the statute does not begin to run till the determination of the precedent estate, and the reversioner or remainderman has entered or is entitled to possession: as it can only exist against one entitled to possession.[1]

47. Aliens may plead the statute as a defence although they cannot acquire title by adverse possession as against the State.[2]

48. If at the commencement of the right to possession the parties happen to be alien enemies the time of such hostility is to be deducted from the time the statute runs.[3]

III. *Title by dedication.*

49. Dedication is the devoting of property for some proper object in such manner as to conclude the owner.[4] It may be by grant, by permission to use, or in such other manner as to show the intention of the grantor or donor. It extends to all kinds of realty, and to easements therein, but more particularly applies to ways, highways, streets, parks and commons, and

[8] Jackson *v.* Thomas, 16 Johns., 293; Jackson *v.* Newton, 18 Johns., 355.

[9] Jackson *v.* Thomas, 16 Johns., 293; Jackson *v.* Newton, 18 Johns., 355.

[1] Clarke *v.* Hughes, 13 Barb., 147; Fogal *v.* Perro, 10 Bos., 100.

[2] Overing *v.* Russell, 32 Barb., 263.

[3] Code, § 404; Bonneau *v.* Dinsmore, 23 How., 397; Sanderson *v.* Morgan, 39 N. Y., 231; U. S. *v.* Victor, 16 Abb., 153.

[4] Hunter *v.* Trustees of Sandy Hill, 6 Hill, 411.

may be for the benefit of the public or for private persons: and sometimes it applies to property set apart for charitable and pious uses.[5]

50. The statute requiring grants to be made by writing under seal expressly excepts, from such requirement, such transfers of land or of interest therein as may take place by operation of law.[6]

51. There is a distinction between a reservation and a grant. The latter when once made is irrevocable. The former may impose no obligation on the owner to continue it, unless there has been some adoption of the reservation by the persons claiming it.

52. The more common way of dedicating streets and ways is by laying the lands out in lots and streets, and then placing the map on file in some public office, like that of the county clerk, as a public record. This alone would not amount to a dedication.[7] But when sales are made of some of the lots, bounding them by streets as indicated on the map, there is an implied agreement that the purchasers are to have an easement over such streets, alleys or places.[8] The purchasers and their grantees are bound by the map, and their lots become subject to the street as a servitude, which becomes appurtenant to all the lots bounded on that street;[9] until acceptance by the public authority, the dedication may be revoked, so far

[5] 2 R. S., 134.

[6] McConnell *v.* Trustees of Lexington, 12 Wheat., 582; Potter *v.* Chapin, 6 Paige, 639; Hunter *v.* Trustees of Sandy Hill, 6 Hill, 407; State *v.* Trask, 6 Vt. R., 355.

[7] Logansport *v.* Dunn, 8 Ind., 378; Irwin *v.* Dixon, 9 How. (U.S.), 10.

[8] Badeau *v.* Mead, 14 Barb., 328; Cox *v.* James, 45 N. Y., 557.

[9] Smiles *v.* Hastings, 24 Barb., 44; Badeau *v.* Mead, 14 Barb., 328.

as the public is concerned, and the streets may be subject to the control of the proprietors.[1]

53. If the dedication is made public by some positive act, accompanied by an open public user, this will make the dedication complete and irrevocable.[2] If the public authorities remove obstructions and improve the streets, this will be an acceptance,[3] or should the public use the streets for twenty years or over, an acceptance is implied.[4]

54. When a tract of land is laid out into lots bounded by streets and sold, if the lots are bounded by the edge of the street, the purchasers own only to the street line, with a right to use the street for all purposes for which a street is ordinarily used, as for passing and repassing, and for the construction of sewers and drains;[5] and by continued occupation and possession his right of ownership would, by such possession, extend to the centre of the street, subject still to the easement of the public; if he is bounded by the street he owns to the centre of the street although the street at the time is not opened,[6] unless there are some restraining clauses like extending so many feet to a street.

55. The selling of the lots on both sides of the street to different purchasers, bounding the lots by

[1] Lee *v.* Village of Sandy Hill, 40 N. Y., 442; *In re* Brooklyn Heights, 48 Barb., 288; Bissell *v.* N. Y. C. R. R. Co., 23 N. Y., 61.

[2] Denning *v.* Roome, 6 Wend., 651; McMannis *v.* Butler, 51 Barb., 436.

[3] McMannis *v.* Butler, 51 Barb., 437.

[4] Wiggins *v.* Talmadge, 11 Barb., 457; Gould *v.* Glass, 19 Barb., 179.

[5] Smiles *v.* Hastings, 24 Barb., 44; Matter of 17th Street, 1 Wend., 262.

[6] Bissell *v.* N. Y. C. R. R., 23 N. Y., 61.

the line of the street, makes a dedication of the street to the public for the use of a street according to the dimensions indicated whether on a map or otherwise.[7] The seller still owns the fee subject to the easement which belongs to the lot owners on the immediate street and adjoining streets, until by acceptance or user the street becomes a public street.[8] The value of the land occupied by the street is merely nominal, as it is subject to the perpetual right of way in the public; and the interest is a mere *reverter*, depending upon the contingency of the public and the adjoining lot owners ceasing to use the same.[9]

56. Where property has been dedicated for a public street or park, and has been accepted, there can be no revocation; but as the dedication and acceptance may depend upon separate and distinct acts and circumstances until they have transpired there may be a revocation. The question of revocation like that of dedication is one of fact.[1] So long as the street continues in use there can be no revocation on the part of the owner.[2] But if but few lots have been sold, or but few persons have acquired easements, he may satisfy the claims of such few, obtain their release and revoke the dedication.[3]

[7] Matter of 39th Street, 1 Hill, 191; Wyman *v.* Mayor, 11 Wend., 486; Matter of Lewis Street, 2 Wend., 472; Matter of Furman Street, 17 Wend., 649.

[8] Smiles *v.* Hastings, 24 Barb., 44; Matter of 32d Street, 19 Wend., 128.

[9] Livingston *v.* Mayor, 8 Wend., 85; Matter of 32d Street, 19 Wend., 128; Matter of 29th Street, 1 Hill, 189; Wetmore *v.* Story, 22 Barb., 414.

[1] McMannis *v.* Butler, 51 Barb., 436.

[2] Adams *v.* Saratoga, etc., 11 Barb., 414.

[3] Bissell *v.* N. Y. C. R. R., 26 Barb., 630; Holdane *v.* Trustees, 21 N. Y. 474.

57. It has been held that on the dedication of land for a public street, the public could use it only for the purpose of passing and repassing; and that only till opened and paid for, could the corporation of the city or village construct sewers, and otherwise use the road-bed for municipal purposes,[4] or grant the privilege of using the streets for the running of horse-cars.[5]

58. A party not owning the road-bed is not entitled to compensation for using the road for a steam railway, provided the usefulness of the road is not impaired.[6]

59. The law having reference to streets prevails also as to public parks and places. But land dedicated for a public square cannot be used for a different purpose on the ground that it would impair the obligations of the contract.[7] A person may appropriate ground to the public use for a while, and yet not make a public dedication of it.[8]

60. Land may be dedicated for pious and charitable uses and purposes, for churches, court houses, public buildings, burying grounds, or a spring of water for public use.[9]

61. A right of way may be acquired over waters and rivers for rafting boards and timber, though such

[4] Kelsey *v.* King, 32 Barb., 410; S. C., 33 How., 39.

[5] Drake *v.* Hudson R. R. Co., 7 Barb., 508; Wetmore *v.* Story, 22 Barb., 414.

[6] Corey *v.* Buff., etc., R. R., 23 Barb., 482.

[7] Warren *v.* Lyons City, 22 Iowa, 351.

[8] Pitcher *v.* N. Y. & E. R. R., 5 Sand., 587.

[9] Potter *v.* Chapin, 6 Paige, 639; Hunter *v.* Trustees of Sandy Hill, 6 Hill, 407; Beaty *v.* Kurtz, 2 Peters, 566.

waters be not navigable in the ordinary sense of that term. Persons living on the banks may use the water for their own emolument so far as it can be done without material interruption of the public use.[1] But the doctrine of dedication does not extend to the use of the banks for loading and unloading,[2] nor to a private stream which can be used only for a short time in each year.[3]

Title by escheat and forfeiture.

62. Where there is no heir, or where there is a failure of competent heirs by reason of alienism, the lands vest immediately in the State, by its right of sovereignity, as the original and ultimate proprietor of land within its jurisdiction.

63. A purchase by an alien, who has not declared his intention of becoming a citizen, does not necessarily create a forfeiture, but the State may interfere and claim the property and deprive him of his title. The estate is deemed to be vested in him till office found, or until his death. His claim is good against everybody but the State; but he has no right to convey it, or create a trust to preserve it.

64. Lands that have escheated to the State can be conveyed by the State before entry.[4]

The State will take the escheated property subject to the same liens, conditions and incumbrances as it was in when the party held it.[5] But the State can-

[1] Shaw *v.* Crawford, 10 Johns., 236; People *v.* Platt, 17 Johns., 195.

[2] Pearsall *v.* Post, 22 Wend., 425.

[3] Munson *v.* Hungerford, 6 Barb., 265.

[4] McCaughal *v.* Ryan, 27 Barb., 376.

[5] 1 R. S., 718; Foster's Crown Law, 96; Borland *v.* Dean, 4 Mason, 74.

not take possession of the land until the alienism and escheat have been judicially established.[6]

65. *Forfeiture* to the State is confined to cases of conviction of outlawry for treason.[7] And the forfeiture is only for the life of the person convicted, of every freehold estate in real property of which such person was seised in his own right at the time of such treason committed, or at any time thereafter and of all of his goods and chattels.[8]

66. There has not been any convictions for treason since the revolution.

[6] Larreau *v.* Davignon, 5 Abb. (N.S.), 367.

[7] 1 R. S., 284.

[8] Code of Crim. Proc., § 819.

CHAPTER XIV.

TITLE BY JUDGMENT, AND BY PROCEEDINGS OF PUBLIC OFFICERS.

1. Title by judgment, etc.
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4. Usual mode of partition.
5. Parol partition.
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11. Method by action.
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15. Who may be made parties.
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22. Service complete, when.
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24. Proof of publication.
25. Complaint, contents of.
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28. Notice of pendency to be recorded.
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30. Defendant may answer or demur.
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33. Commissioners appointed, how.
34. Commissioners must qualify.
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36. Commissioners, when cannot partition.

37. Commissioners must divide property.
38. Two or more may take jointly.
39. Shares need not be equal in value.
40. Improvements allowed, when.
41. Report confirmed, conclusive.
42. Judgment to let in possession.
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45. Notice of sale to be published and posted.
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64. Deed to be recorded
65. If sheriff dies.
66. Coroner acts, when.
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72. What property attached.
73. Attachment issues, when.
74. Attachment granted by a judge.
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77. Execution, form of.
78. Foreclosure, when.

79. Kinds of foreclosure.
80. Owner of mortgage to foreclose.
81. Who to be defendant.
82. Wives of grantees to be defendants.
83. Mortgagor, etc., defendant.
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105. Copy notice to be posted.
106. Copy notice to be filed.
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108. Copy notice to be served on mortgagor.
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110. Served on foreign corporation.
111. Notice may be served on whom.
112. County clerk affix and index notice.
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115. Who may purchase.
116. Sale may be postponed.
117. Affidavits to be made.
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142. Form of assessment roll.
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144. Numbers of the lots.
145. Lands assessed at their value.
146. Rolls completed, notice given.
147. Assessment roll to be given to supervisors.
148. Unpaid taxes, return of to county treasurer and comptroller.
149. Comptroller to advertise and sell lands.
150. Comptroller's deed given, when.
151. Notice to be served on occupant.
152. Lands may be redeemed.
153. Taxes in cities and villages.
154. Comptroller's deed, evidence.
155. Errors in proceedings, effect of.
156. Assessment sales.
157. Mechanics' liens.

1. In addition to acquiring title by the voluntary acts of the parties, title to real property is frequently acquired through the judgment of a competent court; or by the actions of certain public officers.

2. Under the former are embraced, 1. Title by partition; 2. By execution; 3. By attachment; 4. By foreclosures; 5. Surrogate sales. Under the latter: 6. Title by tax sales; 7. By assessment sales; and 8. By mechanics' liens.

I. *Partition.*

3. Partition is the separation or division of the interests of several persons in the same real estate, so that those who formerly held the property as joint tenants, or tenants in common, may each hold his particular share in severalty.

4. The more usual way to make partition is by some instrument in writing under seal. A mutual grant to each one of his particular share or proportion by metes and bounds will convert the joint estate into estates in severalty. This may be done either in one deed executed by all the parties, in which the particular portion of each is distinctly set forth; or by as many deeds as there are persons who have an ownership in the property. Where a large tract of land owned by several proprietors, was surveyed, laid out into lots, regularly numbered, divided amongst the proprietors, and all united in a deed of partition assigning and releasing to each proprietor his particular portion, it was conclusive upon the parties, and after twenty years, a portion of them were not allowed to show that the survey and partition were erroneous.[1]

5. It has been repeatedly held that a parol partition

[1] Jackson *v.* Hasbrouck, 3 Johns., 331.

between tenants in common, followed by possession, is valid and will sever the possession.[2]

6. If any one is unwilling voluntarily to sever his interest from that of the others, he can be compelled as a matter of right to make partition.[3]

7. If a portion of the proprietors are absentees, lunatics, idiots, or infants, the remaining proprietors, one or more of them, can compel partition; the statute having made provision by which the rights and interests of absentees, infants and others shall be protected.[4]

8. The mode of making partition of lands, tenements and hereditaments, held or possessed by joint tenants or tenants in common, where the parties are unwilling or unable to agree is prescribed by the statutes.

9. Courts of Equity originally had jurisdiction in reference to all matters regarding partition independent of the statute. The legislature made provision in 1801 for proceedings to partition real estate upon the petition of such parties as desired partition, which proceedings were modified from time to time and continued until the adoption of the Code, and now all proceedings having reference to partition must be undertaken and carried on in accordance with its provisions.[5]

[2] Ryers *v.* Wheeler, 25 Wend., 434; Bool *v.* Mix, 17 Wend., 119; Jackson *v.* Harder, 4 Johns., 202; Jackson *v.* Bradt, 2 Caines, 174.

[3] Smith *v.* Smith, 10 Paige, 470.

[4] Code, §§ 1570, 1572, 1581 and 1582.

[5] Croyhan *v.* Livingstone, 17 N. Y., 218, 224, 225; S. C., 6 Abb., 350; Matter of Cavanagh, 23 How., 358.

10. [It does not fall within the scope of this work to present a complete treatise upon actions of partition and foreclosure or Surrogate's sales and other proceedings in the courts having reference to title to real estate (matters especially belonging to a work of practice), but only to present so much of the subject as to afford a thorough acquaintance with the steps necessary to be taken to constitute a good title.]

11. The method of procedure to obtain partition is by an ordinary action in the Supreme Court or a county court, or in one of the superior city courts or Common Pleas.[6] All such actions must be tried and the venue laid in the county where the land or some part thereof is situated.[7] The county court has jurisdiction only of land lying within the county where the action is brought.

12. The action of partition will lie whenever two or more persons hold and are in possession of real property as joint tenants, or as tenants in common, in which either of them has an estate of inheritance, or for life, or for years. The property is to be partitioned in accordance with the respective rights of the persons interested therein, and to be sold if it appears that a partition thereof cannot be made, without great prejudice to the owners.[8]

13. Actual partition can be made by remaindermen where two or more persons hold, as joint tenants or tenants in common, a vested remainder or reversion according to their respective shares therein subject to

[6] Code, §§ 340, 263, 1532, 286.

[7] Code, § 982.

[8] Code, § 1532.

the interest of the person holding the particular estate therein. But in such an action the property cannot be sold, and if it appears, in any stage of the action, that partition cannot be made, without great prejudice to the owners, the complaint must be dismissed. Such a dismissal does not affect the right of any party to bring a new action after the determination of the particular estate.[9]

14. The following persons must be made parties to the action. Every person having an undivided share, in possession or otherwise, in the property, as tenant in fee, for life, by the curtesy, or for years; every person entitled to the reversion, remainder or inheritance of an undivided share, after the determination of a particular estate therein; every person who, by any contingency contained in a devise, or grant or otherwise, is or may become entitled to a beneficial interest in an undivided share thereof; every person having an inchoate right of dower in an undivided share in the property; and every person having a right of dower in the property, or any part thereof which has not been admeasured, must be made a party to an action for partition. But no person, other than a joint tenant or a tenant in common of the property, shall be plaintiff in the action.[1]

15. The foregoing provision allows the property to be partitioned when it is subject to liens or incumbrances affecting the whole property. And it is often desirable that upon the partition and sale of the

[9] Code, § 1533.

[1] Code, § 1538.

property it shall be free from all liens and incumbrances of every kind. Hence the statutes provide that the plaintiff may, at his election, make a tenant in dower, by the curtesy, for life, or for years, of the entire property, or a creditor, or other person having a lien or interest, which attaches to the entire property, a defendant in the action. A person having a lien upon the whole property if not made a party is not affected by the judgment in the action.[2] In addition to the above mentioned persons, the plaintiff may, at his election, make a creditor having a lien on an undivided share or interest in the property a defendant in the action,[3] setting forth the nature of the lien, and specifying the share or interest to which it attaches.[4]

16. The lien or incumbrance upon any share will follow that particular share, whether the lien holder is a party to the action or not.

17. The action must be commenced by the service of a summons. The summons must be served by giving a copy of the same to each one of the defendants who can be found within the State, and if any defendant is an infant, under the age of fourteen years, by giving another copy to the father, mother or guardian, if any; if there is none within the State then by giving such copy to the person having the care and control of the infant or with whom he resides, or in whose service he may be employed. If any defendant has had

[2] Code, § 1539.
[3] Code, § 1540.
[4] Code, § 1540.

a committee appointed in consequence of idiocy, lunacy or drunkeness, service is also to be made upon the committee.[5]

18. If any defendant is a non-resident of the State, or where after diligent inquiry, the defendant remains unknown to the plaintiff, or the plaintiff is unable to ascertain whether the defendant is or is not a resident of the State, on application to a judge of the court, or the county judge of the county where the action is triable, upon a verified complaint, showing a sufficient cause of action against the defendant to be served, and proof by affidavit of the additional facts as to non-residence or inability to find such defendant and to make personal service, such judge will make an order directing that service of the summons, upon the defendant named, or described in the order, be made by publication thereof in two newspapers designated in the order as most likely to give notice to the defendant, for a specified time, not less than once a week for six successive weeks; or at the option of the plaintiff, by service of the summons, and of a copy of the complaint and order, without the State upon the defendant personally, if he is of full age, or an infant of the age of fourteen years or upwards. The order must also contain, either a direction that, on or before the day of the first publication the plaintiff deposit in a specified post office one or more sets of copies of the summons, complaint, and order, each contained in a securely closed post-paid wrapper, directed to the defendant, at a place specified in the order; or a state-

[5] Code, § 426.

ment that the judge, being satisfied, by the affidavits upon which the order was granted, that the plaintiff cannot with reasonable diligence, ascertain a place or places, where the defendant would probably receive matter transmitted through the post office, dispenses with the deposit of any papers therein.[6]

19. When service is made by publication, the summons, complaint and order, and the papers upon which the order was made, must be filed with the clerk, on or before the day of the first publication; and a notice, subscribed by the plaintiff's attorney, and directed only to the defendant or defendants to be thus served, substantially in the following form, the blanks being properly filled up, must be subjoined to and published with the summons:

To ——: The foregoing summons is served upon you, by publication, pursuant to an order of ——, (naming the judge and his official title), dated the —— day —— of ——, 18——, and filed with the complaint in the office of the clerk of ——, at ——.[7]

20. Where service is made without the State, the papers above specified must be previously filed; and a notice must be served with the summons, in all respects like the above mentioned notice, except that the words, "without the State of New York" must be substituted for the words "by publication."[8]

21. If the name or a part of the name of the defendant having an interest in the premises is unknown, then the notice in addition to the above must

[6] Code, § 440.
[7] Code, § 442.
[8] Code, § 443.

state briefly the object of the action, and contain a brief description of the property.[9]

22. The service is complete upon the day of the last publication pursuant to the order, and service made without the State is complete upon the expiration thereafter of a time equal to that prescribed for publication.[1]

23. The service of the summons may be proved by the affidavit of the person making it; by the certificate of the sheriff; or by the written admission of the defendant; which admission must be signed and acknowledged or proved in like manner as a deed to be recorded. The certificate, admission or affidavit of service of a summons, must state the time and place of service.[2]

24. Proof of the publication of the summons and notice must be made by the affidavit of the printer or publisher or his foreman or principal clerk, proof of deposit in the post office, or of delivery, must be made by the affidavit of the person, who deposited or delivered it.[3]

25. The complaint must describe the property with common certainty, and must specify the rights, shares and interests therein of all parties, as far as the same are known to the plaintiff. If a party, or the share, right or interest of a party is unknown to the plaintiff; or if a share, right, or interest is uncertain or contingent; or if the inheritance depends upon an executory

[9] Code, § 1541.
[1] Code, § 441.
[2] Code, § 434.
[3] Code, § 444.

devise; or if a remainder is a contingent remainder, so that the party cannot be named; that fact must also be stated in the complaint.[4] When there are liens upon specified shares the complaint must set forth the nature of the lien, and specify the share or interest to which they attach.[5]

26. The complaint should be filed in the office of the clerk of the county where the venue is laid. And there should be filed at the same time, or before final judgment a notice of the pendency of the action, stating the names of the parties, and the object of the action, and containing a brief description of the property in the county affected thereby. This notice should be filed in each county where the property is situated.[6]

27. The object of filing this notice of pendency of action is to give constructive notice to a purchaser or incumbrancer of the property affected thereby.[7]

28. The notice of pendency of action is to be recorded by the clerk in the proper book and to be indexed under each name,[8] as directed by the plaintiff, so as to be convenient and ready for reference.

29. If none of the defendants appear by answer, demurrer or notice of appearance within twenty days after the completed service of the papers, the plaintiff may apply to the court and obtain judgment.

30. Any one or more of the defendants may appear

[4] Code, § 1542.
[5] Code, § 1540.
[6] Code, § 1670.
[7] Code, § 1671.
[8] Code, § 1672.

and demur to the complaint, or may answer controverting the complaint or any part thereof, either as to the allegations of interest of any one of the parties or as to any other matter set up in the complaint; or as to the title or interest of any other co-defendant as stated in his answer. And the issues raised by the pleadings must be tried and determined as in other civil actions.[9]

31. The issues may be tried by the court, by a referee or a jury as the court shall direct.

32. When the issues have been tried and determined an interlocutory judgment is entered which must declare what is the right, share, or interest of each party in the property, as far as the same has been ascertained, and must determine the rights of the parties therein. Where it is found that the property or any part thereof is so circumstanced, that a partition thereof cannot be made without great prejudice to the owners, the interlocutory judgment must direct that the property, or the part thereof which is so circumstanced, be sold at public auction. If it appears that the property or any part thereof is so circumstanced that it can be divided, the interlocutory judgment must direct that partition be made between the parties, according to their respective rights, shares, and interest.[1]

33. Where the interlocutory judgment directs a partition, it must designate three reputable and disin-

[9] Code, § 1543.

[1] Code, § 1546.

terested freeholders, as commissioners, to make the partition so directed.[2]

34. Each of the commissioners must, before entering on the execution of his duties, subscribe and take an oath, before a proper officer, that he will faithfully, honestly and impartially discharge the trust reposed in him, which oath must be filed with the clerk, before he enters upon the execution of his duties.[3]

35. All of the commissioners must meet together in the performance of any of their duties; but the acts of a majority so met are valid. They, or a majority of them, must make a full report of their proceedings under their hands, specifying therein the manner in which they have discharged their trust, describing the property divided, and the share, or interest in a share, allotted to each party with the quantity, courses and distances, or other particular description of each share; and a description of the posts, stones or other monuments; and specifying the items of their charges. Their report must be acknowledged or proved, and certified, in like manner as a deed to be recorded, and must be filed in the office of the clerk.[4]

36. If it appears to the commissioners, or a majority of them, that partition of the property or a part thereof cannot be made without great prejudice to the owners, they must make a written report of that fact to the court.[5]

[2] Code, § 1549.
[3] Code, § 1550.
[4] Code, § 1554.
[5] Code, § 1551.

37. In making the partition, the commissioners must divide the property into distinct parcels, and allot the several parcels thereof to the respective parties, quality and quantity being relatively considered, according to the respective rights and interest of the parties, as fixed by the interlocutory judgment.[6]

38. If two or more persons desire to enjoy their shares in common with each other, their shares may be set off to them, without partition as between themselves to be held by them in common.[7]

39. It is not indispensable that all the shares should exactly correspond in value; one party may be decreed to make compensation to another for equality of partition.[8] The judgment may set off one of the cotenant's shares and decree a sale of the residue for the other tenants, and provide for compensation of inequality of partition. But compensation cannot be awarded to an unknown owner, nor against an infant, unless it appears that he has personal property sufficient to pay it, and that his interests will be promoted thereby.[9] Where the real estate held jointly consisted of a mill dam, the lands overflowed by the mill pond, constituting the water power necessary for several mills, which mills belonged to the different tenants in severalty, it was held that an actual partition of the water power should be made, instead of a

[6] Code, § 1552.

[7] Code, § 1549.

[8] Smith *v.* Smith, 10 Paige, 470; Larkin *v.* Mann, 2 Paige, 27; Code, § 1587.

[9] Haywood *v.* Judson, 4 Barb., 228.

sale, the one-half to be used by the mills of each in the hands of different proprietors and that the commissioners might divide the mill dam, and the lands under the same and under the waters of the pond, and might make such provisions for keeping the different portions of the dam, water gates, and flumes in repair, and such regulations for the use of the water power, which was not capable of actual partition without a destruction of its value, as the parties themselves might make by a partition deed of the same property.[1] A mill and mill dam may be assigned to one, with the privilege of flowing the land of another, for the purpose of raising the necessary head of water.[2]

40. Where one tenant in common has made improvements on the land, the court may adjudge to him compensation, or assign to him the part of the premises on which the improvements have been made.[3]

41. The report of the commissioners is to be confirmed. And upon the confirmation, by the court, of the report of the commissioners making partition, final judgment, that the partition be firm and effectual forever, must be rendered, which is binding and conclusive upon the following persons:

1. The plaintiff and each defendant upon whom the summons was served personally or by publication;

2. Each person claiming from, through or under such party, by title accruing after the filing of the

[1] Smith *v.* Smith, 10 Paige, 470.

[2] Hills *v.* Dey, 14 Wend., 204; see also Belknap *v.* Trimble, 3 Paige, 577.

[3] Green *v.* Putnam, 1 Barb., 500; Town *v.* Needham, 3 Paige, 545.

judgment roll, or after the filing in the proper county clerk's office, of a notice of the pendency of action;

3. Each person, not in being when the interlocutory judgment is rendered, who, by the happening of any contingency, becomes afterwards entitled to a beneficial interest attaching to, or an estate or interest in, a portion of the property, the person first entitled to which, or other virtual representative whereof, was the plaintiff or one of the defendants properly served in the action.[4]

42. The final judgment must also direct that each of the parties, who is entitled to possession of a distinct parcel allotted to him, be let into the possession thereof, either immediately, or after the determination of the particular estate, as the case requires.[5] And if the whole or any portion is to be sold, the judgment shall direct who, as referee, shall sell the same, or whether it is to be sold by the sheriff.[6]

43. An exemplified copy of the judgment roll or of the final judgment, in an action for partition, may be recorded in the office for recording deeds, in each county in which any real property affected thereby is situated.[7]

44. Where the property is to be sold, the notice of sale should contain the title of the action and refer to the judgment showing when and where it was entered, and give distinctly the time and place of sale and give a brief description of the premises to be sold.

[4] Code, § 1557.
[5] Code, § 1558.
[6] Code, § 1560.
[7] Code, § 1595.

It should be dated and signed by the referee or sheriff who makes the sale.[8] It should contain nothing which might unduly enhance the value of the property or mislead the purchaser,[9] nor should it contain any statement calculated to impair the price.[1]

45. The sale must be at public auction to the highest bidder. Notice of such sale must be given by the officer making it as follows:

1. A written or printed notice thereof must be conspicuously fastened up at least forty-two days before the sale, in three public places, in the town or city where the sale is to take place, and also in three public places, in the town or city where the property is situated, if the sale is to take place in another town or city;

2. A copy of the notice must be published, at least once in each of the six weeks, immediately preceding the sale, in a newspaper published in the county, if there is one, or, if there is none, in the newspaper printed at Albany, in which legal notices are required to be published;[2] unless the property is situated wholly or partly in a city in which a daily newspaper is published; and in that case by publishing a notice of the sale at least twice in each week for the three successive weeks, immediately preceding the sale, in one or, in the city of New York, or the city of Brooklyn, in two of such papers. Notice of a postponement of the sale must be published in the paper or papers

[8] Ray *v.* Oliver, 6 Paige, 489.

[9] Veeder *v.* Fonda, 3 Paige, 94.

[1] March *v.* Ridgway, 18 Abb., 262.

[2] Code, §§ 1434, 1678.

wherein the notice of sale was published. The terms of sale must be made known at the time of sale; and if the property, or any part thereof, is to be sold subject to a right of dower, charge or lien, that fact must be declared at the time of sale. If the property consists of two or more distinct buildings, farms or lots, they must be sold separately; except that where two or more buildings are situated on the same city lot, and access to one is obtained through the other, they may be sold together.[3]

46. Immediately after the completing the sale, the officer making it must file with the clerk his report thereof, under oath, containing a description of each parcel sold, the name of the purchaser thereof, and the price at which it was sold.[4] A final judgment must be entered, confirming the sale; directing the officer making it, to execute the proper conveyances, and take the proper securities, pursuant to the sale, and also directing the application of the proceeds of the sale.[5] And the deed must be executed and delivered in accordance with the judgment.

47. The dower interest of any person in the whole of the premises or in any share or part thereof may be sold, or it may be reserved in the estate and the property sold or set apart subject to such dower right.

48. 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

[3] Code, § 1678.
[4] Code, § 1576.
[5] Code § 1577.

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.[6]

49. An action for partition of real property shall not be brought by an infant, except by the written authority of the surrogate of the county where the property is situated. The guardian ad litem of the infant plaintiff can be appointed only by the court, and shall give such security for the faithful discharge of his trust as the court shall direct.[7]

50. The general guardian of an infant and the committee of an idiot, lunatic or habitual drunkard may apply to the Supreme Court, or to the county court of the county, or to the superior city court of the city, wherein the real property is situated, for authority to agree to a partition of the real property.[8]

51. A reference must be had before a final judgment in the action, to take proof as to liens on the undivided share or interest of any part; and the final judgment will be a bar against each person not a party, who has, at the time when it is rendered, a lien on the undivided share or interest of a party, if notice was given him to appear before the referee and make proof of his liens.[9]

II. *Title through sale on execution.*

52. Every judgment where it is for a sum of money

[6] Code, § 1571.
[7] Code, §§ 1534–5–6.
[8] Code, § 1590.
[9] Code, §§ 1561, 1577.

in favor of either party or which directs the payment of a sum of money, taken in any court of record in this State for any sum of money, or taken in a justice's court for more than twenty-five dollars exclusive of costs, may be docketed in a county clerk's office: and when so docketed binds and is a charge for ten years after filing the judgment roll and no longer, upon the real property and chattels real in that county, which the judgment debtor has at the time of so docketing it, or which he acquires at any time afterwards, and within the ten years.[1]

53. The judgment attaches on lands of which the judgment debtor becomes seised at any time after the judgment, unless his seisin was instantaneous, or departed from him *eo instanti* that he acquired it.[2] But it cannot attach upon a mere equity,[3] nor upon an estate at will or sufferance.[4] It attaches to leasehold property, where the lessee or his assignee is possessed, at the time of the sale, of at least five years' unexpired term of the lease, and also to the building or buildings, if any, erected thereupon.[4] And it attaches to real property, held by one person in trust or for the use of another, and is liable to be sold by virtue of an execution issued upon a judgment recovered against the person to whose use it is so held.[5]

54. The party recovering a final judgment, his

[1] Code, §§ 1240, 3017, 1251; Waltermire *v.* Westover, 4 Kern., 16; Crippen *v.* Hudson, 3 Kern., 161.

[2] Stover *v.* Tifft, 15 Johns., 459, 464.

[3] Jackson *v.* Chapin, 5 Cowen, 485.

[4] Code, § 1430.

[5] Code, § 1431.

assignee or personal representative may have execution thereupon, of course, at any time within five years after the entry of the judgment; and have execution after five years; 1*st*. Where an execution was issued thereupon within five years after the entry of the judgment and has been returned wholly or partly unsatisfied or unexecuted. 2*d*. When an order is made by the court granting leave to issue the execution.[6]

55. The execution is issued to the sheriff of the county where the property is situated, and if there is no personal property of the judgment debtor on which he can levy, he must then proceed to sell the real estate.

56. The sheriff who sells real property, by virtue of an execution, must previously give public notice of the time and place of the sale as follows:

1. A written or printed notice thereof must be conspicuously fastened up at least forty-two days before the sale, in three public places, in the town or city where the sale is to take place, and also in three public places, in the town or city where the property is situated, if the sale is to take place in another town or city.

2. A copy of the notice must be published at least once in each of the six weeks, immediately preceding the sale, in a newspaper published in the county, if there is one; or, if there is none, in the newspaper

[6] Code, §§ 1375-6-7.

printed at Albany, in which legal notices are required to be published.[7]

57. In each notice of sale the real property to be sold must be described by common certainty, by setting forth the name of the township or tract, and the number of the lot, if there is any, or by some other appropriate description.[8]

58. The sale must be at public auction, between the hour of nine o'clock in the morning and sunset.[9] If it consists of two or more known lots, tracts, or parcels, each lot, tract or parcel must be separately exposed for sale. If a person who is the owner of, or is entitled by law to redeem, a distinct parcel of the property, of any other description, requires that parcel to be exposed for sale separately, the sheriff must expose it accordingly. No more real property shall be exposed for sale, than it appears to be necessary to sell, in order to satisfy the execution.[1]

59. The sheriff who sells, must make out, subscribe, and acknowledge before an officer authorized to take the acknowledgment of deeds, duplicate certificates of the sale, containing:

1. The name of each purchaser, and the time the sale was made;

2. A particular description of the property sold;

3. The price bid for each distinct parcel separately sold;

[7] Code, § 1434.
[8] Code, § 1435.
[9] Code, § 1384.
[1] Code, § 1437.

4. The whole consideration money paid.[2]

60. One of these certificates must be filed and recorded in the county clerk's office, and the other given to the purchaser.[3] At any time within one year from the sale the judgment debtor, his heir, devisee or grantee may redeem the property from the sale, and any creditor may redeem from the sale at any time within three months after the expiration of the year, provided none of the above named persons have redeemed.

61. The first creditor who redeems is required to pay the sum of money which was paid upon the sale thereof, with interest at the rate of seven per centum a year from the time of sale.[4] The second redeeming creditor must pay the amount paid by the first redeeming creditor with interest at seven per cent. per annum and the amount due upon the first redeeming creditor's mortgage or judgment with interest, provided his judgment or mortgage is subsequent to that of the creditor who has redeemed. These successive redemptions may be made until all persons holding judgments or mortgages which are liens upon the property have been redeemed except the last one. Each creditor, who redeems after the fifteen months have expired, must redeem within twenty-four hours after the last preceding redemption was made.[5]

62. Upon each redemption, the certificate of sale which was delivered to the purchaser must be as-

[2] Code, § 1438.
[3] Code, § 1439.
[4] Code, § 1450.
[5] Code, §§ 1451, 1454.

signed, and the assignment duly acknowledged or proved and certified, and delivered to the redeeming creditor.[6]

63. When the time for redemption has expired, the sheriff who made the sale must execute the proper deed or deeds, in order to convey to the person or persons entitled thereto, the part or parts of the property sold, which have not been redeemed by the judgment debtor, his heir, devisee or assignee. The deed conveys to the grantee therein the right, title and interest which were sold by the sheriff.[7]

64. The deed should be acknowledged or proved and certified and recorded in the clerk's office of the county where the land is situated.

65. In case the sheriff dies, or is removed from office, or is disqualified to act, the under sheriff must execute the papers. If the under sheriff dies, or is removed from office or becomes disqualified, the sheriff's successor must act.[8]

66. If the sheriff is a party to the action then a coroner of the same county has all the power and subject to all the duties of the sheriff.[9]

67. The title of a *bona fide* purchaser without notice, will not be affected by irregularities, if the execution is regular and subsisting.[1] If the judgment is entirely void, or had been satisfied before a sale on execution, a *bona fide* purchaser would derive no title

[6] Code, § 1470.
[7] Code, § 1471.
[8] Code, § 1475.
[9] Code, § 172.
[1] Wood *v.* Moorhouse, 45 N. Y., 369; S. C., 1 Lans., 405.

from the sale whether he had notice of the payment or not.[2] A purchaser is protected, if anything is due, or the execution has only been satisfied in part.[3] If the process is void the sale will be invalid, but not so if the process were merely erroneously issued.[4] No formal entry or levy on the lands is necessary.[5]

68. A slight variance between the judgment and the execution will not vitiate the sale.[6] Nor a neglect to exhaust the personalty.[7] A judgment and execution against one by a wrong name will not authorize the sale of the property.[8]

69. The notice need not be published six full weeks prior to the sale, if it is published weekly for six weeks.[9] If the time for selling has passed, or a new sale becomes necessary, the sale must be readvertised in full, unless there be an order of the court.[1]

70. A sale after sunset or before sunrise would be void.[2] A sale on election day is not necessarily void.[3] The statute to sell separately is directory merely and voidable and may be ratified or waived.[4]

[2] Wood *v.* Colvin, 2 Hill, 566; Jackson *v.* Anderson, 4 Wend., 474; Stafford *v.* Williams, 12 Barb., 240; Craft *v.* Merill, 14 N. Y., 456.

[3] Peet *v.* Cowenhoven, 14 Abb., 56; Peck *v.* Tiffany, 2 Com., 451.

[4] Jackson *v.* Bartlett, 8 Johns., 361; Jackson *v.* Delancey, 13 Johns., 537.

[5] Wood *v.* Colvin, 5 Hill, 228.

[6] Jackson *v.* Walker, 4 Wend., 462.

[7] Neilson *v.* Neilson, 5 Barb., 565.

[8] Farnham *v.* Hildreth, 32 Barb., 277.

[9] Olcott *v.* Robinson, 21 N. Y., 150; Wood *v.* Moorhouse, 45 N. Y., 369.

[1] Bicknell *v.* Byrns, 23 How., 486.

[2] Wood *v.* Moorhouse, 45 N. Y., 369; Carnvick *v.* Myers, 14 Barb., 9.

[3] King *v.* Platt, 37 N. Y., 155.

[4] Cunningham *v.* Cassidy, 7 Abb., 183; Neilson *v.* Neilson, 5 Barb., 568.

71. The deed relates back to the time of the sale although executed afterwards. But the title of the judgment debtor is not gone until the money is paid and the deed delivered.[5]

III. *Title under attachment.*

72. The real property, which may be levied upon by virtue of a warrant of attachment includes any interest in real property, either vested or not vested, which is capable of being alienated by the defendant.[6]

73. It may issue in an action to recover a sum of money only as damages, for 1*st.* Breach of contract, except a contract to marry; 2*d.* Wrongful conversion of personal property; 3*d.* Any other injury to personal property, in consequence of negligence, fraud or other wrongful act; where the defendant is either a foreign corporation, or not a resident of the State; or if he is a natural person and a resident of the State, and he has departed therefrom, with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with a like intent; or if the defendant is a natural person or a domestic corporation that he or it has removed or is about to remove property from the State with intent to defraud his or its creditors, or has assigned or disposed of, or secreted, or is about to assign, dispose of, or secrete property, with the like intent.[7]

74. The warrant of attachment is granted (on

[5] Jackson *v.* Dickenson, 15 Johns., 309; Wright *v.* Douglas, 2 Com., 373; Rich *v.* Baker, 3 Den., 79; Smith *v.* Colvin, 17 Barb., 157.

[6] Code, § 645.

[7] Code, §§ 635, 636.

proof by affidavit of the necessary facts) by a judge of the court or a county judge on filing the proper security.

75. A levy under the warrant of attachment must be made upon real property, by filing with the clerk of the county, where it is situated, a notice of the attachment, stating the names of the parties to the action, the amount of the plaintiff's claim, as stated in the warrant, and a description of the particular property levied upon. The notice must be subscribed by the plaintiff's attorney, adding his office address; and must be recorded and indexed by the clerk, in the same book, in like manner, and with like effect, as the notice of pendency of action.[8]

76. The summons and papers are to be served and the action is to be tried and judgment rendered in the same manner as other civil actions.

77. Upon obtaining judgment, the execution must substantially require the sheriff to satisfy the judgment as follows:

1. When the judgment debtor is a non-resident, or a foreign corporation, and the summons was served upon him or it without the State, or otherwise than personally, and the judgment debtor has not appeared in the action; out of the personal property attached, and, if that is insufficient, out of the real property attached.

2. In any other case out of the personal property attached; and if that is insufficient, out of the other personal property of the judgment debtor; if both are

[8] Code, § 649.

insufficient, out of the real property attached; and if that is insufficient, out of the real property belonging to him, at the time when the judgment was docketed in the clerk's office of the county, or at any time thereafter.[9] Except as above; the execution is to be enforced and the property sold and deed given as under an ordinary execution; and the property so sold is subject to redemption in the same manner.

IV. *Title by foreclosure.*

78. Whenever a default arises in the payment of the principal or interest, or any part thereof, when the same becomes due, or a default in the performance of any of the conditions to be performed by the mortgagor or his assigns as required by the bond and mortgage a cause of action arises for the foreclosure of the mortgage.

79. Mortgages may be foreclosed in two ways:

1*st.* By action;

2*d.* By advertisement.

The first corresponds with what was formerly denominated foreclosure by a bill in equity.

The courts having jurisdiction of actions in foreclosure are the Supreme Court, the County Court, the Common Pleas and the Superior City Courts within their respective local limits.[1]

80. The action to foreclose the mortgage should be brought by the owner of the mortgage, by him to whom the money is to be paid, or for whom the con-

[9] Code, § 1370.

[1] Code, §§ 263, 3343, 340.

sideration is to be performed. If the mortgage is owned by two or more persons, the owners should all join as plaintiffs, or in case all do not join as plaintiffs they should be made defendants, and the reason for so doing should be stated in the complaint. If the bond and mortgage have been assigned to secure a sum less than the amount of the mortgage the assignor and assignee should join as plaintiffs.[2]

81. The persons to be made defendants are all persons who have or claim an interest in, or lien upon the mortgaged premises, which claims or liens are subsequent to the mortgage, and every person who has or claims the right to redeem. These embrace the mortgagor and his wife, even though the mortgage be for purchase money;[3] tenants in possession under lettings subsequent to the mortgage;[4] the holder of a sheriff's certificate of sale;[5] all judgment creditors of the mortgagor or his grantees, unless the judgment was entered previous to the giving of the mortgage;[6] all subsequent mortgagees, all subsequent grantees and their wives; any assignees in bankruptcy;[7] if the mortgagor is dead then his heirs; if he has left a will charging legacies upon his real estate, all such legatees;[8] the personal representa-

[2] Hoyt *v.* Martense, 16 N. Y., 231; Norton *v.* Warner, 3 Edw., 106; Simson *v.* Satterlee, 6 Hun, 305; People *v.* Keyser, 28 N. Y., 226.

[3] Denton *v.* Nanny, 8 Barb., 618; Mills *v.* Van Voorhies, 20 N. Y., 412.

[4] Hirsch *v.* Livingstone, 3 Hun, 9.

[5] N. Y. Life Ins. and Trust Co. *v.* Bailey, 3 Edw. Ch., 416.

[6] Corning *v.* Smith, 6 N. Y., 82.

[7] Wood *v.* Moorhouse, 1 Lans., 405.

[8] McGown *v.* Yerks, 6 Johns. Ch., 450.

tives of subsequent mortgagees or subsequent judgment creditors;[9] the holders of mechanics' liens, although more than one year has expired since the filing of such liens; and in fine, all persons whose liens or incumbrances appear in any way upon the public records.

82. If the mortgagor has conveyed the property and his wife has joined in the conveyance, or if his grantees have conveyed the property, their wives joining in the several conveyances, it may not be necessary to make them parties as they may have no claim upon the mortgaged property.

83. Although the mortgagor has conveyed away the premises, he should be made a party, if he is still liable for any deficiency in the mortgage. There should be joined as defendants, all persons, who have in any way guaranteed or become sureties for the payment of the mortgage; although if not joined it will not affect the title made by the foreclosure.

84. The action is commenced by the service of a summons.

85. The summons is to be served and the proceedings to trial and judgment are to be conducted in the same manner as in ordinary civil actions and as previously defined in actions in partition.

86. While the action to foreclose the mortgage is pending, no other action can be commenced or maintained to recover the mortgage debt or any part thereof without leave of the court; and the complaint must state, whether any other action has been brought to

[9] Shaw *v.* McNish, 1 Barb. Ch., 326.

recover any part of mortgaged debt, and, if so, whether any part thereof has been collected.[1]

87. The complaint must be filed in the office of the clerk of the county in which the action is brought at least twenty days before judgment thereon can be taken. And the plaintiff must, also at least twenty days before a final judgment directing a sale is rendered, file, in the clerk's office of each county where the mortgaged property is situated, a notice of the pendency of the action stating the names of the parties, and the object of the action, and containing a brief description of the property in that county affected by the action, the date of the mortgage, the parties thereto, and the time and place of recording it.[2]

88. When the action is brought, when only a portion of the principal and interest is due, and another portion of either is to become due, and no payment is made before judgment, and the mortgaged property is so circumstanced, that it can be sold in parcels without injury to the interest of the parties; the final judgment must direct that no more of the property be sold, in the first place, than is sufficient to satisfy the sum then due, with the costs of the action and the expenses of the sale; and that, upon a subsequent default in the payment of principal or interest, the plaintiff may apply for an order directing the sale of the residue, or of so much thereof as is necessary to satisfy the amount then due, with the costs of the application and the expenses of the sale.[3] But if it

[1] Code, §§ 1628–9.

[2] Code, §§ 1631, 1670.

[3] Code, § 1636.

appears that the mortgaged property is so circumstanced that a sale of the whole will be most beneficial to the parties, the final judgment must direct that the whole property be sold; that the proceeds of the sale, after deducting the costs of the action, and the expenses of the sale, be either applied to the satisfaction of the whole sum secured by the mortgage, with such a rebate of interest, as justice requires; or be first applied to the payment of the sum due, and the balance, or so much thereof as is necessary, be invested at interest, for the benefit of the plaintiff, to be paid to him from time to time, as any part of the principal or interest becomes due.[4]

89. The judgment is to be entered in the office of the clerk of the county wherein the property is situated, before the purchaser can be required to pay the purchase money or accept the deed, and where the property is situated in two or more counties, certified copies are to be entered in those clerks' offices in which the venue is not laid.[5]

60. The advertisement and sale is to be conducted in the same manner as in sales in partition, and if the premises charged by the mortgage have been sold at different times and to different parties, the several parcels are to be sold in the inverse order of their alienation; and if different parcels have been mortgaged at different times, they are to be sold in the inverse order of the several mortgages.[6] After the sale

[4] Code, § 1637.

[5] Code, § 1677.

[6] Clowes *v.* Dickinson, 5 Johns. Ch., 235; Schryver *v.* Teller, 9 Paige, 173; Guion *v.* Knapp, 6 Paige, 35; Breese *v.* Busby, 13 How., 485.

the deed is to be executed and acknowledged and delivered by the referee.

91. After the delivery of the deed the sheriff or referee who made the sale reports his proceeding to the court, and an order is entered confirming the sale, and the purchaser on presentation of his deed and a service of the order of confirmation upon the occupant is entitled to possession of the property, and unless possession is given, a writ of assistance may be issued to put him in possession, if the person in possesion was a party to the suit.[7]

92. The bid, acceptance and payment of a deposit makes no change in the title. It is not until payment of the balance and delivery of the deed, that the purchaser acquires a right to rents, and the title to the lands.[8]

93. The purchaser or his grantee takes the title the mortgagor had before giving the mortgage,[9] the liens and incumbrances which are subject to the mortgage are all cut off and foreclosed, provided the owners of the same, who appear upon the records, are made parties to the action.[1]

Strict foreclosure.

94. Strict foreclosures are seldom resorted to in this State, except where a foreclosure in the common form

[7] Code, § 1675; N. Y. Life Ins. and Trust Co. *v.* Rand, 8 How., 352; Same *v.* Cutler, 9 How., 407; Lynde *v.* O'Donnell, 21 How., 34.

[8] Whitwell *v.* Bartlett, 52 Barb., 319; Blanco *v.* Foote, 32 Barb., 535; Cheney *v.* Woodruff, 45 N. Y., 98; Brown *v.* Frost, 10 Paige, 247.

[9] Butler *v.* Viele, 44 Barb., 166; Lawrence *v.* Delano, 3 Sandf., 333; Horton *v.* Davis, 26 N. Y., 495.

[1] Bolles *v.* Duff, 43 N. Y., 469.

has been had, the premises sold, but some subsequent incumbrancer or judgment creditor has not been made a party; the object of the strict foreclosure being to cut off his lien. Or if there has been a foreclosure and there be some doubt as to the jurisdiction of the court which ordered the sale, or the regularity of the proceedings.[2]

95. The action is an equitable action, and the parties the same as for an ordinary action in foreclosure, except that it is not necessary to make those persons defendants who were made parties to the first foreclosure, if the object is to cut off those who were not made parties in the former suit.[3] But if the action is brought on account of want of jurisdiction in the former suit, then all those who have or claim to have any liens upon the premises should be made parties.

96. The judgment of strict foreclosure is that the person entitled to redeem do so within a specified time, or in default thereof, that the title vest absolutely in the plaintiff.[4] In case the party fails to redeem within the time limited by the judgment, a final judgment or decree is to be entered, that the title vest absolutely in the plaintiff, and that the defendant be absolutely and forever debarred and foreclosed of all right, title and equity of redemption to the mortgaged lands or any part thereof.[5]

[2] Kendall *v.* Treadwell, 14 How., 165; Benedict *v.* Gilman, 4 Paige, 58.

[3] Benedict *v.* Gilman, 4 Paige, 58.

[4] Kendall *v.* Treadwell, 14 How., 165; S. C., 5 Abb., 16.

[5] Bell *v.* The Mayor, etc., 10 Paige, 49; Benedict *v.* Gilman, 4 Paige, 48; Bolles *v.* Duff, 43 N. Y., 469.

Foreclosure by advertisement.

97. In addition to the method of foreclosure by action, the statute provides a manner of foreclosure by advertisement and sale, sometimes called, Statutory Foreclosure, or, Foreclosure by Statute.

98. All mortgages cannot be foreclosed in this manner.

99. But when the mortgage contains within it a power to the mortgagee, or any other person, to sell the mortgaged property, upon default being made in a condition of the mortgage, it may be foreclosed by advertisement and sale, where the following requisites concur:

1*st.* Default has been made in a condition of the mortgage, whereby the power to sell has become operative;

2*d.* An action has not been brought to recover the debt secured by the mortgage, or any part thereof; or, if such an action has been brought, it has been discontinued, or final judgment has been rendered therein against the plaintiff; or an execution, issued upon a judgment rendered therein in favor of the plaintiff has been returned wholly or partly unsatisfied;

3*d.* The mortgage has been recorded in the proper book for recording mortgages, in the county wherein the property is situated.[1]

100. In case of the death of the mortgagee the mortgage may be foreclosed by his personal represen-

[1] Code, § 2387.

tatives,[2] or his legatee, or if it has been assigned, then by the assignee.[3] If there are two or more owners of the mortgage, it is better that they all join in the foreclosure.[4] The assignment of the mortgage should be recorded.

101. The advertisement or notice of sale must specify:

1*st.* The names of the mortgagor, of the mortgagee, and of each assignee of the mortgage;

2*d.* The date of the mortgage, and the time when, and the place where, it is recorded;

3*d.* The sum claimed to be due upon the mortgage, at the time of the first publication of the notice; and if any sum secured by the mortgage is not then due, the amount to become due thereupon;

4*th.* A description of the mortgaged property, conforming substantially to that contained in the mortgage;[5]

5*th.* That the mortgage will be foreclosed by a sale of the mortgaged property, or a part thereof, at a time and place specified in the notice.[6]

102. This notice must be subscribed by the person entitled to execute the power of sale, unless his name distinctly appears in the body of the notice, in which case it may be subscribed by his attorney or agent.[6]

[2] Demarest *v.* Wynkoop, 3 Johns. Ch., 129, 144.

[3] Cohoes Co. *v.* Goss, 13 Barb., 137; Wilson *v.* Troup, 2 Cow., 195, 231.

[4] Wilson *v.* Troup, 2 Cow., 195.

[5] Code, § 2391; Rathbone *v.* Clark, 9 Abb., 68 n.; 9 Paige, 648.

[6] Code, § 2388; Judd *v.* O'Brien, 21 N. Y., 186; Leeb *v.* McMaster, 51 Barb., 236.

103. An erroneous statement of the amount due will not vitiate the sale unless fraudulently done.[7]

104. 1*st.* A copy of the notice must be published, at least once in each of the twelve weeks immediately preceding the day of sale, in a newspaper published in the county wherein the property to be sold, or a part thereof, is situated.

105. 2*d.* A copy of the notice must be fastened up at least eighty-four days before the day of sale, in a conspicuous place, at or near the entrance of the building, where the county court, of each county, wherein the property to be sold is situated, is directed to be held; or if there are two or more such buildings in the same county, then in a like place, at or near the entrance of the building nearest to the property; or in the city and county of New York, in a like place, at or near the entrance of the building, where the court of Common Pleas for that city and county is directed by law to be held.

106. 3*d.* A copy of the notice must be delivered, at least eighty-four days before the day of sale, to the clerk of each county, wherein the mortgaged property or any part thereof is situated.

107. 4*th.* A copy of the notice *must* be served as prescribed in section 109 upon the mortgagor, or, if he is dead, upon his executor or administrator, a copy of the notice may also be served, in like manner, upon a subsequent grantee or mortgagee of the property, whose conveyance was recorded in the proper office for recording it in the county, at

[7] Klock *v.* Cronkhite, 1 Hill, 108; Jencks *v.* Alexander, 11 Paige, 626.

the time of the first publication of the notice of sale; upon the wife or widow of the mortgagor, and the wife or widow of each subsequent grantee, whose conveyance was so recorded, then having an inchoate or vested right of dower, or an estate in dower, subordinate to the lien of the mortgage; or upon any person, then having a lien upon the property, subsequent to the mortgage, by virtue of a judgment or decree, duly docketed in the county clerk's office and constituting a specific or general lien upon the property.[8]

108. Unless service is made on the mortgagor or his personal representatives the foreclosure will be void.[9]

109. Service of the notice of sale must be made upon the mortgagor, his wife, widow, executor or administrator, or a subsequent grantee of the property, whose conveyance is upon record, or his wife or widow; by delivering a copy of the notice to each natural person, personally; or by leaving such a copy, addressed to the person to be served, at his dwelling house, with a person of suitable age and discretion; and if such person is an infant under fourteen years of age a copy is also to be served on the father, mother, or guardian; if there is none within the State, to the person having the care and control of him, or with whom he resides, or in whose service he is employed; if such person is judicially declared to be incompetent to manage his affairs a copy is to be served

[8] Code, § 2388.

[9] Cole *v.* Moffit, 20 Barb., 18; St. John *v.* Bumpstead, 17 Barb., 100.

on his committee.[1] If service is to be made on a domestic corporation, such copy is to be served, if the city of New York, on the mayor, comptroller, or counsel to the corporation, if any other city, then service is to be made on the mayor, treasurer, counsel, attorney or clerk; in any other case, to the president or other head of the corporation, the secretary or clerk to the corporation, the cashier, the treasurer, or a director or managing agent.[2]

110. If service is to be made upon a foreign corporation such copy must be served within the State on the president, treasurer or secretary, or on the officer performing corresponding functions under another name; or upon such person as the corporation has designated to receive such service, and if no such person has been designated, then upon the cashier, director or managing agent of the corporation within the State. The above service must be made at least fourteen days before the day of sale.[3]

111. Where service is to be made upon any other person, than the mortgagor, his wife, widow, executor or administrator, or a subsequent grantee, his wife or widow, such service can be made personally as above specified; or by depositing a copy of the notice in the post office, properly inclosed in a post-paid wrapper, directed to the person to be served, at his place of residence, at least twenty-eight days before the day of sale.[4]

[1] Code, §§ 426, 2389.
[2] Code, §§ 2389, 431.
[3] Code, § 432.
[4] Code, § 2389; Stanton *v.* Cline, 1 Kernan, 196.

112. The county clerk must forthwith affix the notice of sale given him in a book kept in his office for that purpose; must make and subscribe a minute, at the bottom of the copy, of the time when he received and affixed it; and must index the notice under the name of the mortgagor.[5]

113. The affidavits of service must state distinctly and positively the persons served, their residence and the manner of the service.[6]

114. The sale must be at public auction, in the day time, on a day other than Sunday or a public holiday, in the county in which the mortgaged property, or a part thereof, is situated, except that, when the mortgage is to the people of the State, the sale may be made at the capitol. If the property consists of two or more distinct farms, tracts or lots, they must be sold separately; and as many only of the distinct farms, tracts, or lots, shall be sold, as it is necessary to sell, in order to satisfy the amount due at the time of the sale, and the costs and expenses allowed by law, but where two or more buildings are situated upon the same city lot, and access to one is obtained through the other, they must be sold together.[7]

115. The mortgagee, or his assignee or any other person may purchase at the sale.[8]

116. The sale may be postponed, and if practicable

[5] Code, § 2390.

[6] Mowry *v.* Sanborn, 7 Hun, 380; S. C., 62 Barb., 223; Chalmers *v.* Wright, 5 Robt., 713.

[7] Code, § 2393; Anderson *v.* Austin, 34 Barb., 319.

[8] Code, § 2394.

the notice of postponement is to be published weekly in the same paper as the original notice.[9]

117. Affidavits are to be made by the several persons who have performed the acts necessary to complete the foreclosure showing the several acts performed by each of them. The person who officiated as auctioneer should state in his affidavit the time when and the place where the sale was made; the sum bid for each distinct parcel, separately sold; and the name of the purchaser of each distinct parcel.

118. The original affidavits should be filed and recorded in the office for recording deeds and mortgages, in the county where the sale took place, and are to be recorded at length in the proper book for recording mortgages. If the property is situated in two or more counties, a copy of the affidavits, certified by the officer with whom the originals are filed, may be filed and recorded in each other county, wherein any of the property is situated. The original affidavits so filed, the record thereof and a certified copy of the record, are presumptive evidence of the matters of fact therein stated, with respect to any property sold in that county. And the certified copy with the record have the like effect with respect to the property, in that county, as if the originals were duly filed and recorded therein.[1]

119. The affidavits and record are the evidences of the foreclosure, and no deeds as such are necessary.[2]

120. A sale made and conducted in this manner

[9] Code, § 2392.

[1] Code, § 2398; Bunce *v.* Reed, 16 Barb., 347.

[2] Code, § 2400.

according to the provisions of the statute, to a purchaser in good faith, is equivalent to a sale, pursuant to judgment in an action to foreclose the 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:

1. The mortgagor, his heirs, devisee, executor or administrator;

2. Each person, claiming under any of them, by virtue of a title, or of a lien by judgment or decree, subsequent to the mortgage, upon whom the notice of sale was served;

3. Each person so claiming, whose assignment, mortgage, or other conveyance was not duly recorded, or whose judgment or decree was not properly docketed, at the time of the first publication of the notice of sale, and the executor, administrator, or assignee of such person;

4. Every other person, claiming under a statutory lien or incumbrance, created subsequent to the mortgage, attaching to the title or interest of any person mentioned above;

5. The wife or widow of the mortgagor, or of a subsequent grantee upon whom notice of the sale was served, where the lien of the mortgage was superior to her contingent or vested right of dower or her estate in dower.[3]

121. In case the party in possession of the premises sold, refuses to give possession to the purchaser at

[3] Code, § 2395; Jackson *v.* Henry, 10 Johns., 185.

the sale he can take summary proceedings under the Code to acquire possession.

122. If the purchaser has notice that the mortgage was usurious, he acquires no title, nor his grantee.[4] But the title would be good to a *bona fide* purchaser.[5]

123. The statute in regard to foreclosure by advertisement has had quite a number of alterations since first enacted in colonial times, and hence in examining in regard to titles so acquired, it will be necessary to consult the statutes as they were in force at the time of the respective foreclosures.

V. *Title through sales by order of the surrogate.*

124. Whenever it appears in the settlement of an estate of a decedent, that there is not sufficient personal property to pay his debts and funeral expenses, an application may be made to the Surrogate's Court, which has jurisdiction of the settlement of the estate of such decedent, for a decree directing the sale of his real estate, or so much thereof as may be necessary to pay such debts.

125. At any time within three years after letters were first duly granted within the State, upon the estate of a decedent, an executor or administrator other than a temporary administrator, or a creditor other than a creditor by a judgment or a mortgage, which is a lien upon the decedent's property, may present to the Surrogate's Court from which letters were issued, a written petition duly verified, pray-

[4] Hyland *v.* Stafford, 10 Barb., 558; Burnett *v.* Denniston, 5 Johns Ch., 35.

[5] Jackson *v.* Henry, 10 Johns., 185.

ing for a decree directing the disposition of the decedent's real property, or interest in real property, or so much thereof as is necessary for the payment of his debts or funeral expenses, and that the necessary parties be cited to show cause why such a decree should not be made.[6]

126. If the creditor has commenced an action to enforce his claim against the estate, the time during which such action is pending shall be no part of such three years, provided the creditor shall have filed in the county clerk's office a proper notice of pendency of the action.[7]

127. The petition must set forth the following matters, as nearly as the petitioner can, upon diligent inquiry, ascertain them:

1. The unpaid debts of the decedent, and the name of each creditor, or person claiming to be a creditor, and the amount of the unpaid funeral expenses of the decedent, if any, and the name of each person to whom any sum is due by reason thereof;[8]

2. A general description of all the decedent's real property, and interest in real property, within the State, liable to be disposed of by surrogate's order; a statement of the value of each distinct parcel; whether it is improved or not; whether it is occupied or not, and the name of each occupant. Where he has only an enterest in real property, the value and circumstances of such interest is to be stated;

[6] Code, § 2750.

[7] Code, § 2751.

[8] Atkins *v.* Kinman, 20 Wend., 241; Sheldon *v.* Wright, 7 Barb., 39; Aff'd, 5 N. Y., 497.

3. The names of the husband or wife, and of all the heirs and devisees of the decedent, and also of every other person claiming under them, or either of them, stating who if any are infants; the age of each infant, and the name of his general guardian, if any; and also if the petition is presented by a creditor, the name of each executor or administrator;

4. If the petition is presented by an executor or administrator, the amount of personal property which has come to his hands, and those of his co-executors or administrators, if any; the application thereof, and the amount which may yet be realized therefrom.[9]

128. On presenting the petition, the surrogate examines into the matters, and if necessary compels an accounting on the part of the executor or administrator. If he determines there is not sufficient personal property to pay the debts and funeral expenses, he issues a citation requiring all parties to appear before the court on an appointed day to take proof of the facts and circumstances, and to determine as to the several claims and the amount due thereon.[1]

129. Having ascertained as to the several claimants and the amount due to each, the surrogate enters a decree specifying the amount of each valid and subsisting debt and the reasonable charges for funeral expenses, and what claims have been rejected, and directs whether the real property is to be leased

[9] Code, § 2752; Ackley *v.* Dygert, 33 Barb., 177; Corwin *v.* Merritt, 3 Barb., 341.

[1] Code, §§ 2753, 2757.

mortgaged or sold, and describing it with common certainty.[2]

130. If the property is to be sold, the decree directs who is to sell, what credit, if any, is to be allowed on the sale; and where two or more distinct parcels of property are to be sold, directs the order of sale, subject, however, to the provisions of the statute directing sales in the following order:

1*st*. Property which descended to the decedent's heirs, and has not been sold by them;

2*d*. Property so descended, which has been sold by them;

3*d*. Property which has been devised and has not been sold by the devisee;

4*th*. Property so devised, which has been sold by the devisee.[3]

131. The executor or administrator, before the sale is to execute and file with the surrogate his bond with two or more sureties, to the people of the State in a penalty of not less than twice the sum to be raised, conditioned for the faithful performance of his duties, for the payment into the Surrogate's Court within twenty days after the receipt thereof all money arising from the sale, and delivery to the surrogate of all securities taken thereupon, and that he will account for all money received by him when required so to do.[4]

132. In case of the refusal or inability of the per-

[2] Code, §§ 2758, 2762; Baker *v.* Kingsland, 10 Paige, 366; Bloom *v.* Burdick, 1 Hilt., 130; Sheldon *v.* Wright, 5 N. Y., 497.

[3] Code, §§ 2763-4-5.

[4] Code, §§ 2766, 2771, 2773.

son so appointed to make the sale, the surrogate may appoint some other person who is a freeholder to make the sale, and who on giving the security above mentioned is authorized to make the sale.[5]

133. The sale is to be conducted under the decree in accordance with the directions of the statute as to the sales by sheriff upon an execution issued to collect money upon a judgment for the payment of money.[6]

134. Any persons may purchase at such sale, except an executor or administrator upon the estate, or a general or special guardian of an infant's interest in the estate, though such guardian may purchase for the benefit of his ward if authorized so to do by the surrogate.[7]

135. A report of the sale is to be made, and on the confirmance of the report, conveyances are to be executed by the person making such sale, briefly referring to the decree, the order to execute it, and the order of confirmation.[8]

136. Such a sale will not affect the title of a purchaser or mortgagee, in good faith and for value from an heir or devisee of the decedent, unless letters testamentary or of administration have been issued upon the estate of the decedent upon a petition therefor presented within four years after his death.[9]

137. The conveyance vests in the grantee all the

[5] Code, § 2767–8–9.
[6] Code, § 2772.
[7] Code, § 2774.
[8] Code, §§ 2775, 2776; Rea *v.* McEachron, 13 Wend., 465.
[9] Code, § 2777; Hall *v.* Patridge, 10 How., 188.

estate, right, title and interest of the decedent in the real property so conveyed at the time of his death, free from any claim of dower of his widow, unless such dower has been assigned.[1]

138. The title of the purchaser in good faith is not in any way affected by any of the following omissions, errors, defects, or irregularities; except so far as the same would affect the title of a purchaser at a sale, made pursuant to the directions contained in a judgment, rendered by the Supreme Court in an action:

1. Where a petition was presented, and the proper persons were duly cited, and a decree for a sale, and an order directing the execution thereof was made, as prescribed, and the decree, and the order, if any, were duly recorded; by any omission, error, defect, or irregularity, occurring between the return of the citation, and the making of the decree, or the order directing the execution of the decree.

2. Where an order, confirming a sale and directing a conveyance, has been made, upon proof, satisfactory to the surrogate, that all the acts have been done, which are required by law to be done, after the order directing the execution of the decree, to authorize the surrogate to make such an order of confirmation, by the actual omission to do such an act, or by any error, defect, or irregularity in the same, or by any omission in the recitals of the conveyance.[2]

139. (The payment of the money into court, and

[1] Code, § 2778; Wood *v.* McChesney, 40 Barb., 417; Bloom *v.* Burdick, 1 Hilt., 130; Farrington *v.* King, 1 Bradford, 182.

[2] Code, § 2784.

the distribution thereof, being things to be done after the conveyance and the confirmation thereof, and not affecting the title need not to be treated of in this connection.)

VI. *Title by tax sales.*

140. The statute provides that there shall be annually elected in each of the towns of this State one assessor who shall hold his office for three years.[3] And that on the erection of new towns, three assessors are to be elected at the first annual meeting, who are to be divided by lot into three classes, one to hold his office for one year, one for two years, and one for three years.[4] So that there are to be three assessors in each town in the State. Assessors are also elected or appointed in the different cities and villages.

141. Between the first days of May and July in each year, the assessors are to ascertain the names of all the taxable inhabitants, in their respective towns or wards, and all the taxable property real or personal within the same.[5] And the assessors cannot make an assessment after July 1st,[6] as the assessment roll must be completed on that day. And if one purchases property after the completion of the roll, the assessor has no right to change the assessment.[7] In some of the cities and villages the assessments are made at a different time in the year.

[3] Laws 1866, ch. 30.

[4] Laws 1845, ch. 180.

[5] 1 R. S., 390.

[6] Clark *v.* Norton, 3 Lans., 484.

[7] Clark *v.* Norton, 49 N. Y., 243; People *v.* Supervisors of Chenango, 1 Kern., 563; Wygatt *v.* Washburn, 15 N. Y., 316.

142. The assessors prepare an assessment roll in which they shall set down in four separate columns, and according to the best information in their power,

1*st.* In the first column, the names of all the taxable inhabitants in the town or ward;

2*d.* In the second column, the quantity of land to be taxed to each person;

3*d.* In the third column, the full value of such land;

4*th.* In the fourth column, the full value of all the taxable personal property owned by such person, after deducting the just debts owing by him.[8]

143. Where the owner of the land is a non-resident, the assessors must designate the land by its name, if known by one, or if not distinguished by a name, then they shall state by what other lands it is bounded.

144. If the lots are numbered, then they are to set down in the first column of the roll the numbers of the lots without the names of the owners.

145. The land is to be assessed at its true value as they would appraise the same in payment of a just debt due from a solvent debtor.[9]

146. When the rolls are completed the assessors are to give notice so that they may hear suggestions for correcting the rolls. They can correct only as to such assessments against which complaint is made.[1]

147. When the assessment rolls are finally completed they are to be delivered to the supervisors, and

[8] 1 R. S., 391.

[9] 1 R. S., 393; as amended 1851, ch. 176.

[1] Clark *v.* Norton, 58 Barb., 434; S. C., 3 Lans., 484; Wheeler *v.* Mills, 40 Barb., 644.

the board of supervisors are to set down in the fifth column the amount of tax imposed on each lot.[2] They then annex to the roll a warrant under their hands and seals authorizing the several collectors to collect from the several persons named in the assessment roll the amount due as aforesaid.[3]

148. If any taxes are unpaid the collectors make return thereof to the county treasurer, and deposit with him the original roll, and the county treasurer may issue his warrant to the sheriff to collect any of the uncollected taxes. He is to report to the comptroller of the State a list of all unpaid taxes as they appear on the assessment rolls.

149. The comptroller from the returns so made to him (if the tax remains unpaid for two years from the first of May after they were assessed), is to advertise and sell the lands, and so much of each parcel so assessed shall be sold as will be sufficient to pay the taxes, interest and charges thereon. And upon payment of the amount bid, the comptroller gives to the purchaser a certificate in writing describing the lands purchased, the sum paid, and the time when the purchaser will be entitled to a deed.[4]

150. If the lands are not redeemed from the sale within two years thereafter, the comptroller executes a conveyance under his hand and seal, and the execution is to be witnessed by the deputy comptroller, surveyor general or treasurer, which conveyance is

[2] 1 R. S., 395.

[3] Id., 396.

[4] Laws of 1855, ch. 427.

presumptive evidence that the sale and all proceedings thereto, from, and including the assessment of the land, and all notices required by law to be given previous to the expiration of the two years allowed to redeem were regular, according to the provisions of law and all laws directing or requiring the same, or in any manner relating thereto.[5]

151. The grantee, or his heirs or assigns, shall serve a written notice on any person occupying such land within two years from the time to redeem. The notice may be served personally or at the dwelling of the occupant, by leaving the notice with some one of suitable age and discretion. The notice must state the substance of the sale and conveyance, the amount to be paid to redeem, and that unless paid within six months after filing proof of service of notice in the comptroller's office, the conveyance will become absolute. The conveyance is not to be recorded until the expiration of the six months, and if the land is not redeemed from the sale there is to be recorded with the deed, proof of the service of the notice.

152. The occupant or any other person may redeem before the service of the notice, or at any time within the six months after service of the notice.

153. In some of the cities and counties the tax sales are made by the county treasurer under laws very similar to those under which the State comptroller conducts the sale.

154. As the comptroller or county treasurer's deed is only presumptive evidence that the necessary steps

[5] Laws of 1855, ch. 427.

have been taken; if it is proven that some of the necessary steps have not been taken, the title under the deed will be defective.

155. If the affidavit is not made by the assessors or if made before August 1st, the assessment is invalid.[6] So too if the assessors change or add to the assessment roll after it is finished.[7] If a regular notice of completion of the assessment roll is not given, it is defective.[8] An asssessment or advertisement by a wrong number would pass no title;[9] and the lands must be sufficiently described.[1] Unless the notice to redeem is published as required, at the time, the title is invalid and will not be saved by recitals in the deed.[2] If no notice to the occupant is given, the sale is void as to every part of the land sold;[3] though an error in the notice would not vitiate.[4] When any portion of the land is occupied, the title does not vest under the comptroller's deed until the notice has been served and the six months expired.[5] If the tax was paid before sale no title passes.[6]

VII. *Title by assessment sales.*

156. Power has been given to the different cities

[6] Westfall *v.* Preston, 49 N. Y., 349; Van Rensselaer *v.* Witbeck, 3 Seld., 517; Parisli *v.* Golden, 35 N. Y., 462.

[7] Clark *v.* Norton, 49 N. Y., 243; Mygatt *v.* Washburn, 15 N. Y., 316.

[8] Wbeeler *v.* Mills, 40 Barb., 644.

[9] Dike *v.* Lewis, 2 Barb., 344; S. C., 4 Denio, 237.

[1] Sharp *v.* Spier, 4 Hill, 76; Tallman *v.* White, 2 N. Y., 66.

[2] Westbrook *v.* Willey, 47 N. Y., 457.

[3] Leland *v.* Bennett, 5 Hill, 287; see Smith *v.* Sanger, 4 Com., 577.

[4] Leggetts *v.* Rogers, 9 Barb., 406.

[5] Hand *v.* Ballou, 2 Kern., 541.

[6] Jackson *v.* Morse, 18 Johns., 441.

and villages of the State to take lands for streets, parks and for public buildings, and for laying assessments upon the property benefited to pay for the same and for improvements thereon. And if the assessments so laid are not paid, the proper officers are authorized to sell the property so assessed, and give certificates or deeds conveying the same. When the several steps have been properly taken for the laying of the assessment, and for collecting the money so assessed, and for selling the property, the purchaser will acquire a good title to the premises purchased by him. The laws passed for this purpose are so many and so various that they cannot be set forth properly in a treatise of this kind.

VIII. *Title by mechanic's lien.*

157. Different statutes have been passed for the purpose of giving to mechanics, laborers and material men security for the work performed and materials furnished in the construction and repair of buildings, fences, etc. The lien is obtained by filing in the proper office a notice showing the work done or materials furnished, the amount due, the names of the contractor and owner, and a particular description of the property. After the lien has been filed and within the time specified by the statute, an action must be commenced to enforce or discharge the lien, and unless so commenced the lien obtained by the filing of the notice will in a short time expire. As the security to be obtained by the filing of a mechanic's lien is a statutory remedy, all the provisions of the statute must be

strictly complied with or the pretended lien will be invalid. The action to be commenced for the foreclosure of the lien is an equity proceeding similar to the foreclosure of a mortgage. The judgment when obtained is to be enforced like a judgment in foreclosure, and if there is any deficiency arising on the sale, a judgment should be entered for such deficiency which is a lien upon real estate as an ordinary judgment.

CHAPTER XV.

TITLE BY DESCENT.

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63. Presumptive evidence as to who are heirs.

1. Descent or hereditary succession is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir therefore is the one upon whom the law casts the estate immediately on the death of the ancestor; and an estate, so descending to the heir, is in law called the inheritance.[1]

2. Consanguinity or kindred is the connection or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral.[2]

3. Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct

[1] 2 Black. Com., 201.
[2] 2 Black. Com., 202.

line from the other, as between John Stiles and his father, grandfather, great grandfather and so upwards in the direct ascending line; or between John Stiles and his son, grandson, great grandson, and so downward in the direct descending line. Every generation, in this direct consanguinity, constitutes a different degree, reckoning either upwards or downwards.[3]

4. Collateral kindred answers to the same description; collateral relations agreeing with the lineal in this, that they descended from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such then as literally spring from one and the same ancestor, who is the *stirps*, or root, the *stipes*, trunk or common stock, from whence these relations are branched out. As if John Stiles hath two sons, who have each a numerous issue; both these issues are lineally descended from John Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor and all have a portion of his blood in their veins, which denominates them *consanguineous*.[4]

5. The law of descent has reference to real estate. The law of distribution of estates has reference to personal property. Real estate if not disposed of by devise descends to the heirs. Personal property if not bequeathed is to be distributed among the next of kin according to the statute of distributions. The next of kin in most cases are the same persons as the

[3] 2 Black. Com., 203.

[4] 2 Black. Com., 205.

heirs, but occasionally instances arise in which the real estate is inherited by a greater number than those who receive the personal property under the law of distribution. The personal property cannot be distributed to any of the relatives beyond that of the children of the brothers and sisters of the intestate.[5] While the real estate will descend to the nearest relatives however remote they may be from the intestate.

6. The term "real estate," as used in the law with reference to descent, includes every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of the intestate, seised or possessed thereof, or in any manner entitled thereto, and except leases for years, and estates for the life of another person; and the term inheritance as used in this chapter is to be understood to mean real estate, as herein defined, descending according to the provisions mentioned in this chapter.[6]

7. A leasehold estate for years in lands situated in this State, owned by a resident of another State, will be considered as personal property, and as such, as to its transmission by last will and testament, controlled by the law which governs the person of its owner.[7]

8. Surplus moneys arising after intestate's death, on the sale of land under the foreclosure of a mortgage are a part of the real estate and go to the heir and not

[5] 2 R. S., 97, § 75.

[6] 1 R. S., 754, § 27.

[7] Despard *v.* Churchill, 53 N. Y., 192.

the administrator.[8] If the heir be an infant it will remain real estate during his minority.[9]

9. Things annexed to the freehold or to any building shall descend with the freehold to the heirs or devisees,[1] except such things annexed to the freehold or to any building for the purpose of trade or manufacture, and not fixed into the wall of the house, so as to be essential to its support.

10. Grass, trees and fruits growing upon lands belonging to an intestate, at the time of his death, descend with the land to the heir. But the annual produce of crops cultivated, as distinguished from spontaneous crops, do not descend to the heir.[2]

11. If a lessor dies before the rent becomes due, rent payable after the death of the decedent goes to the heir or devisee, and not to the executors or administrators. The rent is an incident of the reversion and there is no apportionment of rent between the executor or administrator of the lessor and the remainderman. The remainderman succeeding to the reversion is entitled to the entire rent which falls due after the lessor's death; but not to the rent which has fallen due before the lessor's death and has not been collected. Rents reserved on a grant in fee is a hereditament, descendible and devisable.[3]

[8] Moses *v.* Murgatroyd, 1 Johns. Ch., 119; Cox *v.* McBurney, 2 Sandf., 561.

[9] Sweezy *v.* Thayer, 1 Duer, 286.

[1] 2 R. S., 82, §§ 6, 7; Murdock *v.* Gifford, 18 N. Y., 28; Hovey *v.* Smith, 1 Barb., 372.

[2] Kain *v.* Fisher, 2 Seld., 597; Whipple *v.* Foote, 2 Johns., 418; Austin *v.* Sawyer, 9 Cow., 39; Warren *v.* Leland, 2 Barb., 613.

[3] Van Rensselaer *v.* Hays, 19 N. Y., 68; Tyler *v.* Heidorn, 46 Barb., 439.

12. If the real property of an infant has been sold by an order of the court, the proceeds have still the incidents of real estate, and descend to his heirs if the infant dies before his majority. And the same law prevails with reference to the property of idiots and lunatics.[4]

13. Expectant estates are descendible in the same manner as estates in possession.[5] Real estate held in trust for any other person, if not devised by the person for whose use it is held shall descend to his heirs.[6]

14. Pews as usufructuary interests in land pass by descent as incorporeal hereditaments.[7]

15. If any child of an intestate shall have had advanced to him, by settlement, a portion of real or personal estate, or of both of them, the value thereof shall be reckoned as part of the real and personal estate of such intestate, descendible to his heirs, and to be distributed to his next of kin according to law; and if such advancement be equal or superior to the amount of the share, which such child would be entitled to receive of the real and personal estate of the deceased, then such child and his decendants shall be excluded from any share, in the real and personal estate of the intestate.[8]

16. If such advancement be not equal to such share, such child and his decendants shall be entitled to receive so much only, of the personal estate, and to

[4] Valentine *v.* Wetherell, 31 Barb., 655; Horton *v.* McCoy, 47 N. Y., 21; Bowmen *v.* Tallman, 27 How., 212.

[5] 1 R. S., 725, § 35; Savage *v.* Pike, 45 Barb., 464.

[6] 1 R. S., 754, § 21; Billings *v.* Baker, 28 Barb., 343.

[7] McNabb *v.* Pond, 4 Bradf., 7.

[8] 1 R. S., 754, § 23.

inherit so much only, of the real estate, of the intestate as shall be sufficient to make all the shares of the children, in such real and personal estate and advancement to be equal as near as can be estimated.[9]

17. The value of any real or personal estate so advanced shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise such value shall be estimated according to the worth of the property when given.[1]

18. The maintaining or educating, or the giving of money to a child without a view to a portion or settlement in life shall not be deemed an advancement.[2]

19. The minor children are not to be charged for their support and maintenance during minority, after their father's death, out of his estate as previous advances.[3]

20. An advancement of money or property to a child is *prima facie* an advancement; but it may be shown that it was a gift and not an advancement. If originally a gift, it cannot be afterwards treated as an advancement.[4]

21. Every citizen of the United States is capable of holding lands within this State, and of taking the same by descent, devise or purchase.[5] And no person capa-

[9] 1 R. S., 754, § 24; McRae *v.* McRae, 3 Brad., 199; Sandford *v.* Sandford, 61 Barb., 293; Hicks *v.* Gildersleeve, 4 Abb., 3; Hobart *v.* Hobart, 58 Barb., 296.

[1] 1 R. S., 754, § 25.

[2] 1 R. S., 754, § 26.

[3] Vail *v.* Vail, 10 Barb., 69.

[4] Vail *v.* Vail, 10 Barb., 69; Sandford *v.* Sandford, 5 Lans., 486; Thompson *v.* Carmichael, 2 Sandf. Ch., 120; Hicks *v.* Gildersleeve, 4 Abb., 1.

[5] 1 R. S., 719, § 8.

ble of inheriting real estate shall be precluded from such inheritance by reason of the alienism of any ancestor of such person.[6] This does not enable a person to take by inheritance who deduces title by descent through a living alien relation of the deceased, who would himself inherit the estate were he a citizen.[7] Aliens who have taken the incipient steps to become naturalized as mentioned in Chapter II, may inherit.

22. If the next heir of the person last seised be an alien, the land does not therefore escheat, but goes to a remote heir if there be one who is capable of taking.[8]

23. Descendants and relatives of the intestate, begotten before his death, but born thereafter, shall in all cases inherit in the same manner as if they had been born in the lifetime of the intestate, and had survived him.[9]

24. The design of this statute is to give to posthumous children the same portion precisely as they would have if the person had died intestate.[1]

25. Children and relatives who are illegitimate shall not be entitled to inherit,[2] except that in default of lawful issue, illegitimate children may inherit real and personal property from their mother as if legitimate.[3]

[6] 1 R. S., 754, § 22; Smith *v.* Mulligan, 11 Abb. (N. S.), 438; Jackson *v.* Jackson, 7 Johns., 214; Orser *v.* Hoag, 3 Hill, 79.

[7] McLean *v.* Swanton, 3 Kern., 535; People *v.* Irvin, 21 Wend., 128.

[8] Jackson *v.* Jackson, 7 Johns., 214.

[9] 1 R. S., 754, § 18; Mason *v.* Jones, 2 Barb., 251.

[1] Rockwell *v.* Geery, 4 Hun, 606, 612.

[2] 1 R. S., 754, § 19.

[3] Laws of 1855, ch. 547; 1 R. S., 754, § 19.

But if there be more than one illegitimate child from the same mother, they cannot inherit from each other, nor from their putative father, or his relatives, or the relatives of the mother.

26. Whenever there is but one person entitled to inherit, he takes and holds the inheritance solely; and whenever an inheritance, or a share of an inheritance descends to several persons, they take as tenants in common in proportion to their respective rights.[4]

27. The estate of a husband as tenant by the curtesy, or of a widow as tenant in dower, shall not be affected by any of the provisions mentioned in this chapter, nor shall the same affect any limitation of any estate by deed or will.[5]

28. *General rule of descent.* The real estate of a person who shall die without devising the same shall descend in manner following:

1*st.* To his lineal descendants;

2*d.* To his father;

3*d.* To his mother; and,

4*th.* To his collateral relatives.

Subject in all cases to the rules and regulations hereinafter mentioned.[6]

29. *First rule of descent.* If the intestate shall have several descendants in the direct line of lineal descent, and all of equal degrees of consanguinity to such intestate, the inheritance shall descend to such

[4] 1 R. S., 753, § 17.
[5] 1 R. S., 754, § 20.
[6] 1 R. S., 751, § 1.

persons in equal parts, however remote from the intestate the common degree of consanguinity may be.[7]

30. When the heirs are all grandchildren they take *per capita* and not *per stirpes*.[8]

31. If any of the children of such intestate be living, and any be dead, the inheritance shall descend to the children who are living and to the descendants of such children as shall have died; so that each child who shall be living, shall inherit such share as would have descended to him if all the children of the intestate, who shall have died leaving issue, had been living; and so that the descendants of each child who shall be dead, shall inherit the share, which their parent would have received if living.[9]

32. The rule of descent last above prescribed shall apply in every case where the descendants of the intestate, entitled to share in the inheritance, shall be of unequal degrees of consanguinity to the intestate; so that those who are in the nearest degree of consanguinity shall take the share that would have descended to them had all the descendants in the same degree of consanguinity, who shall have died leaving issues, been living; and so that the issue of the descendants who shall have died, shall respectively take the shares which their parents if living would have received.[1]

33. *Second rule of descent.* In case the intestate shall die without lawful descendants and leaving a

[7] 1 R. S., 751, § 2.
[8] Stevenson *v.* Lesley *et al.*, 70 N. Y., 512.
[9] 1 R. S., 751, § 3.
[1] 1 R. S., 751, § 4.

father, then the inheritance shall go to such father, unless the inheritance came to the intestate on the part of the mother and such mother be living; but if such mother be dead, the inheritance descending on her part shall go to the father for life, and the reversion to the brothers and sisters of the intestate and their descendants according to the law of inheritance by collateral relatives hereafter provided. If there be no such brothers and sisters or their descendants living, such inheritance shall descend to the father in fee.[2]

34. When the estate was a gift from the grandfather on the side of the mother, to the mother for life with remainder to her lawful issue and to their heirs forever, *held*, that the estate came to the intestate on the part of the mother.[3]

35. The intestate received money from her mother as a gift and invested it in land; it descended in the same manner as if the money had been earned by herself.[4]

36. *Third rule of descent.* If the intestate shall die without descendants and having no father, or having a father not entitled to take under section thirty-three above mentioned, and having a mother, and a brother or sister, or the descendant of a brother or sister, then the inheritance shall descend to the mother during her life, and the reversion to such brothers and sisters of the intestate as may be living and the descendants of such as

[2] 1 R. S., 751, § 5; Morris *v.* Ward, 36 N. Y., 587.

[3] Morris *v.* Ward, 36 N. Y., 587.

[4] Champlin *v.* Baldwin, 1 Paige, 562.

may be dead according to the same law of inheritance hereinafter mentioned. If the intestate in such case shall have no brother or sister, nor any descendants of any brother or sister, the inheritance shall descend to the mother in fee.[5]

37. R. died intestate, leaving a widow and two children, P. and L. The widow married and by her second marriage had one son, W. L. died intestate without descendants, and then P. died intestate without descendants, leaving the mother and W. living. *Held*, that as to the undivided half of the land which came to P. by descent from his father, W., the half-brother, was excluded from inheriting, he not being of the blood of R., and the mother took the inheritance in fee; as to the other one-half which came to P. by descent from L., W. took the inheritance, subject to the life estate of his mother, having been born of the same mother, and thus being of the blood of L.[6]

38. *Fourth rule of descent.* If there be no father or mother capable of inheriting the estate, it shall descend in the cases hereinafter specified to the collateral relatives of the intestate; and if there be several such relatives, all of equal degree of consanguinity to the intestate, the inheritance shall descend to them in equal parts, however remote from the intestate the common degree of consanguinity may be.[7]

39. If all the brothers and sisters of the intestate be living, the inheritance shall descend to such

[5] 1 R. S., 752, § 6.

[6] Wheeler *v.* Cluttenbuck, 52 N. Y., 67.

[7] 1 R. S., 752, § 7.

brothers and sisters; if any be living and any be dead, then to the brothers and sisters and every one of them who are living, and to the decendants of such brothers and sisters as shall have died; so that each brother or sister who shall be living shall inherit such share as would have descended to him or her if all the brothers and sisters of the intestate who shall have died leaving issue had been living; and so that such decendants shall inherit the share which their parent would have received if living.[8]

40. The same law of inheritance prescribed in the last section shall prevail as to the other direct lineal descendants of every brother and sister of the intestate, to the remotest degree, whenever such descendants are of unequal degree.[9]

41. The inheritance between brothers is immediate, and they will take although the father is an alien.[1]

42. *Fifth rule of descent.* If there be no heir entitled to take under either of the preceding sections, the inheritance, if the same shall have come to the intestate on the part of the father, shall descend,

1. To the brothers and sisters of the father of the intestate in equal shares if all be living;

2. If any be living and any shall have died leaving issue, then to such brothers and sisters as shall be living, and to the decendants of such of the said brothers and sisters as shall have died;

[8] 1 R. S., 752, § 8; Brown *v.* Burlingham, 5 Sandf., 418.

[9] 1 R. S., 752, § 9; Hannan *v.* Osborn, 4 Paige, 336.

[1] Parish *v.* Ward, 28 Barb., 328.

3. If all such brothers and sisters shall have died, then to their descendants;

In all cases the inheritance shall descend in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate.[2]

43. Under sub. 1, above, brothers and sisters of the half-blood take equally with those of the whole blood.[3]

44. *Sixth rule of descent.* If there be no brothers and sisters, or any of them of the father of the intestate, and no descendants of such brothers and sisters, then the inheritance shall descend to the brothers and sisters of the mother of the intestate, and to the descendants of such of the said brothers and sisters as shall have died, or if all shall have died, then to their descendants in the same manner as if all such brothers and sisters had been the brothers and sisters of the father.[4]

45. *Seventh rule of descent.* In all cases not provided for by the preceding sections, when the inheritance shall have come to the intestate on the part of his mother, the same, instead of descending to the brothers and sisters of the intestate father and their descendants as prescribed in the foregoing fifth rule, shall descend to the brothers and sisters of the intestate's mother and to their descendants as directed in the last preceding rule; and if there be no such brothers and sisters or descendants of them, then such inheritance shall descend to the brothers and sisters

[2] 1 R. S., 752, § 10; Pond *v.* Bergh, 10 Paige, 140.

[3] Beebee *v.* Griffing, 14 N. Y., 235; Kelley *v.* Kelley, 5 Lans., 443.

[4] 1 R. S., 753, § 11.

and their descendants of the intestate's father as before prescribed.[5]

46. *Eighth rule of descent.* In cases where the inheritance has not come to the intestate on the part of either the father or mother, the inheritance shall descend to the brothers and sisters both of the father and mother of the intestate, in equal shares, and to their descendants in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate.[6]

47. If the intestate inherits land from a brother, the brothers and sisters or their descendants, both of the father and mother of the intestate, take equally without regard to the source from which the brother received it.[7] Lands set apart to an heir in partition and release are deemed to come to him by inheritance from the ancestor and not by purchase, and on his death the heirs which are of the blood of his ancestor take to the exclusion of those who are not of the blood of such ancestor.[8]

48. Relatives of the half-blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood; unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors; in which case all those who are not of the blood of

[5] 1 R. S., 753, § 12; see section 34 above.

[6] 1 R. S., 753, § 13.

[7] Hyatt *v.* Pugsley, 33 Barb., 373.

[8] Conkling *v.* Brown, 8 Abb. (N. S.), 345.

such ancestor shall be excluded from such inheritance.[9]

49. *Ninth rule of descent. Illegimates.* In case of the death without descendants of an intestate who shall have been illegitimate, the inheritance shall descend to his mother; if she be dead, it shall descend to the relatives of the intestate on the part of the mother as if the intestate had been legitimate.[1]

50. This applies only to the relatives in case of the death of the mother previous to that of the intestate. Were she living and an alien, she could not take, nor could her relatives take.[2]

51. The illegitimate children inherit real and personal property of their mother, provided she leaves no lawful issue. But in case the mother should have lawful issue the illegitimate children do not take.[3]

52. Children and relatives who are illegitimate cannot inherit except as above specified.[4]

53. Whenever in this chapter any person is described as living, it shall be understood that he was living at the time of the death of the intestate from whom the descent came; and whenever any person is described as having died, it shall be understood that he died before such intestate.[5]

54. The expressions used in this chapter where the

[9] 1 R. S., 753, § 15; Beebee *v.* Griffing, 14 N. Y., 235; Champlin *v.* Baldwin, 1 Paige, 562; Wheeler *v.* Cluttenbuck, 52 N. Y., 67.

[1] 1 R. S., 753, § 14.

[2] The People *v.* Irvin, 21 Wend., 128; St. John *v.* Northrup, 23 Barb., 26; McLean *v.* Swanton, 13 N. Y., 535.

[3] Laws of 1855, ch. 547.

[4] 1 R. S., 759, § 19.

[5] 1 R. S., 755, § 28.

estate shall have come to the intestate on the part of the father or a mother, as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by devise, gift or descent from the parent referred to, or from any relative of the blood of such parent.[6]

55. Where a father, R., died intestate leaving a widow and two children, P. and L., the widow married and then had one son, W. L. then died intestate without descendants; then P. died without descendants, leaving the mother and W. living, the undivided half of the land which came to P. by descent from his father, W. the half-brother was excluded from inheriting, he not being of the blood of R., and the mother took such undivided half in fee, and the other undivided half W. took, subject to the life estate of his mother, he having been born of the same mother, and thus being of the blood of L.[7]

56. *Tenth rule of descent.* In all cases not provided for by the preceding rules, the inheritance shall descend according to the course of the common law.[8]

57. The common law rules of descent as laid down by Blackstone are as follows:

1. The first rule is that inheritances shall lineally descend to the issue of the person who last died actually seised *in infinitum*, but shall never lineally ascend;[9]

[6] 1 R. S., 755, § 29.
[7] Wheeler *v.* Cluttenbuck, 52 N. Y., 67.
[8] 1 R. S., 753, § 16.
[9] 2 Black. Com., 208.

2. A second general rule or canon is, that male issue shall be admitted before the female;[a]

3. A third rule or canon of descent is this: that where there are two or more males in equal degree, the oldest only shall inherit; but the females altogether;[1]

4. A fourth rule or canon of descent is this: that the lineal descendants *in infinitum*, of any person deceased, shall represent their ancestors; that is, shall stand in the same place as the person would have done, had he been living;[2]

5. A fifth rule is, that on failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules;[3]

6. A sixth rule or canon therefore is, that the collateral heir of the person last seised must be his next collateral kinsman of the whole blood;[4]

7. The seventh and last rule or canon is, that in collateral inheritances the male stock shall be preferred to the female (that is kindred derived from the male ancestor, however remote, shall be admitted before those from the blood of the female, however near), unless when the lands have, in fact, descended from a female. Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's

[a] 2 Black. Com., 212.
[1] 2 Black. Com., 214.
[2] 2 Black. Com., 217.
[3] 2 Black. Com., 220.
[4] 2 Black. Com., 224.

side are admitted at all; and the relations of the father's father before those of the father's mother; and so on.[5]

As the statute provides for all cases except where there are no children of the intestate, and no brothers or sisters of intestate, or descendants of such brothers and sisters, and no father or mother and no brother or sister of such father or mother, and no descendants of such brothers or sisters of the father or mother of the intestate; it is evident that the rules of the common law will seldom be resorted to, to determine who are the heirs of the intestate. When such cases do arise, the first thing to determine is, whether the estate came to the intestate on the part of the grandmother of the intestate: if so, then the heirs are to be sought for through the grandmother of the intestate as the common ancestor, to the exclusion of the grandfather and all of his blood relations.

58. If it cannot be determined that the estate came to the intestate on the part of the grandmother, then the heirs are to be sought for on the part of the grandfather of the intestate until the immediate blood of the grandfather is spent, and if not found, then go back to the great grandfather of the intestate, reckoning through the male line only.

59. As the grandfather, if living, could not inherit, the title may go to the oldest son of the grandfather if living; if not living then to his descendants if any. If there are no such descendants of the grandfather's oldest son, then the second and third sons are to be

[5] 2 Black, Com., 234.

taken in order, and if there are no sons and no representative of such sons, then the estate would go to the daughters of the grandfather of the intestate, who would take as coparceners and not as tenants in common, the descendants of any deceased daughter taking what their parent would have taken if living, in accordance with the foregoing rules of the common law.

60. The heirs of an intestate, and the heirs and devisees of a testator, are respectively liable for the debts of the decedent, arising by simple contract, or by specialty, to the extent of the estate, interest, and right in the real property, which descended to them from, or was effectually devised to them by the decedent.[6]

61. But an action to enforce such liability cannot be maintained except in one of the following cases:

(*a.*) Where three years have elapsed since the death of the decedent, and no letters testamentary, or letters of administration, upon his estate, have been granted within this State;[7]

(*b.*) Where three years have elapsed since letters testamentary, or letters of administration, upon his estate, were granted within the State.[7]

62. The action should be brought against all the heirs, or all the devisors jointly, and if the property in the hands of the heirs is not sufficient to pay the claims, then the heirs and devisees may be joined in the action. The property of the heirs is to be first exhausted, and then that of the devisees. The recovery

[6] Code, § 1843; Jewett *v.* Keenholts, 16 Barb., 193.

[7] Code, § 1844.

for damages and costs is to be apportioned among all of the defendants of the same class, whether heirs or devisees.[8]

Probate of heirship.

63. When a person seised in fee of real property dies intestate, his heirs or any of them may present to the Surrogate's Court which has acquired jurisdiction of his estate, or if no surrogate has acquired jurisdiction then to the Surrogate's Court of any county where the real property or any part thereof is situated, a written petition duly verified describing the real property, setting forth the facts conferring jurisdiction on the court, and the interest or share of the petitioner and that of all the other heirs in the real property, and praying for a decree establishing the right of inheritance thereto. Citations thereupon are to be issued to all the heirs of the intestate, and upon the return of the citation the surrogate must hear the allegations and proofs of the parties and make a decree describing the property, and declaring the right of inheritance thereto, which decree may be recorded in the office of the clerk, or of the register, of each county in which the real property is situated, as prescribed by law for recording deeds, and from the time of such record, the decree, or the record thereof, is presumptive evidence of the facts so declared to be established thereby.[9]

[8] Code, §§ 1846, 1847; Rockwell *v.* Geery, 4 Hun, 606; Stuart *v.* Kissam, 11 Barb., 271.

[9] Code, §§ 2654, 2659.

CHAPTER XVI.

TITLE BY WILL OR DEVISE.

1. What is a will.
2. What is a devise.
3. What is a nuncupative will.
4. What is a codicil.
5. Who may make a will as to real estate.
6. Who may make a will as to personal estate.
7. Monomaniacs and lunatics make will, when.
8. Married women previous to 1849.
9. Who may be devisees.
10. Devise to corporation void, when.
11. What may be devised.
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13. How executed.
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15, 16. First requisite of execution.
17. Second requisite of execution.
18. Third requisite of execution.
19. Fourth requisite of execution.
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23. Codicil, how executed.
24. Revocation of wills.
25. Incompetent to make a will, cannot revoke.
26. Marriage and issue revokes a will.
27. Woman's will revoked by marriage.
28, 29. Charge or incumbrance does not revoke.
30, 31. Conveyance revokes, when.
32. Birth of a child after will is made.
33. Issue of devisor dying, his issue take.
34. Revoked will republished.
35. Republication.
36. Devise void, when.
37. Executors may be authorized to sell and pay proceeds.
38. Intention, to govern in construction.
39. Extrinsic evidence.
40. Will and codicil construed together.

41. Legal interpretation to govern.
42. Ambiguous words.
43. Repugnant provisions.
44. General intention prevails.
45. Introductory part.
46. Technical words.
47. Words transposed, supplied, rejected.
48. Clearly manifest intention.
49. Misnomer.
50. Power to sell may be given without any interest or trust in the estate.
51. Devisee dying before testator, devise lapses.
52. Children does not include grandchildren.
53. Grandchildren not include great grandchildren.
54. Descendants include only issue.
55. Wills to be proved in Surrogate's Court.
56. When proved to be recorded and used in evidence.

1. A will is a disposition of real or personal property, to take effect after the death of the testator.

2. A devise is a disposition of real property in a person's last will and testament, to take effect after his death.

3. A nuncupative will is an unwritten will for the purpose of disposing of personal property, and is limited by the statute to soldiers in service and mariners at sea, and is not good unless made when the testator is *in extremis*, or overtaken by sudden and violent sickness and has no opportunity to make a written will.[1]

4. A codicil is a supplement to a will and is usually drawn to add to, modify or change some portion of the original will without rewriting it entirely.

5. All persons, except idiots, persons of unsound mind, and infants, may devise their real estate by a

[1] 2 R. S., 60, § 22; Ex parte Thompson, 4 Bradf., 154; Gwin's Estate, 1 Tuck., 44; Botsford *v.* Krake, 1 Abb. (N. S.), 112.

last will and testament, duly executed according to the provisions of law.[2]

6. 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 bequeath personal estate.[3]

7. A monomaniac may make a valid will, when the provisions of the will are entirely unconnected with the particular delusion.[4] A will made by a lunatic in a lucid interval may be valid; but the facts establishing intelligent action must be shown.[5]

8. Previous to 1849 a married woman could not devise her real estate, except by virtue of a power or by way of appointing a use, which right of devise she might possess by virtue of a marriage settlement, or ante-nuptial contract, or by the terms of the gift, or conveyance of the property to her.

9. A devise may be made to every person capable by law of holding real estate, including posthumous children, but a devise to a corporation shall not be valid unless such corporation be expressly authorized by its charter or by statute to take by devise.[6]

10. No person having a husband, wife, child or parent shall devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association, or corporation, in trust or other-

[2] 2 R. S., 56, section as amended by Laws of 1867, ch. 782.

[3] 2 R. S., 60, § 21; Laws of 1867, ch. 782.

[4] 1 Beck's Med. Jur., 650.

[5] Gombault *v.* Public Admr., 4 Bradf., 226; *In re* Burr, 2 Barb. Ch., 208; Ean *v.* Snyder, 46 Barb., 230.

[6] 2 R. S., 65, § 49, and 57, § 3; Theo. Sem. of Auburn *v.* Childs, 4 Paige, 422; King *v.* Rundell, 15 Barb., 139.

wise, more than half his estate, after paying debts, and such devise or bequest shall be valid to the extent of one-half, and no more.[7] The corporations formed under the general act of April 12, 1848, are made capable of taking, holding or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will and testament of any person whatsoever, the clear annual income of which devise or bequest shall not exceed the sum of ten thousand dollars, and are expressly subject to the proviso that no person leaving a wife, child or parent, shall devise or bequeath to such institution or corporation more than one-fourth of his or her estate, after the payment of his or her debts, and such devise shall be valid to the extent of one-fourth; and no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator.

11. Every estate and interest in real property descendible to heirs may be devised whether such estates be in possession, or remainder, or reversion,[8] or whether held adversely.[9] Every grant or devise of real estate, or any interest therein passes all the estate or interest of the grantor or testator, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the

[7] Laws of 1860, ch. 360; Harris *v.* Am. Bible Society, 2 Abb. Ct. Ap. Dec., 316; S. C., 4 Abb. (N.S.), 421.

[8] 2 R. S., 57, § 2.

[9] Pond *v.* Bergh, 10 Paige, 149; Varick *v.* Jackson, 2 Wend., 166; Demarest *v.* Willard, 8 Cowen, 206.

terms of such grant or devise.[1] The word heirs or other words of inheritance are not necessary to pass a fee.

12. The will must be in writing. It is not material in what language it be written so that it be plain and intelligible and express the meanings and intention of the testator. And whatever the intention of the testator may have been, it is the duty of the executors and of the courts to ascertain and carry it into effect, provided it is not in contravention of law and good morals.

13. The statute has determined what are the requisites for its proper execution in the following manner:

1*st.* It shall be subscribed by the testator at the end of the will;

2*d.* Such subscription shall be made by the testator, in the presence of each of the attesting witnesses or shall be acknowledged by him to have been so made, to each of the attesting witnesses;

3*d.* The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament;

4*th.* There shall be at least two attesting witnesses, each of whom shall sign his name at the end of the will, at the request of the testator.[2]

14. Literal compliance with the statute prescribing

[1] 1 R. S., 748, § 1.

[2] 2 R. S., 63, § 40; Lewis *v.* Lewis, 11 N. Y., 220; Arthur *v.* Arthur, 10 Barb., 21.

the manner of executing and attesting wills is not required, a substantial observance of it is sufficient.[3] But the four ingredients above specified must enter into and taken as a whole constitute one entire complex substance essential to a complete execution of a will.[4]

15. The first requisite is that the testator must sign at the end of the will. The subscription is deemed at the end of the will notwithstanding a blank of four inches between the last line and the signature.[5] And a signature by the testator, with those of the witnesses, below the usual attestation clause, is good, although a seal was affixed above the attestation clause.[6]

16. The testator's subscription may be written by another person in his presence and by his express direction.[7] So too the testator, if unable to write, may make his mark, but the person who writes his name should also sign as a subscribing witness to the will;[8] though the omission to add his own name does not avoid the will.[9]

17. The second requirement is, that such subscription shall be made in the presence of each attesting witness, or acknowledged to each witness. The testator's subscription or acknowledgment must be in

[3] Gamble *v.* Gamble, 39 Barb., 373.

[4] Remsen *v.* Brinckerhoff, 26 Wend., 331.

[5] Matter of Gilman, 38 Barb., 364.

[6] Cohen Estate, 1 Tuck., 286.

[7] Robins *v.* Coryell, 27 Barb., 556; Campbell *v.* Logan, 2 Bradf., 90.

[8] 2 R. S., 64, § 41; Jackson *v.* Jackson, 39 N. Y., 153.

[9] Hollenbeck *v.* Van Valkenburgh, 5 How., 281.

the presence of both witnesses. The presence of one is not enough.[1] He may subscribe in the presence of one and acknowledge it separately to the others.[2] After the testator had subscribed without the presence of witnesses, his friend, in his presence and that of the witnesses, read the attestation clause, which was in the usual form, and asked him if it was his last will and testament, and he said it was. This was a sufficient acknowledgment of his subscription.[3]

18. The third requisite is, that the testator at the time of so subscribing, or acknowledging, shall declare the instrument so subscribed to be his last will and testament. This testamentary declaration may be incorporated with the request to the witnesses to attest;[4] or by means of a question put to the testator and his affirmative response.[5] Where the will was read to the testatrix and witnesses, and afterwards she asked for it designating it as such, and signed it, and then declared she was glad it was done, it was a good publication.[6] The information or acknowledgment must come from the testator and not from the messenger who calls the witness.[7] A request to sign as witnesses without a declaration that the paper is a will is not enough.[8]

[1] Rutherford *v.* Rutherford, 1 Den., 33; Lewis *v.* Lewis, 11 N. Y., 220.
[2] 4 Kent's Com., 516; Matter of Sonnette, 5 N. Y. Leg. Obs., 254.
[3] Whitbeck *v.* Patterson, 10 Barb., 608.
[4] Rieten *v.* Hicks, 3 Bradf., 353.
[5] Tunison *v.* Tunison, 4 Bradf., 138; Coffin *v.* Coffin, 23 N. Y., 9.
[6] Nipper *v.* Groesbeck, 22 Barb., 670.
[7] Bown *v.* De Selding, 4 Sandf., 10.
[8] Harris Estate, 1 Tuck., 293.

19. The fourth requisite to the due execution of the will is that there shall be at least two attesting witnesses, each of whom shall sign his name at the end of the will and at the request of the testator. "Will you witness my will," or, "I want you to witness my will" constitutes a sufficient acknowledgment, declaration and rogation.[9] A request to only one witness to sign is not enough, at least without constructive request to the other.[1] When there are three witnesses, if two of them act in compliance with the statute, it is sufficient.[2] It is not necessary that the attesting witnesses sign literally and strictly in the testator's presence;[3] or in the presence of each other.[4] A subscribing witness may make his mark.[5] The witnesses must sign with the intention of being witnesses to a will.[6]

20. It is not necessary that there should be an attestation clause, but it is advisable that there should be one, and that it should express what was done at the time of executing and publishing the will, and may be in the following form: Signed, sealed, published and declared by the said testator to be his last will and testament in our presence, who at his request in his presence, and in presence of each other

[9] Hardner's Estate, 1 Tuck., 426; Van Hooser *v.* Van Hooser, 5 N. Y. Sur. (Redf.), 365.

[1] Rutherford *v.* Rutherford, 1 Denio, 33.

[2] Lyon *v.* Smith, 11 Barb., 124; Carroll *v.* Norton, 3 Bradf., 291.

[3] Ruddor *v.* McDonald, 1 Bradf., 352.

[4] Hoysradt *v.* Kingsman, 22 N. Y., 372.

[5] Meehan *v.* Rourke, 2 Bradf., 385; Morris *v.* Kniffin, 37 Barb., 336.

[6] Matter of Leroy, 3 Bradf., 227.

have signed our names as witnesses the —— day of ——.

21. The witnesses should annex their residence to their names in accordance with the provision of the statute;[7] though an omission to annex their respective places of residence will not affect the validity of the will.

22. The attestation certificate should be in due form and read over to the witnesses in the presence and hearing of the testator, and if the will is there subscribed in their presence it affords sufficient evidence of a request by the testator that the witnesses were showed the will and of his declaration that it is his last will.[8]

23. Codicils are to be published and executed in the same manner as wills. The term wills as used in the statute includes codicils as well as wills.[9]

24. No will in writing, except in cases hereinafter mentioned, nor any part thereof, shall be revoked, or altered otherwise than by some other will in writing, or some other writing of the testator declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person in his presence, by his

[7] 2 R. S., 64, § 41.

[8] Doe *v.* Roe, 2 Barb., 200; Rutherford *v.* Rutherford, 1 Denio, 33; Remsen *v.* Brinckerhoff, 26 Wend., 332; Whitbeck *v.* Patterson, 10 Barb. 608.

[9] 2 R. S., 68, § 71; Seymour *v.* Van Wyck, 2 Seld., 120.

direction and consent, and when so done by another person, the direction and consent of the testator shall be proved by at least two witnesses.[1]

25. If a man is incompetent to make a valid will, he is equally incompetent to revoke a will made previously. A destruction of a will by the testator is not a revocation thereof unless he intends thereby to revoke it. A lunatic can have no such intent.[2]

26. If after the making of any will, disposing of the whole estate of the testator, such testator shall marry, and have issue of such marriage, born either in his lifetime or after his death, and the wife or the issue of such marriage shall be living at the death of the testator, such will shall be deemed revoked, unless provision shall have been made for such issue by some settlement, or unless such issue shall be provided for in the will, or in such way mentioned therein, as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation shall be received.[3]

27. A will executed by an unmarried woman shall be revoked by her subsequent marriage.[4]

28. An agreement to convey any property devised or bequeathed in a will previously made shall not be deemed a revocation of such previous devise or bequest,

[1] 2 R. S., 64, § 42; Simmons *v.* Simmons, 26 Barb., 68; Timon *v.* Claffy, 43 Barb., 438; M'Loskey *v.* Reid, 4 Brad., 334; Leaycraft *v.* Simons, 3 Brad., 35; McPherson *v.* Clark, 3 Brad., 92.

[2] Smith *v.* Wait, 4 Barb., 28; Delafield *v.* Parish, 25 N. Y., 9.

[3] 2 R. S., 64, § 43; Havens *v.* Vandenburgh, 1 Denio, 27.

[4] 2 R. S., 64, § 44; Brown *v.* Clark, 77 N. Y., 369; Lathrop *v.* Dunlop, 4 Hun, 213.

either at law or equity; but such property shall pass by the devise or bequest subject to the same remedies for a specific performance or otherwise, against the devisees or legatees, as might be had by law against the heirs of the testator, or his next of kin, if the same had descended to them.[5]

29. A charge or incumbrance placed upon any real estate is not deemed a revocation of any will relating to the same estate previously executed, but the devise passes subject to such charge or incumbrance.[6]

30. A conveyance, settlement, deed, or other act of a testator by which his estate or interest in property previously devised or bequeathed by him shall be altered but not wholly divested, shall not be deemed a revocation of the devise or bequest of such property; but such devise or bequest shall pass to the devisee or legatee the actual estate or interest of the testator, which would otherwise descend to his heirs or pass to the next of kin; unless in the instrument by which such alteration is made, the intention is declared that it shall operate as a revocation of such previous devise or bequest.[7] But if the provisions of the instrument by which such alteration is made are wholly inconsistent with the terms and nature of such previous devise or bequest, such instrument shall operate as a revocation thereof, unless such provision depend upon a contingency, and such condition be not performed or such contingency do not happen.[8]

[5] 2 R. S., 64, § 45; Knight *v.* Weatherwax, 7 Paige, 182.

[6] 2 R. S., 64, § 46.

[7] 2 R. S., 65, § 47; Vandermark *v.* Vandermark, 26 Barb., 416.

[8] 2 R. S., 65, § 48; Adams *v.* Winne, 7 Paige, 97; Barstow *v.* Goodwin, 2 Bradf., 413; Beck *v.* McGillis, 9 Barb., 35.

31. A devise is revoked by the conveyance of the land devised, notwithstanding the conveyance be to the devisee. The latter will hold under the deed and not under the will.[9]

32. Whenever a testator shall have a child born after making a last will, either in the lifetime or after the death of such testator, and shall die leaving such child, so after-born, unprovided for by any settlement, and neither provided for, nor in any way mentioned in such will, every such child shall succeed to the same portion of such parent's real and personal estate as would have descended or been distributed to such child if such parent had died intestate, and shall be entitled to recover the same portion from the devisees and legatees in proportion to and out of the parts devised and bequeathed to them by such will.[1]

33. Whenever any estate, real or personal, shall be devised or bequeathed to a child or other descendant of the testator, and such legatee or devisee shall die during the lifetime of the testator, leaving a child or other descendant who shall survive such testator, such devise or legacy shall not lapse, but the property so devised or bequeathed shall vest in the surviving child or other descendants of the legatee or devisee as if such legatee or devisee had survived the testator and had died intestate.[2]

[9] Rose *v.* Rose, 7 Barb., 174.

[1] 2 R. S., 65, § 49; Mitchell *v.* Blain, 5 Paige, 588; Sanford *v.* Sanford, 4 Hun, 753; Rockwell *v.* Geery, 4 Hun, 606; Plummer *v.* Murray, 51 Barb., 201.

[2] 2 R. S., 66, § 52; Armstrong *v.* Moran, 1 Brad., 314; Van Buren *v.* Dash, 30 N. Y., 393.

34. When a will has been revoked it may be republished by the testator in one of two ways — *expressly* or *constructively*. Express republication arises when the testator repeats the ceremonies which are essential to constitute a valid execution of a will. Constructive republication is when a testator makes a codicil to his will, and either by annexing it to the former will or by referring to it in such a way and manner, as to show conclusively, that he intends to have it speak as a part and portion of the codicil then published. In such cases both should be read and construed together as one entire instrument. And though the codicil may have reference only to personal estate, it may republish and give efficacy to a revoked will having reference to real estate. And it may give efficacy to a will originally defective and void by reason of the want of the necessary subscribing witnesses.[3]

35. Sometimes it is advisable to republish the will by repeating the same solemnities as attended the former execution, or by a duly attested codicil.[4] And this is especially the case where the testator has made specific legacies of a portion of his estate, and divided the residue among his children by name, and he has had several children born to him since the former publication.

36. A devise is void when the person named as devisee is not capable of taking; as a devise to an alien who has not taken the necessary steps to hold real

[3] Van Cortland *v.* Kip, 1 Hill, 590; Williams on Exrs., 132; Havens *v.* Foster, 14 Pick., 543; Pigott *v.* Waller, 7 Ves., 98.

[4] Mooers *v.* White, 6 Johns. Ch., 375; Jackson *v.* Potter, 9 Johns., 312.

estate; or to a corporation not authorized by law to hold real estate. If a devise is given to a class as to the sons of A. and some of the sons are aliens and others naturalized, those who are naturalized will take the whole devise unless it specifies that the devise is to be divided into a number of shares, of which each is to have one or more, in such cases the share intended for those who are aliens will lapse, and unless they are disposed of by a residuary clause will descend to the heirs in the same manner as if there had not been any will. Should the testator desire that the devise should go to the issue of the devisee in case he should die before the testator, he must so express it in every case except when the devise is to a lineal descendant.[5]

37. In many cases where the person or corporation is not competent to take a devise, power may be given to the executors or trustees to sell the realty and pay the proceeds, thus changing real to personal property. In such cases the devisees take their several interests as money and not as land.[6]

38. In the construction of a will or devise the intention of the testator, if not inconsistent with the rules of law, must govern, and the intent is to be gathered from the words of the will itself,[7] and in doing this, effect should be given to every part of the will and no portion disregarded unless entirely repug-

[5] Downing *v.* Marshall, 23 N. Y., 366; Magan *v.* Field, 48 N. Y., 668; Seabury *v.* Brewer, 53 Barb., 662; Clark *v.* Lynch, 46 Barb., 68.

[6] Drake *v.* Pell, 3 Edw. Ch., 251; Meaking *v.* Cromwell, 5 N. Y., 136.

[7] Mann *v.* Mann, 14 Johns., 1; Jackson *v.* Luquere, 5 Cow., 221.

nant to another portion.[8] Where the meaning of the testator is apparent from the language of the will, the plain import of the language cannot be departed from, though it result in rendering the will invalid;[9] in case of doubt such a construction is to be avoided as would lead to an actual intestacy.[1]

39. Extrinsic evidence is inadmissible to influence the construction of a will, founded on clear language and well settled rules,[2] and yet the court is at liberty to look at all the attending circumstances,[3] to the situation of the testator at the time of making the will, the number of his children and the different kinds of property of which he was seised.[4]

40. A will and codicil are to be construed together as parts of one and the same instrument.[5] But the dispositions of the will are not to be disturbed by a codicil further than is absolutely necessary to give it effect.[6] 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 and some part of the codicil.[7]

41. The legal interpretation that has been fixed by

[8] Carter *v.* Hunt, 40 Barb., 89 ; Lovett *v.* Gillender, 35 N. Y., 617.

[9] Van Nostrand *v.* Moore, 52 N. Y., 12.

[1] Bates *v.* Hillman, 43 Barb., 645.

[2] Bunner *v.* Storm, 1 Sandf. Ch., 357; Wolfe *v.* Van Nostrand, 2 N. Y., 436.

[3] Shulters *v.* Johnson, 38 Barb., 80.

[4] Doe *v.* Provoost, 4 Johns., 61 ; Cronner *v.* Pinckney, 3 Barb. Ch., 466.

[5] Westcott *v.* Cady, 5 Johns. Ch., 334.

[6] Kane *v.* Astor, 5 Sandf., 467; aff'd, 9 N. Y., 113.

[7] Conover *v.* Hoffman, 15 Abb., 100.

a long series of decisions is to govern in determining the testator's intention.[8]

42. When ambiguous words are used, which admit of a twofold construction, one of which would render it void and the other would uphold it, the court must give that construction which will make it effectual in law.[9]

43. If two provisions of a will are repugnant so that both cannot stand, the latter must prevail.[1] This rule is to be applied only when the two provisions are so totally inconsistent that it is impossible for them to coincide with each other, or with the testator's general intention.[2]

44. A general or primary intention will prevail over a secondary or particular one;[3] and especially if the secondary intention is inconsistent with the primary intention.[4]

45. The introductory part of a will may have some effect in construing subsequent portions thereof, as by showing that it was the intent of the testator to dispose of his whole estate.[5]

46. Technical words and terms are to have a liberal

[8] Brown *v.* Lyon, 6 N. Y., 419; Corrigan *v.* Kiernan, 1 Bradf., 208.

[9] Mason *v.* Jones, 2 Barb., 229; Pond *v.* Bergh, 10 Paige, 140.

[1] Bradstreet *v.* Clarke, 12 Wend., 602; Van Vechten *v.* Keator, 63 N. Y., 52.

[2] Covenhoven *v.* Shuler, 2 Paige, 122; Sweet *v.* Chase, 2 N. Y., 73; Everitt *v.* Everitt, 29 N. Y., 39.

[3] Lovett *v.* Gillender, 35 N. Y., 617.

[4] Post *v.* Post, 47 Barb., 72.

[5] Earl *v.* Grim, 1 Johns. Ch., 494; Barheydt *v.* Barheydt, 20 Wend., 576.

and popular meaning if their technical interpretation would defeat the intent of the testator.[6]

47. Words may be transposed to get at the correct meaning,[7] or they may be supplied,[8] or they may be rejected.[9]

48. A clearly manifested intention in any part, ought not to give place to a doubtful or ambiguous provision.[1] But sometimes the clear literal interpretation of words may be departed from, if they will bear another construction; and the strict grammatical sense may be neglected.[2]

49. A misnomer may be corrected, as sister Elizabeth Mitchell in place of sister Elizabeth Michael;[3] Caroline Thompson in place of Cornelia Thompson;[4] so a gift to my nephew Cormar, son of my brother Cormar, was given to Cormar, son of his brother James, he having no brother Cormar.[5] Inherited may be applied to lands devised or conveyed by a parent or ancestor.[6]

50. Power may be given in a will to executors to sell the real estate without vesting in them any estate

[6] De Kay *v.* Irving, 5 Denio, 646; Burtis *v.* Doughty, 3 Bradf., 287.

[7] Mason *v.* Jones, 2 Barb., 229; Pond *v.* Bergh, 10 Paige, 140.

[8] Drake *v.* Pell, 3 Edw. Ch., 251; Carter *v.* Bloodgood, 3 Sandf. Ch., 293.

[9] Pond *v.* Bergh, 10 Paige, 140; Grim *v.* Dyar, 3 Duer, 354.

[1] Corrigan *v.* Kiernan, 1 Bradf., 208.

[2] Rathbone *v.* Dyckman, 3 Paige, 9; Bradhurst *v.* Bradhurst, 1 Paige, 331.

[3] Thomas *v.* Stevens, 4 Johns. Ch., 607.

[4] Connoly *v.* Pardon, 1 Paige, 297.

[5] Wightman *v.* Stoddard, 3 Bradf., 393.

[6] De Kay *v.* Irving, 5 Denio, 646.

in the land.[7] If the direction is that the estate be sold and divided it is a mere power in trust, and the executors have no estate in the land.[8] The time for executing the power will be interpreted by a reference to the whole instrument, and to the objects to be obtained by the power.[9] If the directions are that the real estate be sold as soon as possible, in such mode as the executors agree on, the estate descends to the heir, subject only to be defeated by the execution of the power; and on the death of all the executors the power falls.[1]

51. Where the devisee dies in the lifetime of the testator (unless the devisee is a descendant of the testator) the devise lapses; and such lapsed portions or shares, unless disposed of by the residuary clause of the will, are to be disposed of as in cases of intestacy.[2]

52. "Children" mean generally immediate issue, not grandchildren;[3] it does not include a step-child but only a child of the blood;[4] if there are legitimate children it will not include those that are illegitimate;[5] but if there are no legitimate children it will include illegitimate children.[6]

[7] Hall *v.* McLaughlin, 2 Bradf., 107; 1 R. S., 729, § 56.

[8] Williams *v.* Conrad, 30 Barb., 524; Hutchings *v.* Baldwin, 7 Bosw., 236.

[9] Egerton *v.* Conkling, 25 Wend., 224; Richardson *v.* Sharpe, 29 Barb., 222.

[1] Catton *v.* Taylor, 42 Barb., 578.

[2] Gill *v.* Brouwer, 37 N. Y., 549.

[3] Mowate *v.* Carow, 7 Paige, 328; Stires *v.* Van Rensselaer, 2 Brad., 172.

[4] Matter of Hallett, 8 Paige, 375; Cutter *v.* Doughty, 23 Wend., 513.

[5] Collins *v.* Hoxie, 9 Paige, 81; Cromer *v.* Pinkney, 3 Barb. Ch., 466.

[6] Gardner *v.* Heyer, 2 Paige, 11.

53. "Grandchildren" will not include great grandchildren.[7]

54. "Descendants" do not include brothers and sisters, nor next of kin, or heirs at law generally, but the issue of the body of the person; and "next of kin" does not include a widow.[8]

55. Wills and devises of real estate may be proved and recorded in the Surrogate's Court of the county of which the testator, if a citizen, was a resident at the time of his death; if the testator was not a citizen of the State, it can be proved in the Surrogate's Court in any county where he had property at the time of his decease, or in any county into which assets of his estate may be brought after his decease.[9] But if the original will is in another State or country, under such circumstances that it cannot be obtained for proof in a Surrogate's Court, or has been lost or destroyed before it was duly proved and recorded within the State, then it may be established in a court of record by a judgment in an action brought for that purpose.[1]

56. Any will which has been proved in the Supreme Court, the Court of Chancery, or before a surrogate of the State, with the certificate of proof thereof annexed thereto, or indorsed thereon, may be recorded in the office of the clerk or the register of any county in the State, in the same manner as a deed of real property. It is the duty of the executor or adminis-

[7] Hone *v.* Van Schaick, 3 N. Y., 538.

[8] Hamlin *v.* Osgood, 1 Redf., 409.

[9] Code, § 2611, etc.

[1] Code, §§ 1861, 1862.

trator with the will annexed, to cause every will having reference to real estate proved since September, 1880, to be recorded in each county where real property of the testator is situated, within twenty days after letters are issued to him. An exemplification of the record of such a will, from any office where the same has been recorded, may be in like manner recorded in the office of the clerk or register of any county. Such a record or exemplification, or an exemplification of the record thereof, must be received in evidence, as if the original will was produced and proved.[2]

[2] Code, § 2633.

CHAPTER XVII.

MORTGAGES.

1. Mortgage, what is it.
2. In form a conveyance.
3. Sometimes contains all the conditions.
4. Usually accompanied with a bond or note.
5. Usually contains power of sale.
6. Power is part of the security.
7. All the conditions should be in the mortgage or bond.
8. Two things necessary to constitute a mortgage.
9. Deed when considered a mortgage.
10. Should be under seal.
11. May be given for debt of a third person.
12. Need not covenant to pay money.
13. Differs from a pledge.
14. Differs from a conditional sale.
15. Mortgage preferred to a conditional sale.
16. Equitable mortgages.
17. Equitable liens.
18. Equitable lien for purchase money.
19. Usurious mortgage for purchase money.
20. Equitable mortgage may be foreclosed.
21. Who can make a mortgage.
22. Mortgage of infants and religious corporations.
23. Mortgage executed under power of attorney.
24. What may be mortgaged.
25. When one may mortgage, and not grant.
26. Mortgage of exempt homestead.
27. Mortgagee's name inserted before delivery.
28. To be signed, sealed, acknowledged and recorded.
29. Deeds with defeasance recorded with mortgages.
30, 31. If recorded in wrong book no protection.
32. Effect of not recording defeasance.
33. Mortgages recorded as of time of delivery to clerk.
34. Improperly recorded not notice.
35. Two mortgages recorded simultaneously.
36. Object of recording mortgages.
37. Unrecorded mortgage preference, when.
38. Mortgage given previous to acquiring title.
39. The record is notice — who protected by.

40. Mortgage for the purchase money.
41, 42. To secure debts and future advances.
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46, 47. Mortgagor still the owner.
48. Duty of mortgagor.
49. Interest of mortgagee.
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51. Mortgagee may take possession, when.
52, 53. Liability of mortgagee in possession.
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55. When may charge for paying taxes and assessments.
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66. One of several executors may assign.
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71. Assignee of an assignee.
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73, 74. Assignment merges, when.
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78, 79. Purchaser of mortgaged premises, when bound to pay mortgage.
80, 81. Liability of grantee from mortgagor.
82. Equity of redemption, what it is.
83. Inseparable incident.
84. Cannot be sold on execution, when.
85. Right to redeem, when barred.
86. Mortgagees of leases redeem after ejectment.
87. Mortgage to secure a note, good for twenty years.
88. Payment of debt pays mortgage.

89. Payment to mortgagee after assignment.
90. Payment before foreclosure.
91. Payment when part is due.
92. Junior mortgagee demand assignment, when.
93. Surety paying becomes equitable assignee.
94. On payment, entitled to satisfaction.
95. Mortgages to the people how satisfied.
96. After twenty years, presumed to be paid.
97. Mortgagee dead, how discharged.
98. Given to secure for third person, extending debt.
99. Mortgage, estoppel *in pais*.
100. Part of premises released.
101. Recording subsequent conveyances not notice.
102. Insurable interest of mortgagor and mortgagee.
103. Insurable interest of assignee, and of purchaser in foreclosure.
104. Insurance company subrogated, when.
105. Inchoate right of dower.
106. Execution of mortgage by married woman previous to 1879.
107. Widow compelled to contribute, when.
108. Mortgage once paid cannot be set up against dower.
109. Mortgage void for usury, when.
110. Usurious contract must be between mortgagor and mortgagee.
111. When given to secure a previous usurious debt.
112. Usurious bond and mortgage to secure a valid debt.
113. Who may plead usury.
114. When purchaser from mortgagor cannot set up usury.
115. Agreement to pay interest in advance not usury.

1. A mortgage is a conditional conveyance of an estate by way of pledge for the security of a debt; to become void on payment of the debt as therein provided: or to become absolute on failure to pay the debt upon the foreclosure of the mortgage.[1]

2. In its most usual form it is a conveyance in fee of the lands intended to be charged with the debt or

[1] Smith *v.* Gardner, 42 Barb., 356; Packer *v.* Rochester R. R., 17 N. Y., 287.

obligation, executed by the owner of the property, who is called the mortgagor, to the creditor who is called the mortgagee, with a proviso, or condition inserted in the instrument that the estate, thus created, shall be void on the payment of the sum of money therein expressed with interest; or the doing of some other act according to the terms of the mortgage, or according to the terms of the bond, note, or other instrument executed by the mortgagor to the mortgagee and referred to in the mortgage.[2]

3. Sometimes the mortgage contains all the conditions and obligations of the agreement, and is not accompanied with any note, bond or other obligation in which cases it is the principal instrument or obligation.

4. But the more usual way is to execute and deliver with it a note or bond, and in these cases the note or bond is the principal instrument, and the mortgage is collateral to such bond or note.

5. The mortgage usually contains a power authorizing the mortgagee, his heirs, executors, administrators or assigns, in case of any default in paying the money secured by it, or any part thereof, or on the non-performance of any other conditions, to sell the premises described, with the appurtenances, in the manner prescribed by law, and out of the money arising on such sale, to retain the principal, interest and costs, and to render the overplus to the mortgagor or his assigns.

6. This power of sale is deemed a part of the security, and vests in, and may be executed by any

[2] Cooper *v.* Whitney, 3 Hill, 95; Baker *v.* Thrasher, 4 Denio, 495.

person who, by assignment or otherwise, becomes entitled to the money so secured to be paid.[3] It differs from an ordinary power of attorney in this, that it survives the mortgagor and is irrevocable, being coupled with an interest.[4]

7. All the conditions or covenants should be embraced either in the mortgage or the accompanying note or bond; as no mortgage shall be construed as implying a covenant for the payment of the sum intended to be secured. And when there shall be no express covenant for such payment contained in the mortgage, and no bond or other separate instrument, to secure such payment, shall have been given, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage.[5]

8. Two things are necessary to constitute a mortgage; a conveyance of property, and a cotemporaneous agreement that such conveyance shall be a security. It is not material in what form this agreement is expressed, nor whether it be in one instrument or more than one. It is usual and most advisable to insert the defeasance in the same instrument, but it is not indispensable to the validity of the agreement. Where land was conveyed absolutely in one instrument, and the grantee in a separate instrument covenanted to reconvey to the grantor on his paying the sum of money, the transaction was held to be a mortgage.[6]

[3] 1 R. S., 737.

[4] Bergen *v.* Bennett, 1 Cai. Ca., 1; Knapp *v.* Alvord, 10 Paige, 205.

[5] 1 R. S., 738; Hone *v.* Fisher, 2 Barb. Ch., 559.

[6] Murray *v.* Walker, 31 N. Y., 399; Peterson *v.* Clarke, 15 Johns., 205; Brown *v.* Dean, 3 Wend., 208; Dunham *v.* Dey, 15 Johns., 555.

9. Every deed conveying real estate, which by any other instrument in writing, shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered a mortgage.[7]

10. The conveyance should be under seal and the defeasance or evidence of the right to redeem may be in a separate instrument and not under seal and bear a date subsequent to the conveyance;[8] or the defeasance may lie in parol, as it may be shown by parol that a deed absolute on its face was intended only as a security and is in reality only a mortgage.[9] The presumption is that the writing expresses the true contract, and the agreement showing the right to redemption must be clearly made out by a preponderance of proof.[1]

11. The mortgage may be given to secure the debt of a third person and not by the original debtor; and in such cases the redemption can be made either by the original debtor or by the mortgagor.[2] The original transfer being intended as a security, the grantee will not be allowed to claim it as an absolute conveyance. Once a mortgage always a mortgage, and an absolute conveyance cannot become a mortgage by any subsequent agreement.[3]

[7] 1 R. S., 756, § 3.

[8] Dey *v.* Dunham, 2 Johns. Ch., 182.

[9] Marks *v.* Pell, 1 Johns. Ch., 594; Horn *v.* Keteltas, 46 N. Y., 605; S. C., 42 How., 138; Brown *v.* Clifford, 7 Lans., 46.

[1] Marks *v.* Pell, 1 Johns. Ch., 599; Holmes *v.* Grant, 8 Paige, 243.

[2] Stoddard *v.* Whitney, 46 N. Y., 627; Hemans *v.* Lucy, 1 N. Y. Sup. Ct., 523.

[3] Sturtevant *v.* Sturtevant, 20 N. Y., 39; Barrett *v.* Carter, 3 Lans., 68.

12. It is not essential that the mortgage contain a covenant to pay money or to do any particular act. A deed in fee, with a condition that if the grantor should pay certain legacies charged upon the lands, so sold and conveyed by the grantor to the grantee then the deed to be void, was held to be a mortgage.[4]

13. There is a distinction between a pledge and a mortgage. A pledge or pawn, is a deposit of goods redeemable on certain terms, and either with or without a fixed period for redemption. Delivery accompanies a pledge, and is essential to its validity.[5]

14. A mortgage and a conditional sale have some incidents common to both, they are both conveyances, and both contain provisions for revesting the title in the grantor. And it is sometimes difficult to determine whether the transaction is a mortgage or a conditional sale. If the debt remains, it is a mortgage, and there is a right of redemption, but if it be extinguished by mutual agreement the instrument is not a mortgage.[6]

15. There is frequently great difficulty in determining whether a conveyance was intended by the parties as a mortgage, a mere security for money, or as a conditional sale;[7] as the line of distinction is not clearly defined, each case may be said to stand upon its own particular circumstances.[8] In cases of doubt

[4] Stewart *v.* Hutchins, 13 Wend., 485; aff'd, 6 Hill, 143.

[5] 4 Kent's Com., 138.

[6] Eskford's Ex. *v.* De Kay, 8 Paige, 89; aff'd, 26 Wend., 37; Robinson *v.* Cropsey, 2 Edw. Ch., 147; aff'd, 6 Paige, 480.

[7] Holmes *v.* Grant, 8 Paige, 258.

[8] Saxton *v.* Hitchcock, 47 Barb., 220.

the courts are inclined to hold in favor of the transaction being a mortgage, as by so doing the grantee cannot be grievously injured, and the grantor is required to furnish ample proof before an instrument, absolute upon its face, is adjudged to be subject to the right of redemption.[9]

16. Certain agreements between parties are held as equitable mortgages. They differ from mortgages in the fact that there is no express conveyance of the land. Where the debtor deposited his title deeds with his creditor as security, it was held to be an equitable mortgage although against the Statute of Frauds.[1] But such a deposit would not operate against *bona fide* purchasers or incumbrancers,[2] and would be of force only as between the parties and those having actual notice of the agreement.[3]

17. An agreement in writing although not under seal to give a mortgage, will create an equitable lien,[4] upon the maxim that a court of equity looks upon things agreed to be done as actually performed.[5]

18. Upon the sale of real estate, the vendor has an equitable lien upon the estate sold for the unpaid purchase money. But such lien would be upheld only as between the parties and against subsequent mortgagees or purchasers, with notice, or who paid no

[9] Fullertown *v.* McCurdy, 55 N. Y., 637; see Cooper *v.* Hill, 3 Hill, 95; Baker *v.* Thrasher, 4 Denio, 493.

[1] Rockwell *v.* Hobby, 2 Sandf. Ch., 9; Ray *v.* Adams, 4 Hun, 332.

[2] Garson *v.* Green, 1 Johns. Ch., 308.

[3] Jackson *v.* Parkhurst, 4 Wend., 369.

[4] Marquat *v.* Marquat, 7 How., 417.

[5] Burdick *v.* Jackson, 7 Hun, 488; Burger *v.* Hughes, 5 Hun, 180; Stoddard *v.* Whiting, 46 N. Y., 627.

new value.[6] The lien cannot be extended to third parties, but only to vendor and vendee and their privies in law and estate,[7] and when the Statute of Limitations runs against the debt the lien ceases.[8] Taking securities other than the personal obligation of the grantee will waive the lien unless taken in part payment.[9]

19. When the bond and mortgage were given upon a usurious agreement, and on that account held void, the unpaid purchase money remained an equitable lien upon the land;[1] so too when the bond and mortgage for the purchase money were defectively executed, a vendor's lien was enforced.[2] The lien is superior to the lien of a prior judgment against the vendee.[3]

20. Equitable mortgages may be foreclosed by action, in a manner similar to a foreclosure of an ordinary mortgage by action.

21. As a mortgage is a conditional conveyance, it follows that all persons and corporations able to convey by deed can make a mortgage and all persons capable of purchasing real estate may be mortgagees, and power is given to aliens under certain circumstances to take mortgages.[4]

22. The statutes make provision for the mortgaging of the real estate of infants, of lunatics, of habitual

[6] Burlingame *v.* Robbins, 21 Barb., 327; Clark *v.* Hall, 7 Paige, 382.
[7] McKillip *v.* McKillip, 8 Barb., 552.
[8] Borst *v.* Corey, 15 N. Y., 505.
[9] Fish *v.* Howland, 1 Paige, 20.
[1] Crippen *v.* Hermance, 9 Paige, 211.
[2] Burger *v.* Hughes, 5 Hun, 180.
[3] Arnold *v.* Patrick, 6 Paige, 310.
[4] 1 R. S., 721, § 19.

drunkards, of persons of unsound mind, and of religious corporations; and authorizes the mortgaging of the real property of deceased persons to raise money for the payment of debts.

23. A mortgage may be executed by a person authorized so to do by a power of attorney. But in all such cases the power of attorney must be strictly followed. A power to sell does not confer a power to mortgage.[5] A power to mortgage includes the necessary authority to execute a mortgage with the usual and customary provisions in mortgages authorizing the mortgagee to sell on default of prompt payment, to keep the buildings on the mortgaged premises insured and policy assigned to the mortgagee, and for the prompt payment of taxes and assessments upon the premises.[6]

24. All estates and interests in property, whether present, future or contingent, may become the subject of mortgage.

25. Every grant of lands is absolutely void, if at the time of the delivery of a deed of the same such lands were in the actual possession of another person claiming under a title adverse to the grantor. But every person, having a just title to lands of which there shall be an adverse possession, may execute a mortgage on such lands, and such mortgage, if duly recorded, shall bind the lands from the time when the possession thereof shall be recovered by the mortgagor or his representatives. And every such mortgage

[5] Bloomer *v.* Waldron, 3 Hill, 361; Albany Fire Ins. Co. *v.* Bay, 4 N. Y., 9.

[6] Wilson *v.* Troup, 2 Cow., 195; Fox *v.* Lipe, 24 Wend., 164.

shall have preference over any judgment or other instrument, subsequent to the recording thereof, and if there be two or more such mortgages, they shall severally have preference according to the time of recording the same respectively.[7]

26. Where a lot of land, with one or more buildings thereon, owned and occupied as a residence, by a householder and his family, is held and occupied as an exempt homestead, such exemption must be cancelled before a mortgage will be binding and valid upon such exempt household property.[8]

27. The name of the mortgagee should be inserted in the instrument before it is delivered.[9] If not inserted it does not purport to be evidence of any agreement with any person.

28. Mortgages are to be sealed, signed, witnessed, acknowledged, delivered and recorded in the same manner as deeds.

29. All deeds with defeasances, intended as a security in the nature of a mortgage, must be recorded and indexed in the books provided for the recording of mortgages, as the statute provides. Every deed conveying real estate, which, by any other instrument in writing shall appear to have been intended only as a security in the nature of a mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage; and the person for whose benefit such deed shall be made shall not derive any advantage from the recording thereof, unless every

[7] 1 R. S., 739, §§ 147, 148; Newton *v.* McLean, 41 Barb., 285.

[8] Code, §§ 1404, 1398.

[9] Chauncy *v.* Arnold, 24 N. Y., 330.

writing operating as a defeasance of the same, or explanatory of its being designed to have the effect only of a mortgage or conditional deed be also recorded therewith, and at the same time.[1]

30. The deed should be recorded as a mortgage, and if recorded as a deed only, the mortgagee is not protected against subsequent *bona fide* mortgagees or purchasers. The defeasance may be subsequently made and recorded with the principal instrument.[2]

31. The record of a deed, given as a security if recorded in the deed book is a nullity, but will become operative upon the mortgagee acquiring the equity of redemption.[3]

32. Where the deed intended as a security is recorded and the defeasance is not recorded, a purchaser for value from the grantee without notice of the defeasance, will hold an absolute title as against the grantor and his grantees. It is an absolute deed as regards third persons without actual notice, and a *bona fide* purchaser will take the land discharged of the equity of redemption.[4]

33. Mortgages are to be recorded in the order as of the time when the same shall be delivered to the clerk for that purpose.[5]

[1] 1 R. S., 756, § 3.

[2] James *v.* Johnson, 6 Johns. Ch., 417; White *v.* Moore, 1 Paige, 554; Brown *v.* Dean, 3 Wend., 208; Grimstone *v.* Carter, 3 Paige, 421.

[3] Warner *v.* Winslow, 1 Sandf. Ch., 430.

[4] Stoddard *v.* Rotton, 5 Bosw., 378; Mills *v.* Comstock, 5 Johns. Ch., 214; Whittick *v.* Kane, 1 Paige, 202.

[5] 1 R. S., 756.

34. If the mortgage is recorded improperly or in the wrong place, it is no notice.[6]

35. Where two mortgages, executed simultaneously, are recorded simultaneously, the intention of the parties governs their priority,[7] or neither has the preference,[8] or the priority may be determined by the equitable rights of the parties.[9] The assignee of one of such mortgages may acquire priority if he has no knowledge of the circumstances.

36. The object of recording the mortgage is to give notice of such lien to subsequent purchasers or mortgagees; as between the parties the recording is of no validity, nor is priority of registry of any avail against actual previous notice of an unrecorded mortgage.[1] But a *bona fide* assignee of such mortgage, without notice, would gain a preference if he recorded the mortgage and his assignment before the first mortgage.[2]

37. An unrecorded mortgage has preference over a subsequent general assignment, though the latter is first recorded.[3] It has preference over a subsequent docketed judgment, but should the land be sold under the judgment, prior to recording the mortgage the purchaser without notice would be protected.[4]

[6] Gillig *v.* Maas, 28 N. Y., 191.

[7] Jones *v.* Phelps, 2 Barb. Ch., 440.

[8] Rhoades *v.* Canfield, 8 Paige, 545.

[9] Stafford *v.* Van Rensselaer, 9 Cow., 316.

[1] Berry *v.* Mutual Fire Ins. Co., 2 Johns. Ch., 603; Jackson *v.* Colden, 8 Cowen, 266; Jackson *v.* McChesney, 7 Cow., 360.

[2] Fort *v.* Burch, 5 Denio, 187; Peabody *v.* Roberts, 47 Barb., 91.

[3] Wyckoff *v.* Remsen, 11 Paige, 564.

[4] Jackson *v.* Dubois, 4 Johns., 216; Jackson *v.* Terry, 13 Johns., 471.

38. A mortgage recorded before the date of the mortgagor's title was formerly not considered notice to a subsequent purchaser,[5] but the Court of Appeals have held that it is.[6]

39. The record of the mortgage is notice of the statements recorded in it which describe the debt;[7] and that its contents are what is spread upon the record;[8] and a record of a $3,000 mortgage as of only $300 was held to be notice to a subsequent purchaser of only the smaller amount.[9] No one is protected by the recording acts except a purchaser in good faith and for a valuable consideration, and whose conveyance is first duly recorded.[1]

40. Whenever lands are sold and conveyed and a mortgage is given by the purchaser at the same time to secure the payment of the purchase money, or any part thereof, such mortgage shall be preferred to any previous judgment which may have been obtained against such purchaser;[2] even though the mortgage was given to a third person who advanced the purchase money;[3] and although executed some time after the purchase.[4] A mortgage given for improvements, when given at the time of the purchase, was held entitled to a preference over the prior creditors of the mortgagor.[5]

[5] Truscott *v.* King, 6 Barb., 346; Raynor *v.* Wilson, 6 Hill, 469.

[6] Tefft *v.* Munson, 57 N. Y., 97; see also Crane *v.* Turner, 7 Hun, 357.

[7] Dimon *v.* Dunn, 15 N. Y., 498.

[8] Thomson *v.* Wilcox, 7 Lans., 376.

[9] Frost *v.* Beekman, 1 Johns. Ch., 288; aff'd, 18 Johns., 544.

[1] Lawrence *v.* Clark, 36 N. Y., 128; Webster *v.* Van Steenberg, 46 Barb., 211; Fort *v.* Burch, 5 Denio, 187.

[2] 1 R. S., 749, § 5.

[3] Jackson *v.* Austin, 15 Johns., 477.

[4] Haywood *v.* Nooney, 3 Barb., 643.

[5] Tallman *v.* Farley, 1 Barb., 280.

41. Mortgages may be given to secure any valid debts or obligations which are past due, for money loaned at the time, or for advances thereafter to be made. A mortgage given for an old debt stands on an equality with a judgment of the same date, as neither of them are for a valuable consideration passing at the time. If the mortgage is given to secure future advances, the agreement relative to the future advances should be recorded to be noticed.[6] A parol agreement treating the mortgage as security for further advance would be void.[7] A subsequent advance cannot be tacked to a prior security, to the prejudice of a *bona fide* junior incumbrancer.[8]

42. If the mortgage in terms provides that the mortgagee shall make future advances and the mortgagor shall accept the same and pay interest thereon, the rights of the parties are fixed at the time, and the mortgage will protect the mortgagee against subsequent incumbrancers, whose liens are acquired before the advances are actually made. The subsequent mortgagee has notice of the agreement and must take that into consideration when he takes his mortgage.[9]

43. If the mortgagee is not obligated to make future advances, and no notice is contained in the mortgage with reference to future advances, and the mortgagee makes further advances with knowledge

[6] Truscott *v.* King, 2 Seld., 147; St. Andrews Ch. *v.* Tompkins, 7 Johns. Ch., 14.

[7] Stoddard *v.* Hart, 23 N. Y., 556.

[8] Craig *v.* Tappin, 2 Sand. Ch., 78.

[9] Story's Eq. Jur., § 1023; Griffin *v.* Burtnett, 4 Edw., 673; Youngs *v.* Wilson, 27 N. Y., 351; Robinson *v.* Williams, 22 N. Y., 387.

of a subsequent lien, his rights as to the further advances are inferior to the subsequent lien.[1]

44. Where the bond and mortgage are given to secure a particular debt therein mentioned, the mortgagee cannot as against subsequent incumbrancers or purchasers hold it as a lien for a different debt, upon parol proof that it was intended to cover that debt also.[2] The time to pay the original debt may be extended. The lien created by the mortgage to secure the payment of one debt is satisfied by the payment of that debt, and a new lien can be created only by a new grant.[3]

45. Where the mortgage is to secure notes discounted or to be discounted; or to secure indorsements, it should state that it is a continuing guaranty, and the amount and the period for which it is to be a continuing guaranty.

46. The mortgagor after the execution and delivery of the mortgage is still the legal and equitable owner of the fee;[4] he has the whole control of the land and may maintain trespass against the mortgagee or a person acting under his license.[5]

47. His estate in the land may be attached, it may be sold on execution, is subject to dower and to curtesy.[6] In fine the mortgagor has the same control of

[1] Robinson *v.* Williams, 22 N. Y., 380; Brinckerhoff *v.* Marvin, 5 Johns. Ch., 320.

[2] Bank of Utica *v.* Finch, 3 Barb. Ch., 302.

[3] Stoddard *v.* Hart, 23 N. Y., 556.

[4] Runyan *v.* Messereau, 11 Johns., 534; Bryan *v.* Butts, 27 Barb., 503.

[5] Hitchcock *v.* Harrington, 6 Johns., 290; Coles *v.* Coles, 15 Johns., 319.

[6] Trimm *v.* Marsh, 54 N. Y., 599; Ten Eyck *v.* Craig, 62 N. Y., 406.

the land as before, subject however to the lien of the mortgage. The existence of the mortgage is not a breach of the covenant of seisin.[7]

48. It is the duty of the mortgagor to pay the interest and principal of the mortgage when the same becomes due, to pay the taxes and assessments, to cultivate the premises in a good husbandlike manner, not to commit any acts of waste or to do anything by which the security of the mortgage is impaired. He is entitled to possession and to the rents and profits until the sale in foreclosure is confirmed.[8]

49. The mortgagee's interest in the land is a mere chattel interest, a lien upon the land, not an estate in it; the mortgagor being the legal owner.[9] Until some breach in the conditions of the mortgage or some act of the mortgagor tending to weaken the security, he has no more control over the land than a stranger.

50. Whenever a breach has been committed by the mortgagor, the mortgagee may take steps to secure himself. He cannot enter by way of ejectment even if the estate of the mortgagor should be entirely forfeited.[1] This step must be taken in accordance with the provisions of the statute.

51. He may take possession of the property with the consent of the mortgagor;[2] and when once in possession, he may keep possession even against the

[7] Sedgwick *v.* Hollenback, 7 Johns., 376.

[8] Syracuse City Bank *v.* Tallman, 31 Barb., 201.

[9] Aymar *v.* Bill, 5 Johns. Ch., 570; Morris *v.* Mowatt, 2 Paige, 586.

[1] 2 R. S., 312; Murray *v.* Walker, 31 N. Y., 396; Trimm *v.* Marsh, 54 N. Y., 604.

[2] Waring *v.* Smyth, 2 Barb. Ch., 119.

mortgagor.[3] The only remedy of the mortgagor is to bring an action for accounting,[4] and to pay the balance which may remain due, if any, before he can reenter. Upon such accounting interest upon interest is not allowed, and whenever any amount received by the mortgage is more than the amount of interest then accrued, the excess is to be deducted from the principal.[5]

52. The mortgagee in possession is liable and accountable as one holding a pledge in possession and may retain possession until the debt is paid, but the title is always in the mortgagor.[6]

53. The mortgagee, while in possession, is liable for waste, he must keep the premises in repair, he is accountable for the rents received, and liable for those lost by his negligence, he cannot turn out a sufficient tenant or refuse a higher rent, if the premises are not rented through his neglect he is liable for a fair cash rent. He stands in the relation of a trustee and upon his accounting, all necessary taxes, repairs and expenses and prior incumbrances are to be allowed him; and if any increase of rent has been made on account of permanent improvements, he is to be allowed that.[7]

54. The mortgagee, whether in possession or not,

[3] Mickles *v.* Townsend, 18 N. Y., 584.

[4] Hubbell *v.* Moulson, 53 N. Y., 225.

[5] Bennett *v.* Cook, 2 Hun, 526; Stone *v.* Seymour, 15 Wend., 19; French *v.* Kennedy, 7 Barb., 452; Jencks *v.* Alexander, 11 Paige, 619.

[6] Jackson *v.* Willard, 4 Johns., 41; Chase *v.* Peck, 21 N. Y., 586.

[7] Van Buren *v.* Olmstead, 5 Paige, 9; Ensign *v.* Colburn, 11 Paige, 503; Cameron *v.* Irwin, 5 Hill, 272; 4 Kent's Com., 167; Quinn *v.* Brittain, 3 Edw., 314; Walsh *v.* Rutgers Fire Ins. Co., 13 Abb., 33; Story's Eq. Jur., § 1016 b.

may purchase the premises upon a tax sale or assessment sale,[8] he may purchase the premises at a sale on execution, even if the execution should have been issued in his own favor,[9] and he may purchase any outstanding title.

55. If the mortgagee is compelled to pay taxes or assessments, or rent on a perpetual lease, or a prior judgment to prevent a re-entry, or to protect his security, he may charge them and recover them under the mortgage.[1] But if he pays taxes or assessments he was under no obligation to pay, he is to be protected to the extent of the money so paid as against junior incumbrancers whose liens his payment protected.[2]

56. If he purchases the premises at a tax sale he has his tax certificate as a lien additional to his mortgage, and he may enforce it, or it may be redeemed from him in the same manner as from any other individual.

57. A provision is sometimes made, that in case the interest or any instalment of principal shall remain due and unpaid for a certain period of time, or for any other breach of the condition, the whole amount of the principal shall, at the option of mortgagee, or his assigns, become due and payable forthwith. In such cases the mortgagee or his assigns may insist on the payment of the whole sum at once, and may proceed

[8] Williams *v.* Townsend, 31 N. Y., 411.

[9] Trimm *v.* Marsh, 54 N. Y., 599; Ten Eyck *v.* Craig, 62 N. Y., 406.

[1] Robinson *v.* Ryan, 25 N. Y., 320; Kortright *v.* Cady, 23 Barb., 490; Brevoort *v.* Randolph, 7 How., 393; Rapelye *v.* Prince, 4 Hill, 119.

[2] Cook *v.* Kraft, 3 Lans., 512; S. C., 41 How., 279.

to foreclose for that amount.[3] If this clause is inserted in the bond, he may take judgment against the mortgagor for any deficiency, but if the clause is inserted in the mortgage only and not in the bond, it becomes due only so far as the lien is concerned, but he cannot bring an action on the bond for the full amount.[4]

58. The interest of the mortgagee being not an estate in the land, but a mere security, he is entitled to have that security protected; and in so doing he may have an action where injury is done fraudulently,[5] and he may stay waste by an injunction against the mortgagor or the purchaser,[6] and against the person committing waste.[7]

59. In regard to fixtures, as between mortgagor and mortgagee, the same law prevails as between grantor and grantee, and whatever fixtures would pass on a sale of the premises, the same fixtures would be held by the mortgage.[8] The fixtures, when annexed to the realty after the mortgage is executed and delivered, are bound by the mortgage, unless equities in favor of third persons require that such fixtures shall continue to be personal.[9]

60. When the fixtures become bound by the mortgage they cannot be removed except by the consent of

[3] Dimon *v.* Dunn, 15 N. Y., 498.

[4] Mattory *v.* The West Shore Hudson R. R. Co., 3 J. & S., 174.

[5] Gardner *v.* Heartt, 3 Denio, 234.

[6] Van Pelt *v.* McGraw, 4 Com., 110.

[7] Wilson *v.* Maltby, 59 N. Y., 126.

[8] Babcock *v.* Utter, 32 How., 439; Bishop *v.* Bishop, 11 N. Y., 123; Voorhees *v.* McGinnis, 48 N. Y., 278; Snedeker *v.* Warring, 12 N. Y., 170.

[9] Tifft *v.* Horton, 53 N. Y., 377.

the mortgagee, who may restrain their removal or destruction by injunction, if such removal injures the security;[1] and he may bring an action against the wrongdoer who removes them.[2]

61. An estate for years or a durable lease may be mortgaged. And where the estate for years is renewed, such renewal enures to the mortgagee's benefit, and his lien attaches to the extended term.[3] The mortgagor is still the owner of the term until foreclosure, and if the mortgagee enters into possession and holds as mortgagee in possession, a renewal of the lease would enure to the benefit of the mortgagor as a renewal of the old lease,[4] and the mortgagor could redeem. But should the mortgagee foreclose and purchase in the term, he would become responsible for rent and might be dispossessed for non-payment.[5]

62. The rolling stock of a railroad has been held in some of the States to be bound by a mortgage as fixtures, while in the State of New York the Commission of Appeals has held differently.[6]

63. Emblements pass to a purchaser upon foreclosure as against the mortgagor, his vendee or lessee though soon after the execution of the mortgage.[7]

64. The usual assignment of a mortgage is by an

[1] Bobinson *v.* Preswick, 3 Edw., 246.

[2] Van Pelt *v.* McGraw, 4 N. Y., 110; Lafflin *v.* Griffiths, 35 Barb., 58.

[3] Slee *v.* Manhattan Co., 1 Paige, 48; Holdridge *v.* Gillespie, 2 Johns. Ch., 30.

[4] Holdridge *v.* Gillespie, 2 Johns. Ch., 30.

[5] People ex rel. Grissler *v.* Dudley, 58 N. Y., 323.

[6] Hoyle *v.* Plattsburgh & M. R. R. Co., 54 N. Y., 314; Beardsly *v.* Ontario Bank, 31 N. Y., 619.

[7] Lane *v.* King, 8 Wend., 584; Sherman *v.* Willett, 42 N. Y., 146.

instrument under seal, duly acknowledged, that it may be recorded. The recording of the assignment is notice to the holders of all prior mortgages to such an extent as to require them to make all assignees of mortgages parties to a foreclosure of the prior mortgage, if they would cut off their right of redemption.[8] Unless the assignment of the mortgage is recorded or actual notice given to the holder of the prior mortgage, such subsequent mortgage may be cut off although the holder was not made a party.[9]

65. A written assignment is not necessary as it is not a conveyance of land, and it is equally effectual by a mere delivery, as by a written assignment.[1]

66. One of several executors or joint creditors may assign the bond and mortgage; as one of them can assign the debt, so one of them can assign the security which accompanies the debt.[2]

67. The assignment must be of the debt, as this transfers the equitable title to the mortgage. The mortgage interest as distinct from the debt created by the bond, has no determinate value, and is not a fit subject of assignment. It has been frequently held that the assignment without the accompanying bond, whether by writing or parol, and as collateral or otherwise, is a nullity, and the assignee acquires no interest.[3] And yet it is possible to assign the lien

[8] Vanderkemp *v.* Shelton, 11 Paige, 28; Pickett *v.* Barron, 29 Barb., 505; Ely *v.* Scofield, 35 Barb., 330.

[9] Moore *v.* Sloan, 50 Barb., 442.

[1] Runyan *v.* Mersereau, 11 Johns., 534; Bedell *v.* Carll, 33 N. Y., 581.

[2] Bogert *v.* Hertell, 4 Hill, 492.

[3] Cooper *v.* Newland, 17 Abb., 342; Merrick *v.* Bartholick, 36 N. Y., 44; Pattison *v.* Hull, 9 Cow., 747; Jackson *v.* Blodgett, 5 Cow., 202.

upon the land without transferring a personal claim against the person who executed the bond. When there is not any note or bond and no personal covenant of the mortgagor in the mortgage, an assignment of the mortgage transfers all the interest of the mortgagee, which is his claim upon the land.[4]

68. The assignment of the bond and mortgage and the money due thereon carries with it all the collaterals.[5]

69. The assignee takes the bond and mortgage subject to all the equities between the mortgagor and the mortgagee, although assigned before due,[6] and in this it differs from the transfer of a note or of commercial paper before due. Hence the assignee should have some assurance as to the amount still unpaid upon the bond and mortgage, and that there may be no defence of usury or want of consideration.

70. An estoppel *in pais* may bind the mortgagor and all those claiming under him,[7] but this would not in all cases be binding upon subsequent mortgagees or incumbrancers.

71. The assignee of an assignor takes only the title of his assignor.[8]

72. An assignment of a bond and mortgage carries with it by implication, that the vendor has a perfect

[4] Coleman *v.* Van Rensselaer, 44 How., 368; Hone *v.* Fisher, 2 Barb. Ch., 560; Severance *v.* Griffith, 2 Lans., 38; 1 R. S., 738.

[5] Belden *v.* Meeker, 2 Lans., 470; Craig *v.* Parkis, 40 N. Y., 181.

[6] Murray *v.* Lylburn, 2 Johns. Ch., 441; Evans *v.* Ellis, 5 Denio, 640.

[7] Schafer *v.* Reilley, 50 N. Y., 61; Payne *v.* Burnham, 2 Hun, 143.

[8] Sweet *v.* Van Wyck, 3 Barb. Ch., 647; White *v.* Knapp, 8 Paige, 173; Bush *v.* Lathrop, 22 N. Y., 535.

title;[9] that it is not a forgery;[1] that it is unpaid and there is no legal defence to its collection;[2] and that it can be enforced according to its terms when it shall become due.[3]

73. Where the owner of the equity of redemption pays off an existing mortgage and takes an assignment of it, such mortgage will be extinguished, unless it appears that some beneficial interest requires the keeping the legal and equitable estates distinct, or the mortgagor makes known or so declares his intention at the time.[4] When the mortgage has become once merged it cannot be restored so as to give priority over a junior lien.[5]

74. The merger can only occur when the property liable to pay the debt and the debt are owned by the same person; and it cannot exist if a portion of the property liable is owned by any other person than the owner of the mortgage, nor unless the owner of the property is the owner in fee;[6] nor if there is a junior mortgage.

75. The assignee of the mortgage should immediately give notice to the mortgagor of the assignment; because unless notified, any payment made to the mortgagee would be a payment upon the mortgage.[7]

[9] Burt *v.* Dewey, 40 N. Y., 283; Carman *v.* Trude, 25 How., 440.

[1] Corwin *v.* Wesley, 2 J. & S., 109.

[2] Lake *v.* Smith, 7 Abb. (N.S.), 106.

[3] Furniss *v.* Ferguson, 34 N. Y., 485.

[4] Purdy *v.* Huntington, 42 N. Y., 334; Gardner *v.* Astor, 3 Johns. Ch., 53; Starr *v.* Ellis, 6 Johns. Ch., 393; Copper *v.* Whitney, 3 Hill, 96; Van Nest *v.* Latson, 19 Barb., 604; Champney *v.* Coope, 32 N. Y., 543.

[5] Angel *v.* Boner, 38 Barb., 425; Moore *v.* Hamilton, 48 Barb., 120.

[6] Warner *v.* Blakeman, 36 Barb., 501; Skeel *v.* Spraker, 8 Paige, 182.

[7] Trustees of Union College *v.* Wheeler, 61 N. Y., 88; James *v.* Johnson, 2 Cow., 246.

76. The recording of the assignment is not notice to the mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them or either of them to the mortgagee,[8] and is only notice to prior mortgagees for the purpose of foreclosure.[9]

77. It is the duty of the mortgagor while the mortgagee is in possession, to give him notice and assist him in making the estate more productive, or it will be evidence against him should he undertake to charge the mortgagee with negligence. If he has sold the property, and the mortgage has become due, he should notify the mortgagee to foreclose, if the property is becoming dilapidated, if he would save himself from liability for any deficiency.[1]

78. Where the mortgagor sells his real estate subject to a mortgage and the grantee is to pay the mortgage, such assumption of the mortgage by the purchaser should be inserted in the deed in express words, so that it cannot be misunderstood. The acceptance of the deed "subject to the mortgage," or "upon which there is a mortgage" does not (in default of any other words showing a personal obligation on the part of the purchaser) make the grantee liable to pay for a deficiency on the foreclosure.[2]

[8] 1 R. S., 763, § 42; Reed *v.* Marble, 10 Paige, 409.

[9] Moore *v.* Sloan, 50 Barb., 442; Ely *v.* Scofield, 35 Barb., 330; Vanderkemp *v.* Shelton, 11 Paige, 28.

[1] Calvo *v.* Davies, 8 Hun, 222; Johnson *v.* Zink, 52 Barb., 396; Merritt *v.* Lincoln, 21 Barb., 249; Herrick *v.* Borst, 4 Hill, 650.

[2] Belmont *v.* Coman, 22 N. Y., 438; Stebbins *v.* Hall, 29 Barb., 524; Binsse *v.* Paige, 1 Keyes, 87; Dingledein *v.* Third Av. R. R. Co., 37 N. Y., 575; Hamill *v.* Gillespee, 48 N. Y., 556.

79. Any words in the deed which import a promise on the part of the grantee to pay the debt will be sufficient to hold him;[3] even in a personal action without foreclosing the mortgage.[a]

80. It was formerly held that if the grantor of the premises was not personally liable to pay the debt, that his grantee could not be bound personally to pay the debt by any condition inserted in the deed,[4] but the Supreme Court has lately held otherwise.[5]

81. After a conveyance by the mortgagor to his grantee, by a deed in which the purchaser assumes to pay the mortgage, the question has been raised whether the mortgagor could afterwards release the purchaser from his personal liability, and the General Term in the Fourth Department held that he could.[6] The question has not yet been passed upon by the Court of Appeals, but that court has held that the purchaser could not set up usury to defeat the mortgage even though the mortgagor released his grantee from the covenants and agreements contained in the deed.[7]

82. The right to redeem is called the *equity of redemption.* It is sometimes applied to the estate which the mortgagor has in the premises after the execution and delivery of the mortgage. But it exists not only in the mortgagor himself, but in his heirs and per-

[3] Belmont *v.* Coman, 22 N. Y., 438; Trotter *v.* Hughes, 2 Kern., 74.

[a] Burr *v.* Beers, 24 N. Y., 178.

[4] King *v.* Whitely, 10 Paige, 465.

[5] Vrooman *v.* Turner, 8 Hun, 78.

[6] Stephens *v.* Casbacker, 8 Hun, 116.

[7] Hartley *v.* Harrison, 24 N. Y., 170.

sonal representatives, and in every other person who has an interest in or an equitable or legal lien upon the the property, whether grantee, reversioner, remainderman, tenant by curtesy or dower, incumbrancer, etc.

83. The equity of redemption is an inseparable incident to the mortgage, and cannot be clogged or restrained by agreement. That which was once a mortgage is always a mortgage.[8] The mortgage may be redeemed while in process of foreclosure at any time before sale.[9]

84. It cannot be sold on an execution under a judgment at law for the mortgage debt,[1] but may be for any other debt.

85. The right to redeem, like the right to foreclose, would be barred by the lapse of twenty years. And the possession of twenty years must intervene after the mortgagee enters into possession, or after any payment has been made before this right can be barred; and should the mortgagee or his assigns commence to foreclose the mortgage after the lapse of twenty years, such proceedings would revive the right of redemption.[2]

86. Where lessees for years have been ejected from the premises for the non-payment of rent, the mortgagees of such leases may redeem at any time within a year.[3]

[8] Clark *v.* Henry, 2 Cow., 624; Henry *v.* Davis, 7 Johns. Ch., 40.

[9] Tuthill *v.* Tracy, 31 N. Y., 157; Pardee *v.* Van Auken, 3 Barb., 534; Averil *v.* Taylor, 4 Seld., 44.

[1] 2 R. S., 368.

[2] Calkins *v.* Isbell, 20 N. Y., 147; Jackson *v.* Slater, 5 Wend., 295; Calkins *v.* Calkins, 3 Barb., 305.

[3] Laws of 1842, ch. 240.

87. A mortgage under seal to secure a promissory note may be enforced at any time within twenty years, although the note may be barred.[4] So too the premises may be redeemed within the same period.

88. The mortgage being only a collateral security for the debt, payment of the debt discharges the lien of the mortgage.[5] And it may be paid and discharged in any way the parties agree upon;[6] and where there are two or more mortgagees it may be paid to either of them;[7] and either of them may discharge the mortgage.[8] If the mortgage has been assigned merely as a security, the assignee may take the money and give the discharge. Possession of the bond and mortgage representing the debt is evidence of authority to receive payment of the interest and of the principal.[9] Where payment is made to any other person than the mortgagee or assignee, the mortgagor should see that such payment is indorsed upon the bond.

89. Payment to the mortgagee after assignment would be good if the mortgagor had not received notice of the assignment.[1]

90. Payment destroys the power of sale,[2] and the mortgage thereafter cannot be kept alive by any

[4] Borst *v.* Corey, 15 N. Y., 510; Heyer *v.* Pruyn, 7 Paige, 465; Pratt *v.* Huggins, 29 Barb., 277.

[5] Jackson *v.* Stackhouse, 1 Cow., 122.

[6] Griswold *v.* Griswold, 7 Lans., 72.

[7] Pierson *v.* Hooker, 3 Johns., 68; The People *v.* Keyser, 28 N. Y., 235; Austin *v.* Hall, 13 Johns., 286.

[8] People *v.* Keyser, 28 N. Y., 226.

[9] Van Keuren *v.* Corkins, 4 Hun, 129.

[1] Van Keuren *v.* Corkins, 6 N. Y. Sup. Ct., 355.

[2] Cameron *v.* Irwin, 5 Hill, 272.

agreement.[3] The mortgagor and any grantee of the mortgagor may pay the amount at any time before foreclosure, or either may tender the amount, and if acceptance is declined, tender and refusal are equivalent to performance, and the incumbrance on the land is discharged.[4] The creditor by refusing to accept the money does not forfeit his right to the money, he only loses his lien upon the land; the tender need not be kept good or the money brought into court.[5] The tender must be for the full amount due and unconditional.[6] If the tender is properly made the mortgagee cannot impose any terms, as the payment of another debt as condition of his acceptance.[7]

91. Where an action is brought to foreclose a mortgage, upon which a portion of the principal or interest is due, and another portion is to become due, the defendant may pay into court, at any time before judgment, the amount due and costs, and the suit must be discontinued; if after judgment has been entered, he may pay the amount and costs into court and further proceedings on the judgment will be stayed until the next payment becomes due.[8]

92. Under certain circumstances a junior mortgagee or incumbrancer may pay the amount due upon the

[3] Kellogg *v.* Ames, 41 Barb., 218.

[4] Kemble *v.* Wallis, 10 Wend., 374; Kortright *v.* Cady, 21 N. Y., 343; Graham *v.* Linden, 50 N. Y., 547; Jackson *v.* Crafts, 18 Johns., 110.

[5] Hunter *v.* LeConte, 6 Cow., 728; Coit *v.* Houston, 3 Johns. Ch., 243; Edwards *v.* Farmers' Fire Ins. and Loan Co., 26 Wend., 545.

[6] Graham *v.* Linden, 50 N. Y., 547; Rosevelt *v.* N. Y. & Harlem R. R. Co., 30 How., 230; S. C., 45 Barb., 554.

[7] Burnett *v.* Denniston, 5 Johns. Ch., 35; Harris *v.* Jex, 55 N. Y., 421; Trustees of Union College *v.* Wheeler, 61 N. Y., 88.

[8] Code, §§ 1634, 1635.

mortgage and insist upon an assignment to him of the mortgage. This is not a strict right but the court will grant it where it is necessary for the protection of equitable rights, even after a decree of foreclosure and sale has been entered.[9]

93. Where the surety of the debt pays the amount due, he does not thereby satisfy the mortgage but he becomes the equitable purchaser, and he may enforce payment of the mortgage without any formal assignment.[1] He is subrogated to the rights of the mortgagee.

94. Upon payment of the mortgage debt the person paying is entitled to a certificate from the mortgagee or his assigns that the mortgage has been paid, and should he decline to give it, the court will compel him to do so.[2] Any one of several mortgagees can discharge the mortgage.[3] And the statute provides that any mortgage shall be discharged upon the record thereof, by the officer in whose custody it shall be, whenever there shall be presented to him a certificate signed by the mortgagee, his personal representatives or assigns, acknowledged, or proved and certified as prescribed, to entitle conveyances to be recorded, specifying that such mortgage has been paid or otherwise satisfied and discharged.[4] And such certificate with the proof or acknowledgment shall be

[9] Dings *v.* Parshall, 7 Hun, 522; Bloomingdale *v.* Barnard, 7 Hun, 459; Frost *v.* Yonker's Savings Bank, 8 Hun, 26.

[1] Ellsworth *v.* Lockwood, 42 N. Y., 89.

[2] Beach *v.* Cook, 28 N. Y., 508.

[3] People *v.* Keyser, 28 N. Y., 226.

[4] 1 R. S., 761, § 28.

recorded at full length, and a reference is to be made to the book and page containing such record by the officer upon the record thereof,[5] and a memorandum is made upon the margin of the recorded mortgage to such certificate of discharge.

95. In mortgages given to the people of the State, the State treasurer is to give the certificate of discharge which is to be countersigned by the comptroller.[6]

96. After twenty years from the last payment of interest or any portion of the principal, and there has been no foreclosure or entry, the mortgage will be considered as paid;[7] and an uncancelled mortgage sixty years old is no lien.[8]

97. The statute provides that where the mortgagees or all of them have been dead for more than five years, or if the mortgagee was an association or corporation which has been dissolved, and a mortgage which has been duly paid remains not discharged of record, that upon proper application to the Supreme Court, showing all the facts as to the payment of the mortgage and the death or dissolution of the mortgagee, the court may order such mortgage discharged of record.[9]

98. If the mortgage has been given as security for the debt of a third person, extending the debt to the original creditor will, under such circumstances as

[5] 1 R. S., 761, § 29.

[6] 1 R. S., 175.

[7] Jackson *v.* Wood, 12 Johns., 242.

[8] Belmont *v.* O'Brien, 2 Kernan, 394.

[9] Laws of 1862, 1868 and 1873; Matter of Townsend, 4 Hun, 31.

would discharge any other surety, act as a discharge of the mortgage.[1]

99. Where a mortgagee represents to a person intending to purchase the property that the mortgage has been paid, or by holding out another person to act for him in making bargains in relation to the mortgage, or the mortgaged property, he may be estopped either by his own acts or the acts of his agent from saying that the mortgage has not been paid, and the mortgage may be satisfied and discharged without actual payment.[2]

100. The mortgagee or his assignee may at any time release any portion of the mortgaged property, leaving the lien to remain in full force upon the property not so released. If the mortgagor sells any portion of the mortgaged property, the mortgagee may be compelled to enforce payment first against the property not sold and then against the remaining property in the inverse order of its alienation.[3]

101. The recording of subsequent conveyances or mortgages on parcels of the premises embraced in the prior mortgage is not notice to such prior mortgagee, and if such mortgagee releases the portions of the premises not conveyed, his lien upon the residue will not be impaired.[4] But if the mortgagee has actual

[1] Smith *v.* Townsend, 25 N. Y., 479; The Bank of Albion *v.* Burns, 49 N. Y., 170; Gahn *v.* Niemcewicz, 11 Wend., 312.

[2] Curtiss *v.* Tripp, Clark, 318.

[3] Stuyvesant *v.* Hall, 2 Barb. Ch., 151; N. Y. Life Ins. and Trust Co. *v.* Milnor, 1 Barb. Ch., 353; Snyder *v.* Stafford, 11 Paige, 71.

[4] Howard Ins. Co. *v.* Halsey, 8 N. Y., 271; Stuyvesant *v.* Hall, 2 Barb. Ch., 151; Wheelwright *v.* De Peyster, 4 Edw., 233.

notice of such sales, as by the actual occupancy of the purchasers, or by other information sufficient to put him on inquiry, he cannot release in derogation of their rights or to their prejudice.[5]

102. The mortgagor and the mortgagee have each an insurable interest in the property. The bond and mortgage frequently provide that the mortgagor shall insure and keep insured the buildings upon the mortgaged premises, and keep the policy assigned to the mortgagee or his assigns as a part of the collateral security of the debt. In such cases if the mortgagor fails to keep the premises insured and policy assigned, the mortgagee may pay the same and charge the expense of such insurance to the mortgagor and collect the same on the foreclosure of the mortgage.

103. The insurable interest of the mortgagee in the property is the extent of his lien,[6] and the assignee of the mortgage has the same insurable interest,[7] and he has this insurable interest as soon as he has made an agreement to purchase the bond and mortgage.[8] The purchaser at a foreclosure sale has an insurable interest upon his signing the contract of purchase and paying an instalment of the purchase-money;[9] and should the buildings be burned down or injured between the signing of the contract and delivery of the deed, he will not be entitled to be relieved from his purchase.

[5] Trustees of Union College *v.* Wheeler, 61 N. Y., 88, 98 ; Guion *v.* Knapp, 6 Paige, 41 ; Howard Ins. Co. *v.* Halsey, 4 Sandf., 565.

[6] Kernochan *v.* N. Y. Bowery Fire Ins. Co., 17 N. Y., 428.

[7] Tillou *v.* Kingston Mutual Ins. Co., 7 Barb., 570.

[8] Excelsior F. Ins. Co. *v.* Royal Ins. Co. of Liverpool, 55 N. Y., 343.

[9] McLaren *v.* The Hartford Fire Ins. Co., 5 N. Y., 151.

104. In case the mortgagee insures the buildings to protect his mortgage debt and the buildings are injured or destroyed by fire, the insurer on paying the amount of insurance may be subrogated to the rights of the mortgagee for his indemnity to the amount which he has paid.[1]

105. In order to bind the inchoate dower right of a married woman in her husband's real estate by mortgage, it is necessary that she join with her husband in the execution of the mortgage, and in order to cut off her right of dower in the property, she must be made a party to the foreclosure. And upon foreclosure her inchoate right of dower remains in the surplus, if any.[2]

106. Previous to 1879,[3] in her execution of the mortgage with her husband it was necessary that she acknowledge, on a private examination apart from her husband, that she executed such conveyance freely and without any fear or compulsion of her husband.[4] The law of 1847, giving a married woman power to convey her separate estate, did not change the law with reference to her execution of mortgages or deeds of her husband's estate.

107. Where the widow's dower exists in the equity of redemption, she is bound to contribute her fair proportion to the payment of the mortgage, or the pay-

[1] Excelsior F. Ins. Co. *v.* Royal Ins. Co. of Liverpool, 55 N. Y., 359; Mercantile Mut. Ins. Co. *v.* Caleb, 20 N. Y., 176; Rogers *v.* Hosack's Exrs., 18 Wend., 319.

[2] Tabele *v.* Tabele, 1 Johns. Ch., 45; Titus *v.* Neilson, 5 Johns. Ch., 452.

[3] Laws of 1879, ch. 249, and 1880, ch. 300.

[4] 1 R. S., 758, § 10.

ment of the interest.[5] If the mortgagee insists upon payment of the principal, the widow may redeem, and obtain an assignment of the mortgage, and it will be good in her hands for the full amount except her proportion of the debt.[6] If the mortgage is to be paid the widow is chargeable with a sum equal at the time of payment to the then value of an annuity of the amount of one-third of the interest upon the sum unpaid at her husband's death for the residue of her life.[7]

108. If the mortgagor or his grantee pays the mortgage debt, or appropriates property for its payment, the mortgage cannot afterwards be set up as against the claim of the wife for dower.[8]

109. All mortgages given upon an illegal and usurious consideration are void;[9] and in a proper case the Supreme Court has power to decree such mortgages void for usury; and may compel the party holding a usurious mortgage to surrender it to be cancelled, though the lands mortgaged lie in another State.[1]

110. The usurious contract must be between the mortgagor and mortgagee, or for the mortgagee's special benefit; extra compensation paid to the agent who secures the money does not make the loan

[5] Graham *v.* Linden, 50 N. Y., 547; Bell *v.* Mayor of N. Y., 10 Paige, 49; Levenworth *v.* Cooney, 48 Barb., 570; Coates *v.* Cheever, 1 Cow., 461.

[6] Swaine *v.* Perine, 5 Johns. Ch., 482.

[7] House *v.* House, 10 Paige, 158; Bell *v.* The Mayor of New York, 10 Paige, 49.

[8] Holmes *v.* Holmes, 3 Paige, 363.

[9] 1 R. S., 772.

[1] Williams *v.* Ayrault, 31 Barb., 364.

usurious, even though the person who obtains the money is the agent of the lender.[2]

111. Where a bond and mortgage are given to secure a previous usurious debt, it partakes of the taint of the original debt, even when given by a third person where there is no other consideration than the original usurious indebtedness.[3]

112. But if a usurious bond and mortgage are given to secure a valid debt, the avoidance of the usurious security will revive the debt,[4] although given for a part of the purchase price.[5] And an assignee of the bond and mortgage may enforce the old security if the new one is avoided.[6]

113. The defence of usury is a personal defence and is available only to the borrower or his privies in blood, representation or estate. It cannot be set up by a stranger to the original transaction.[7] But it may be set up by the heir or devisee, a subsequent judgment creditor of the mortgagor, or a purchaser under such judgment,[8] by a subsequent mortgagee of the mortgaged premises;[9] by a subsequent holder of a mechanic's lien upon the same premises,[1] or by the

[2] Condit *v.* Baldwin, 21 N. Y., 219; Bell *v.* Day, 32 N. Y., 165.

[3] Bell *v.* Lent, 24 Wend., 330; Vickery *v.* Dickson, 35 Barb., 96.

[4] Winsted Bank *v.* Webb, 39 N. Y., 325; Cook *v.* Barnes, 36 N. Y., 520.

[5] Crippen *v.* Hermance, 9 Paige, 211.

[6] Gerwig *v.* Sitterly, 56 N. Y., 214.

[7] Williams *v.* Tilt, 36 N. Y., 319; Ohio & Miss. R. R. Co. *v.* Kasson, 37 N. Y., 218; Stoney *v.* The American Life Ins. Co., 11 Paige, 635.

[8] Dix *v.* Van Wyck, 2 Hill, 522; Schroeppel *v.* Corning, 5 Den., 236; Thompson *v.* Van Vechten, 27 N. Y., 568; Mason *v.* Lord, 40 N. Y., 476; Carow *v.* Kelly, 59 Barb., 239.

[9] Mutual Life Ins. Co. *v.* Boweu, 47 Barb., 618.

[1] The Knickerbocker Life Ins. Co. *v.* Hill, 6 N. Y. Sup. Ct., 285.

assignee of the mortgagor for the payment of his, the mortgagor's debts,[2] unless the assignment provides for such debts as are claimed to be tainted with usury.[3]

114. Where, by the terms of sale, the property is sold subject to the lien and payment of such a mortgage, the purchaser cannot set up usury;[4] nor when sold at a master's sale for a price "over and above all incumbrances and liens thereon;"[5] nor where the mortgagor in his deed of conveyance sets forth in his deed that it is "subject to any indebtedness from the mortgagor to the mortgagee."[6]

115. An agreement in advance to pay interest upon interest is not usurious, but it cannot be enforced. An agreement to pay interest on interest which has accrued is valid. If compound interest is voluntarily paid, it cannot be recovered back.[7] But otherwise if paid ignorantly upon the faith of a calculation made by a third person.[8]

[2] Pearsall *v.* Kingsland, 3 Edw., 195.

[3] Murray *v.* Judson, 9 N. Y., 73; Pratt *v.* Adams, 7 Paige, 615, 639.

[4] Hartley *v.* Harrison, 24 N. Y., 172; Bullard *v.* Raynor, 30 N. Y., 206; Freeman *v.* Auld, 44 N. Y., 50; Hardin *v.* Hyde, 40 Barb., 435; Post *v.* Bank of Utica, 7 Hill, 391.

[5] Wells *v.* Chapman, 4 Sandf. Ch., 312; aff'd, 13 Barb., 561.

[6] Murray *v.* Barney, 34 Barb., 336.

[7] Mowry *v.* Bishop, 5 Paige, 98.

[8] Boyer *v.* Pack, 2 Denio, 107.

CHAPTER XVIII.

SEARCHES.

1. What is a search.
2. Commences where and shows what transfers.
3. Should show liens if any.
4, 5. Conveyances, liens and incumbrances recorded.
6. Books indexed.
7. When title sought outside the records.
8. Searches in countries without public records.
9, 10. How source of title to be found.
11, 12. How chain of title obtained.
13, 14, 15. What chain of title should contain.
16. Liens or incumbrances to be sought for.
17. Liens and incumbrances, what are.
18. Mortgage liens.
19, 20. For what period to examine for mortgages.
21. Mortgages discharged of record.
22. Search for judgments.
23. Sheriff's certificates of sale.
24. What recorded in books of deeds.
25. Leases.
26. The less common liens.
27. Taxes, assessments, and water rates.
28. Notices of pendency of action, and of attachment.
29. Conveyances by executors or trustees.
30. Sheriff's or referee's deed.
31, 32. Tax or assessment title.
33. Title from heirs.
34. Adverse possession.

1. A *search* is a description of title to real property.

2. It should commence at the original source of title and show the different transfers which have been made, down to, and including the conveyance to the present owner.

3. If there are any liens upon the property, it

should specify them distinctly, show how such liens originated and when they expire by limitation, or how they can be released or discharged.

4. The statutes provide that all liens or incumbrances shall become matters of public record; hence the examination of such public records will show all the liens and incumbrances at any time existing or which can affect the owner or purchaser.

5. The recording acts provide that all deeds, wills and mortgages may be recorded; and they all must be recorded to be of avail as against purchasers or mortgagees, who purchase or loan money upon mortgage or judgment, without knowledge that such deeds or mortgages exist.

6. The clerks of counties and registers of deeds are required to index every deed and mortgage under the names of the grantor and grantee, and the mortgagor and mortgagee, with reference to the book and page where the deed and mortgage can be found. The records of deeds and mortgages are kept in separate series of books and the indices are kept in the same manner; and where they are regularly and correctly kept, the title to each piece of real property can be easily and readily traced.

7. Sometimes the owner comes into the possession of the property by inheritance, where the ancestor died without a will and under circumstances that the record may not show any written title in the owner. In such cases the evidences of the title must be sought outside the record.

8. In those countries where provisions have not

been made for the recording of deeds and mortgages the searches are more elaborate, and are more generally kept and transferred with the deeds as one of the muniments of title, and upon each transfer of the property the original search can easily be extended. With us the recording of papers, the limitations of claims to real property, and our manner of conveying, with warranties of different kinds, have induced us to place less stress and significance upon an elaborate and extended search. Hence the search is often mislaid and lost; and upon a transfer of the property, the purchaser who wishes to be secure in his title must have a new examination made to see that the title is clear.

9. Often the only evidence or trace of title which the owner has is the deed of his grantor, the last previous owner.

10. With this, the examination is made by looking in the proper office in the index of grantees, against the name of the former owner from the time when this deed was recorded, tracing the index backward till the name of the person is found who conveyed to him the property; then look against the name of this grantor, in the index of grantees, till you have found his grantor, and so on continue the examination till you have reached a time or an owner beyond which there is no desire or wish to inquire, or until the conveyance originally made by the State has been found.

11. When this has been done the point has been found at which the search should commence.

12. Look now in the index of grantors, against the name of the original owner, for conveyances made by him till the deed is reached which purports to convey the property in question. Then against the name of this grantee continue the search in the index of grantors till the next conveyance of the property is found; and so continue the examination until the record of the deed is found which describes the property in question as belonging to the present owner. This latter examination furnishes the chain of title.

13. The chain of title should contain a list of all the successive owners of the property from the ownership of the government down to the present time; with the dates of the successive deeds and the times and places of their several records; thus showing how long and at what periods each person was the owner of the property.

14. In preparing this chain of title careful examination should be made of each deed, not only to see that it has a proper description of the property, but that the acknowledgments have been properly taken, that the wives joined with the husbands in the respective conveyances; and where the execution of the deeds were made without the State, that proper and sufficient certificates have been annexed in accordance with the provisions of the statute.

15. In examining as to the chain of title thus far attention has been paid to those cases where the transfer of title has been by deed only. Other methods of transfer of title will be noticed hereafter.

16. Having obtained the regular chain of title, it

is necessary to see whether the property is affected by any liens or incumbrances.

17. The more common liens and incumbrances arise by way of mortgage, judgment, judgment and sale, mechanics' liens, taxes, assessments, homestead exemptions, and as sureties on bonds of collectors.

18. *Mortgage liens.* Search should be made for mortgages, including mortgages to United States Loan Commissioners, against the several persons while they are or were the owners of the property. In doing this, search should be extended for a sufficient length of time to show that there is not any mortgage outstanding to affect or be a lien upon the property. And no absolute rule can be given as to how far such examination should extend.

19. It was formerly supposed that if search was made for mortgages against all the successive owners of the property, search against each one from the date of his deed to him, that such a search would reach all the claims by way of mortgage. But since the decision in Tefft *v.* Munson, 57 N. Y., 97, it would seem to be otherwise. A mortgage recorded before the mortgagor acquires title is not ordinarily a notice to subsequent purchasers in good faith. But if the mortgage so recorded contains covenants of warranty of seisin and of title, and the title is subsequently acquired by the mortgagor, he will be estopped from saying that he had not title at the time of the execution of the mortgage, or that the title did not pass to the mortgagee. And this estoppel binds not only the parties, but also privies in estate, privies in

blood and privies in law. And where such mortgages are given the title is treated as having been previously vested in the mortgagor, and upon the execution and delivery of the mortgage as passing immediately by way of estoppel. A record therefore of such prior mortgage is a constructive notice to a subsequent purchaser in good faith.

20. A presumption arises that a mortgage is paid after the expiration of twenty years from the time the amount secured has become due;[1] and after twenty years from the time when the last amount was paid thereon. The Court of Appeals has decided that a mortgage sixty-six years old upon the record uncancelled, is not a valid objection to the title to the land covered thereby when there is no evidence to rebut the legal presumption that it has been satisfied.[2] From this it will be seen that it would be a wise precaution to examine for mortgages executed by the different owners of the property for a period some time previous to that at which they respectively became the owners thereof.

21. When mortgages have been discharged of record, attention must be given to determine whether the satisfaction has been properly executed and acknowledged, and if the satisfaction was executed by an assignee, whether the several assignments embrace the proper reference and descriptions, and have all been properly executed and acknowledged.

22. Search is to be made for judgments against all

[1] 2 R. S., 301, § 48; Lawrence *v.* Ball, 14 N. Y., 477; Morey *v.* Farmer's L. & T. Co., 14 N. Y., 302.

[2] Belmont *v.* O'Brien, 12 N. Y., 394.

persons for ten years, who have at any time within that period been the owners of the premises. If the judgment has been suspended by injunction or appeal, the time of the lien is extended for the period it is suspended, if a notice to that effect is filed and noted.[3]

23. Sheriff's certificates of sale are to be sought for against all parties against whom judgments have been found for ten years last past who have become owners of the property within ten years last past, and for twenty-two years against those persons who were in possession of the property at that time as owners, and against all persons who have owned the property since that time, from the time each became the owner until the date of search, as no limitation has been fixed within which a sheriff may execute a deed of the real estate sold by him, or within which such deed is to be recorded.

24. Wills, general assignments, insolvent assignments, and assignments under the United States bankrupt act, and homestead exemptions should be recorded with conveyances, but they may not have all been recorded in the proper books and that fact should be ascertained. It has not been the usual custom to record wills in the county clerk's office, and the records of the Surrogate Courts can be examined for that purpose.

25. Leases for three years and upwards are to be recorded in the clerks' offices in most of the counties of the State, and when not so recorded the facts

[3] Code, §§ 1251, 1259.

whether any such leases have been made should be learned from the several owners.

26. The liens which are less common, and on that account are liable to be overlooked, are the bonds of collectors and receivers of taxes and their securities; and mechanics' liens, which are made a specific lien for one year, and if suit is commenced to foreclose them within the year, such lien to continue until judgment has been obtained thereon.

27. Taxes, assessments, and water rates are to be sought for in the various bureaus of the various local officers having charge of those subjects. Taxes on lands of residents of towns are payable from the time the assessment rolls are made up.[4]

28. If there has not been any mortgage upon the premises, it will not be necessary to look in the book of notices of foreclosure by statute, or for lis pendens, or notices of the pendency of action for foreclosure, but it will be necessary to examine the book containing notices of pendency of action in other cases, and notices of attachment.

29. When the title has been traced through conveyances made by executors or by trustees of an express trust, the instruments, conferring power upon them to convey, should be examined not only to determine whether the instrument creating the power was properly executed, but also to see whether the power is actually given by the instrument purporting to create the power.

[4] Rundell *v.* Lakey, 40 N. Y., 513.

30. Where deeds have been given by a referee or a sheriff in foreclosure or partition, care should be taken to determine whether the action was properly commenced by a valid service of the summons upon all the parties, or whether those persons upon whom such service was not properly made have regularly appeared by attorneys or other persons competent to take charge of their interest in the subject-matter of the controversy; and whether all the steps were correctly taken in the court to perfect the judgment, and the sale thereunder has been confirmed.

31. Where title is acquired by a tax or an assessment sale all the proceedings are governed by the directions contained in the statute, and unless all its provisions have been properly complied with, the sales may be declared void, notwithstanding the statute may say that the deed is presumptive evidence that all the steps have been properly taken.

32. Titles acquired by tax and assessment sales are usually the least satisfactory of any. The acts to be performed are so many, and the officers performing the same often have little regard to the correct performance of their duties, and the records of their proceedings are so improperly kept, that it is difficult after a few years to prove whether all the steps have been taken to make the title complete. A failure properly to perform one of the more important acts renders the whole proceedings so far as a good title is concerned of no value whatever. While judgments and proceeding in court can be amended, and thus a title may be made good which would otherwise be defec-

tive; no such remedy can be applied to cure defective transactions which should have been performed in accordance with the directions of a statute.

33. Where a deed has been given by the heirs of an intestate, or by the heirs of a person who failed to make a disposition of his real estate by will, it is sometimes difficult to determine whether all of the heirs have actually joined in the conveyance. By examining the papers in the Surrogate's Court, where a will of the decedent's personal estate has been proved, or where letters testamentary have been issued, the petition filed on the application for proof of the will, or for the issuing of letters testamentary should indicate who were the heirs of the decedent. In 1873, a law was passed (chap. 552) authorizing the surrogate in certain cases to take proof as to the heirs of deceased persons, and his certificate of the facts proven was presumptive evidence as to the succession to the real estate of deceased persons. This statute has been repealed, and the provisions of the code having reference to probate of heirship is intended to place on record not only the names of the several heirs but descriptions of the property to which they are entitled, and to affix the share or interest to which each is entitled.

34. In some cases a title may be good although the origin cannot be shown by any deed or will. In those cases it must be shown that there has been such a long uninterrupted possession, enjoyment and dealing with the property, as to afford a reasonable presumption that there is an absolute title. The acquiescence of all adverse claimants is presumed by the lapse of time.

APPENDIX OF FORMS.

No. 1. Deed — quit-claim.
2. Deed — quit-claim — short form.
3. Deed — covenant against grantor.
4. Deed — warranty.
5. Deed — full covenant.
6. Deed — full covenant, with covenants for quiet enjoyment and further assurance.
7. Deed — executor's, covenant against grantor.
8. Deed — land subject to mortgage.
9. Deed — sheriff's on execution to purchaser.
10. Deed — sheriff's on execution to assignee of purchaser.
11. Deed — sheriff's on execution to a redeeming creditor.
12. Deed — of referee or sheriff in foreclosure.
13. Deed — of referee or sheriff in partition.
14. Deed by corporation.
15. Deed of release of part of mortgaged premises.
16. Deed of administrator or executor by order of surrogate.
17. Deed — guardian's.
18. Sheriff's certificate of sale.
19. Assignment of sheriff's certificate of sale.
20. Mortgage with power of sale.
21. Mortgage without note or bond.
22. Mortgage with insurance clause.
23. Mortgage with interest, insurance and tax clause.
24. Mortgage with tax, interest and insurance clause.
25. Bond — short form.
26. Bond with insurance clause.
27. Bond with interest and insurance clause.
28. Bond with interest, insurance and tax clause.
29. Bond with interest, insurance and tax clause, long form.
30. Assignment of mortgage.
31. Assignment of mortgage — short form.
32. Assignment of mortgage with guaranty of payment.
33. Assignment of mortgage with guaranty of collection.
34. Satisfaction of mortgage.

35. Certificate of acknowledgment by a single person.
36. Certificate of acknowledgment by husband and wife.
37. Certificate of acknowledgment by husband and wife previous to law of 1879.
38. Certificate of acknowledgment made by guardian.
39. Certificate of proof made by a subscribing witness.
40. Certificate of acknowledgment under a power of attorney.
41. Certificate of proof of execution by a corporation.
42. Certificate of acknowledgment by executor or trustee.
43. Lease signed by landlord and tenant.
44. Security given by the tenant.
45. Lease — short form.
46. Lease of a farm.
47. Contract for sale of land.
48. Agreement to sell real property.
49. Assignment of a lease.
50. General assignment without preference.
51. Assignment with preferences.
52. Power of attorney to sell land.
53. Revocation of power of attorney.
54. Covenant to keep in repair.
55. Covenant to pay taxes.
56. Covenant to renew lease.
57. Foreclosure of mortgage by advertisement and sale — Notice of sale.
58. Foreclosure by advertisement, proofs of publication.
59. Proof of printing and affixing notice.
60. Proof of serving notice of sale.
61. Affidavit of auctioneer who made the sale.
62. Wills — short form.
63. Will, with trust and annuity clause, etc.
64. Codicil.
65. Instructions to county clerk for an official search.

No. 1.

QUIT-CLAIM DEED.

This indenture, made this —— day of ——, in the year of our Lord one thousand eight hundred and ———, between ——— of the first part, and ——— of the second part: Witnesseth, that the said part of the first part, in consideration of the sum of ——— dollars, to ——— in hand paid by the said part of the second part, the receipt whereof is

hereby confessed and acknowledged, ha bargained, sold, remised and quit-claimed, and by these presents, do bargain, sell, remise and quit-claim unto the said part of the second part, ——— and to ——— heirs and assigns forever (insert description of the premises). Together with all and singular the hereditaments and appurtenances thereto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever, of the said part of the first part, either in law or equity, of, in and to the above bargained premises, with the said hereditaments and appurtenances, to have and hold the said ——— to the said part of the second part, ——— heirs and assigns, to the sole and only proper benefit and behoof of the said part of the second part, —— heirs and assigns forever.

In witness whereof, the part of the first part ha hereunto set —— hand and seal the day and year first above written.

Sealed and delivered in the presence of

A. B. [L. S.]

No. 2.

QUIT-CLAIM DEED.— SHORT FORM.

In consideration of one hundred dollars to me in hand paid by C. D., I, A. B., hereby sell, grant, release and quit-claim to said C. D., all that certain lot (here insert description), to have and to hold the said released premises unto the said C. D., and his heirs and assigns forever. Witness my hand and seal this ——— day of ———, 188 .

In presence of

A. B. [L. S.]

No. 3.

DEED.— COVENANT AGAINST GRANTOR.

This indenture, made this —— day of ———, in the year of our Lord one thousand eight hundred and ———, between ——— of the first part, and ——— of the second part: Witnesseth, that the said part of the first part, in consideration of the sum of ——— dollars, to ——— duly paid, ha sold, and by these presents do grant and convey to the said part of the second part, ——— heirs and assigns (insert description). Together with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever, of the said part of the first part, either in law or equity, of, in and to the

above bargained premises, with the said hereditaments and appurtenances, to have and to hold forever.

And the said ————, for ——— heirs, executors and administrators, do covenant, promise and agree, to and with the said part of the second part, —— heirs and assigns, that —— ha not made, done, committed, executed, or suffered any act or acts, thing or things whatsoever, ———— whereby, or by means whereof, the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be impeached, charged, or incumbered, in any manner or way whatsoever.

In witness whereof, the part of the first part ha hereunto set —— hand and seal the day and year first above written.

Sealed and delivered
in the presence of

No. 4.

WARRANTY DEED.

This indenture, made this ——— day of ———, in the year of our Lord one thousand eight hundred and ———, between ——— of the first part, and —— of the second part: Witnesseth, that the said part of the first part, in consideration of the sum of —— dollars, to —— duly paid, ha sold ———, and by these presents do grant, sell and convey to the said part of the second part, ——— heirs and assigns (insert description). With the appurtenances, and all the estate, title and interest therein of the said part of the first part. And the said ———— do hereby covenant and agree to and with the said part of the second part, ——— heirs and assigns, that the premises thus conveyed in the quiet and peaceable possession of the said part of the second part, ——— heirs and assigns, ——— will forever warrant and defend against any person whomsoever, lawfully claiming the same, or any part thereof.

In witness whereof, the part of the first part ha hereunto set —— hand and seal the day and year first above written.

Sealed and delivered
in presence of

No. 5.

DEED. — FULL COVENANT.

This indenture, made this ——— day of ———, in the year of our Lord one thousand eight hundred and seventy ———, between ———— of the

first part, and ———— of the second part: Witnesseth, that the said part of the first part, in consideration of the sum of ——— to ——— duly paid, ha sold, and by these presents do grant and convey to the said part of the second part, ——— heirs and assigns, all (insert description). With the appurtenances, and all the estate, title and interest therein, of the said part of the first part. And the said ———— do hereby covenant and agree to and with the said part of the second part, ——— heirs and assigns, that at the time of the ensealing and delivery of these presents, ———— the lawful owner and ———, well seised in fee simple, and possessed of the premises above conveyed, and of the whole thereof, and that the same are free and clear from all incumbrance, lien, charge and claim whatever, ———— and that the premises thus conveyed, in the quiet and peaceable possession of the said part of the second part, —— heirs and assigns, ——— will forever warrant and defend against any person whomsoever, lawfully claiming the same, or any part thereof.

In witness whereof, the said part of the first part, ha hereunto set —— hand and seal the day and year first above written.

Sealed and delivered
in the presence of

No. 6.

DEED — FULL COVENANT, WITH COVENANT FOR QUIET ENJOYMENT AND FOR FURTHER ASSURANCE.

This indenture, made the —— day of ——, in the year one thousand eight hundred and eighty ——, between —— of the first part ——, and —— of the second part: Witnesseth, that the said part of the first part, for and in consideration of the sum of —— lawful money of the United States, to —— in hand paid by the said part of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said part of the second part, ——— heirs, executors and administrators, forever released and discharged from the same; by these presents, ha granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey and confirm, unto the said part of the second part, and to —— heirs and assigns forever, all (insert description). Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof: And also, all the estate, right, title, interest, ——— property, possession, claim and demand whatsoever, as well in law as in equity, of the said part of the first part, of, in and to the same, and every part and

parcel thereof, with the appurtenances: To have and to hold the above granted and described premises, with the appurtenances, unto the said part of the second part, ——— heirs and assigns, to ——— their own proper use, benefit and behoof, forever.

And the said ———, for —— heirs, executors and administrators, do covenant, grant and agree, to and with the said part of the second part, ——— heirs and assigns, that the said ———, at the time of the sealing and delivery of these presents, ——— lawfully seised in ——— of a good, absolute and indefeasible estate of inheritance, in fee simple, of, and in all and singular the above granted and described premises, with the appurtenances, ——— and ha good right, full power and lawful authority to grant, bargain, sell and convey the same in manner aforesaid: And that the said part of the second part, ——— heirs and assigns, shall and may at all times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the above granted premises and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction or disturbance of the said part of the first part, ——— heirs or assigns, or of any other person or persons lawfully claiming or to claim the same: And that the same now are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances of what nature or kind soever.

And also, that the said part of the first part and ——— heirs, and all and every person or persons whomsoever, lawfully or equitably deriving any estate, right, title or interest, of, in or to the hereinbefore granted premises, by, from, under or in trust for ——— them, shall and will, at any time or times hereafter, upon the reasonable request, and at the proper costs and charges in the law, of the said part of the second part, ——— heirs and assigns, make, do and execute, or cause to be made, done and executed, all and every such further and other lawful and reasonable acts, conveyances and assurances in the law, for the better and more effectually vesting and confirming the premises hereby granted or so intended to be, in and to the said part of the second part, —— heirs and assigns forever, as by the said part of the second part, ——— heirs or assigns, or ——— their counsel learned in the law, shall be reasonably advised or required: And the said ——— heirs, the above described and hereby granted and released premises, and every part and parcel thereof, with the appurtenances, unto the said part of the second part, ——— heirs and assigns, against the said part of the first part, and ——— heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same, shall and will warrant, and by these presents forever defend.

In witness whereof, the party of the first part ha hereunto set ——— hand and seal the day and year first above written.

Sealed and delivered in
the presence of

No. 7.

EXECUTOR'S DEED. — COVENANT AGAINST GRANTOR.

This indenture, made the ——— day of ———, in the year of our Lord one thousand eight hundred and —, between ——— party of the first part, and —— of the second part: Witnesseth, that the said part of the first part, by virtue of the power and authority to ——— given by the said last will and testament, ——— and for and in consideration of the sum of ——— to ——— paid by the said part of the second part, the receipt whereof is hereby acknowledged, ha granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey, unto the said part of the second part, and to ——— heirs and assigns forever, all (insert description). Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof. And all the estate, right, title, interest, ——— property, possession, claim and demand whatsoever, which the said testa had in ——— lifetime, and at the time of ——— decease, and which the said part of the first part ha by virtue of the said last will and testament or otherwise, of, in and to the above described premises, and every part and parcel thereof, with the appurtenances, to have and to hold forever. And the said part of the first part, for themselves severally and not jointly, and for their respective heirs, executors and administrators, do severally and not jointly covenant, promise and agree to and with the said part of the second part, ——— heirs and assigns, that ——— ha not made, done, committed, executed, or suffered any act or acts, thing or things whatsoever, ——— whereby or by means whereof the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be impeached, charged or incumbered, in any manner or way whatsoever.

In witness whereof, the said part of the first part ha hereunto set ——— hand and seal the day and year first above written.

Sealed and delivered in
the presence of

No. 8.

DEED WHEN LAND IS SUBJECT TO A MORTGAGE.

(After the description of the premises in either of the foregoing deeds insert as follows):

Subject however to the payment, conditions and agreements set forth and contained in a certain indenture of mortgage executed by the said A. B. and his wife to one C. D., dated Dec. 19, 1880, and recorded in the ——— county clerk's office, in Book of Mortgages 236, page 15, which mortgage was given for the purpose of securing the payment of the sum of one thousand dollars and interest, at the time and in the manner therein specified, which said sum the said party of the second part hereby assumes and agrees to pay according to the terms thereof with the interest from the 10th day of July, 1881.

No. 9.

SHERIFF'S DEED ON SALE UNDER AN EXECUTION.

This indenture, made the —— day of ———, in the year of our Lord one thousand eight hundred and ——, between —— sheriff of the county of —— of the first part, and ——— of the second part:

Whereas, by virtue of ——— certain execution issued out of the ——— at the suit of ———— defendant , directed and delivered to the said sheriff, commanding him that of the goods and chattels of the said defendant he should cause to be made certain moneys in the said execution specified, and if sufficient goods and chattels could not be found, that then he should cause the amount so specified to be made of the lands, tenements, real estate and chattels real, which the said defendant had on a day in the said execution mentioned, or at any time afterwards, in whose hands soever the same might be; and the said ——, in obedience to the command of the said execution , did levy on and seize all the estate, right, title and interest which the said defendant so had, of, in and to the premises hereinafter conveyed and described, and on the —— day of ———, one thousand eight hundred and ———, sold the said premises at public vendue, at —— in the said ——, having first given public notice of the time and place of such sale by advertising the same according to law, at which sale the said premises were struck off to ——— for the sum of ———, being the highest bidder, and that being the highest sum bidden for the same.

*And whereas, the said premises, after the expiration of fifteen months from the time of the said sale, remained unredeemed, and no creditor of the said —— hath acquired the right and title of the said purchaser, according to the statute in such case made and provided.†

Now this indenture witnesseth, that the said party of the first part, as sheriff as aforesaid, by virtue of the said execution and in pursuance of the statute in such case made and provided, and in consideration of the sum of money so bidden as aforesaid, to him duly paid, hath sold, and by these presents doth grant and convey unto the said part of the second part, all the estate, right, title and interest which the said defendant had on the ——— day of ———, one thousand eight hundred and ———, or any time afterwards, of, in and to all (insert description). To have and to hold the said above mentioned and conveyed premises, with the appurtenances, unto the said part of the second part, ——— and assigns forever, as fully and absolutely as the said party of the first part, as sheriff as aforesaid, can or ought to sell and convey the same, by virtue of the said execution and the law relating thereto.

In witness whereof, the said party of the first part hath hereunto set his hand and seal, the day and year first above written.

Sealed and delivered
in presence of

No. 10.

DEED OF SHERIFF ON EXECUTION TO ASSIGNEE OF PURCHASER.

(After the † in last form insert):

And whereas, the said (purchaser at the sale) has sold, assigned, transferred and set over to E. F. the certificate of sale heretofore given by the said sheriff to the said (purchaser), and all the right, title and interest therein and thereby acquired.

No. 11.

DEED OF SHERIFF ON EXECUTION TO A REDEEMING CREDITOR.

(In No. 9 strike out the words from the * to the † and insert):

And whereas the said premises, after the expiration of one year from the time of said sale, remained unredeemed by any person entitled to make such redemption, within that time; and whereas E. F., a creditor of the said judgment debtor, having in his own name (or as assignee or trustee) a judgment in the ——— court against the said judgment debtor for the sum of ——— in a civil action rendered before the expiration of fifteen months from the time of such sale, and which is a lien and charge on the premises so sold, hath acquired all the right of the said (the origi-

nal purchaser) to said premises, within the time and in the manner and form prescribed by the statute in such case made and provided; and no other creditor of the said ——— hath acquired the same from or against the said purchaser.

No. 12.

REFEREE'S OR SHERIFF'S DEED IN MORTGAGE CASES.

This indenture, made this ——— day of ———, in the year of our Lord one thousand eight hundred and ——, between —— referee in the action hereinafter mentioned (as sheriff) ——— of the first part, and ——— of the second part: Whereas, at a ——— term of the ——— court of ———, held at ——— on the —— day of ——, one thousand eight hundred and ——, it was, among other things, ordered, adjudged and decreed by the said court, in a certain action then pending in the said court, between ———, that all and singular the premises described in a mortgage executed by —— to ———, and recorded in ——— county clerk's office in liber —— at page ———, and being the same premises mentioned in the complaint in said action, and in said judgment described, or so much thereof as might be sufficient to raise the amount due to the plaintiff for principal, interest and costs in said action, and which might be sold separately without material injury to the parties interested, be sold at public auction according to the course and practice of said court, by or under the direction of the said ———, who was appointed a referee in said action (or by the sheriff of the county of) and to whom it was referred by the said order and judgment of the said court, among other things, to make such sale; that the said sale be made in the county where the said mortgaged premises, or the greater part thereof, are situated; that the said referee (or sheriff) give public notice of the time and place of such sale, according to the course and practice of said court, and that any of the parties in said action might become a purchaser or purchasers on such sale; that the said referee (or sheriff) execute to the purchaser or purchasers of the said mortgaged premises, or such part or parts thereof, as shall be sold, a good and sufficient deed or deeds of conveyance for the same. And whereas, the said referee (or sheriff), in pursuance of the order and judgment of the said court did, on the —— day of ———, one thousand eight hundred and ———, sell at public auction at ——— the premises in said order and judgment mentioned, due notice of the time and place of such sale being first given, agreeably to the said order; at which sale the premises hereinafter described were struck off to the said party of the second part, for the sum of ——— dollars, that being the highest sum bidden for the same. Now this indenture witnesseth, that the said referee (or sheriff), the party of the

first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the order and judgment of the said court, and in conformity to the statute in such case made and provided, and also in consideration of the premises, and of the said sum of money so bidden as aforesaid, having been first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey unto the said party of the second part (describe the premises). To have and to hold, all and singular the premises above mentioned and described, and hereby conveyed unto the said party of the second part, —— heirs and assigns forever.

In witness whereof, the said party of the first part, referee (or sheriff) as aforesaid, hath hereunto set his hand and seal the day and year first above written.

Sealed and delivered
in the presence of

No. 13.

REFEREE'S (OR SHERIFF'S) DEED IN PARTITION.

This indenture, made the ——— day of ———, in the year one thousand eight hundred and eighty ———, between ————, referee in the action hereinafter mentioned (or sheriff), of the first part, and ——— of the second part. Whereas, at a special term of the ——— court of ———, held at ——, on the ——— day of ———, one thousand eight hundred and eighty ———, it was among other things ordered, adjudged and decreed, by the said court, in a certain action then pending in the said court, between ————, that all and singular the premises mentioned in the complaint in said action, and hereinafter described, be sold at public auction, according to the course and practice of said court, by or under the direction of the said ————, who was appointed a referee in said action (or sheriff of the county of ——), and to whom it was referred by the said order and judgment of the said court, among other things, to make such sale; that the said sale be made in the county where the said premises, or the greater part thereof, are situated; that the referee (or sheriff) give public notice of the time and place of such sale, according to law and the rules and practice of said court, and that any of the parties in said action might become a purchaser or purchasers on such sale; that the said referee (or sheriff), after said sale, make report thereof to said court, and after his report of sale shall have been duly confirmed, then that he execute to the purchaser or purchasers of the said premises, or such part or parts thereof as shall be so sold, a good and sufficient deed or deeds of conveyance for the same. And whereas, the said referee (or sheriff), in

pursuance of the order and judgment of the said court, did, on the ——— day of ———, one thousand eight hundred and eighty ———, sell at public auction, at ———, the premises in the said order and judgment mentioned, due notice of the time and place of such sale being first given, agreeably to the said order; at which sale the premises hereinafter described were struck off to the said part of the second part, for the sum of ——— dollars, that being the highest sum bidden for the same, and the said referee's (or sheriff's) report of said sale having been duly confirmed.

Now this indenture witnesseth, that the said referee (or sheriff), the party of the first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the order and judgment of the said court, and in conformity to the statute in such case made and provided, and also in consideration of the premises, and of the said sum of money so bidden, as aforesaid, being first duly paid by the said part of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey, unto the said part of the second part, —— heirs and assigns, all the right, title and interest which said parties (here insert the names of parties in interest) had at the time of the commencement of the said action, or have since acquired in and to the premises herein described as follows (insert description). To have and to hold, all and singular the premises above mentioned and described, and hereby conveyed, or intended so to be, unto the said part of the second part, ——— and assigns, to ——— only proper use, benefit and behoof, forever.

In witness whereof, the said party of the first part, referee (or sheriff) as aforesaid, hath hereunto set his hand and seal the day and year first above written.

Sealed and delivered
in the presence of

No. 14.

CORPORATION DEED.

This indenture, made this first day of July, 1880, by and between the city of Albany (or the First National Bank of the city of Hudson), party of the first part, and S. R., of the city of Albany, party of the second part (as in the usual form to the words "in witness" and then add), the said party of the first part has hereunto caused its corporate seal to be affixed, and these presents to be subscribed by I. G., the mayor of said city (or the president of said bank), the day and year first above written.

I. G. [L. S.]
Mayor or President.

No. 15.

DEED OF RELEASE — PART OF MORTGAGED PREMISES.

This indenture, made this —— day of ——, one thousand eight hundred and ——, between —— of the first part and —— of the second part, witnesseth: That whereas, —— by an indenture of mortgage, bearing date the —— day of ——, one thousand eight hundred and ——, for the consideration therein mentioned, and to secure the payment of the money therein specified, did convey certain lands and tenements, of which the lands hereinafter described are part, unto ———. And whereas, the said part of the first part, at the request of the said part of the second part ha agreed to give up and surrender the lands hereinafter described, unto the said part of the second part, —— heirs and assigns, and to hold and retain the residue of the said mortgaged lands as security for the money remaining unpaid on the said mortgage. Now this indenture witnesseth, that the said part of the first part, in pursuance of the said agreement, and in consideration of ——— duly paid at the time of the ensealing and delivery of these presents, being a part of the money secured to be paid by the said mortgage, the receipt whereof is hereby acknowledged, ha granted, released, quit-claimed and set over, and by these presents do grant, release, quit-claim and set over, unto the said part of the second part, and to —— heirs and assigns, all that part of the said mortgaged lands described as follows (insert description). Together with the hereditaments and appurtenances thereto belonging; and all the right, title and interest of the said part of the first part, of, in or to the same, to the intent that the lands hereby conveyed may be discharged from the said mortgage, and that the residue of the lands in the said mortgage specified may remain to the said part of the first part, as heretofore. To have and to hold, the lands and premises hereby released and conveyed, to the said part of the second part, —— heirs and assigns, to —— only proper use, benefit, and behoof forever, free, clear, and discharged of and from all lien and claim, under or by virtue of the indenture of mortgage aforesaid.

In witness whereof, the said part of the first part ha hereunto set —— hand and seal the day and year first above written.

No. 16.

ADMINISTRATOR'S OR EXECUTOR'S DEED — BY ORDER OF SURROGATE.

This indenture, made this ——— day of ———, in the year of our Lord one thousand eight hundred and eighty ———, between ——— as executor of the last will of ——— (or as administrat of the goods,

chattels and credits of ———), late of the ——— of ———, county of ———, N. Y., deceased, of the first part, and ——— of the ——— of ———, in the State of ———, of the second part, Witnesseth: Whereas, ——— of the ——— of ———, county of ———, and State of ———, executor (or administrat of the goods, chattels and credits of said ———, late of the ——— of ———, deceased), having heretofore, and on the ——— day of ———, 188 , presented to the Surrogate's Court of the county of ———, N. Y., a written petition, duly verified, praying for a decree directing the disposition of said decedent's real property ———, or so much thereof as is necessary for the payment of his debts and funeral expenses ———. Whereupon, such proceedings were afterwards had in the premises, pursuant to the provisions of the Code of Civil Procedure, that a decree was made, and entered in the office of the surrogate of the county of ———, N. Y., on the ——— day of ———, 188 , directing a sale of the real property described in said petition ———. And whereas, such proceedings were thereupon had, that afterwards and on the ——— day of ———, 188 , an order was made, and entered in said surrogate's office, directing the execution of the said decree above specified ———. And whereas, in obedience to such decree and order, the said executor (or administrat) did, on the ——— day of ———, 188 , ——— at ——— o'clock, in the noon, at the ———, in the ——— of ———, county of ———, N. Y., sell at public sale, the premises mentioned in said petition and hereinafter described, to the said party of the second part hereto, for the sum of ——— dollars, which was the highest sum bidden for the same, and thereupon ——— made due return of ——— proceedings in the premises, to the said surrogate; and there was, thereupon, made, and entered in said surrogate's office, on the ——— day of ———, 188 , an order in all things confirming such sale and directing a conveyance to said purchaser.

And whereas, said purchaser has in all things complied with the conditions of said sale, to be performed on his part: Now, therefore, this indenture witnesseth, that the said part of the first part, in pursuance of the said sale, and of the said decree and orders, and to carry the same into full effect, in pursuance of the statutes of this State in such case made and provided, and also for and in consideration of the said sum of ——— dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has bargained, sold and conveyed, and by these presents does bargain, grant, sell and convey unto the said party of the second part, his heirs and assigns forever, all and singular the premises mentioned in said petition and described as follows: All (insert description). Together with the privileges, heredita-

ments and appurtenances thereto belonging, or in any way appertaining, and all the reversions, remainders, rents, issues and profits thereof, and all the estate, right, title and interest which the said ———, deceased, at the time of his death, had of, in and to the said premises, *free from any claims for dower or right of dower of —— widow of the said ———, deceased;* subject however to all subsisting charges thereon by judgment, mortgage or otherwise, upon the land so sold, which existed at the time of the death of the said ———, deceased,—— to have and to hold the above described and conveyed premises, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part ha hereunto set —— hand and seal the day and year first above written.

Sealed and delivered
in presence of

No. 17.

GUARDIAN'S DEED.

This indenture, made this —— day of ——, in the year of our Lord one thousand eight hundred and eighty-one, between ———, of the —— of ——, county of ——, and State of New York, *infant* under the age of twenty-one years, by —— his special guardian, of the first part, and ———, of the —— of ——, county of ——, and State of ——, of the second part, witnesseth as follows:

Whereas, a petition was heretofore presented to the —— court on behalf of the above named *infant* , praying for a sale of the right, title and interest of the said *infant* in the premises in said petition mentioned and hereinafter described: upon which petition an order of the —— court was made, hearing date the —— day of ——. 1881, appointing ———, above named, the special guardian of such *infant* with respect to these proceedings, and that it be referred to a referee to inquire into the merits of the application and examine into the truth of the allegations of said petition, etc.; and thereupon, after the said special guardian had given the security by law required, such proceedings were had, that by an order of the ——, bearing date the —— day of ——, in the year 188 , it was, among other things, in substance ordered that said referee's report be confirmed, and the said real property be sold; that the above named special guardian of such *infant* be authorized to contract for the sale and conveyance of all the right, title and interest of the said *infant* in such real estate, subject to the approval of the court, for a sum not less than that specified in the referee's report, mentioned in said order; and that the terms and conditions of said agreement be re-

ported to the court, under oath, before the conveyance of such premises should be executed.

And whereas, the said special guardian, pursuant to such order, contracted for the sale of the said premises with ——— for the sum of —— dollars, that being the highest sum offered for the same; and thereupon the said guardian made his report of such agreement to the court, pursuant to the requisitions of the last mentioned order, upon which another order was made, bearing date the —— day of ——, 188 , confirming such report, and among other things approving and confirming such agreement of sale, and directing the same to be carried into effect, upon the purchaser's complying with the terms of said agreement.

And whereas, said purchaser has complied with said terms.

Now, therefore, this indenture witnesseth, that the said parties of the first part, pursuant to said last mentioned order, for and in consideration of ——— dollars ($), to them duly paid, the receipt whereof is hereby acknowledged, have bargained, sold, granted, released and conveyed; and by these presents do bargain, sell, grant, release and convey unto the said party of the second part, and to —— heirs and assigns forever, all the right, title, interest, claim or estate of the said *infant* , parties of the first part, of, in and to all that tract or parcel of land situate in the —— of ——, county of ——, and State of New York, described as follows: (insert description). With the appurtenances thereto belonging, to have and to hold the same, unto the said party of the second part, his heirs and assigns, forever.

In witness whereof, the said party of the first part ha , by his guardian aforesaid, hereunto set his hand and seal the day and year first above written.

Sealed and delivered
in presence of

No. 18.

SHERIFF'S CERTIFICATE OF SALE.

I, A. B., sheriff of the county of ——, do hereby certify, that by virtue of an execution issued out of the —— court of the State of New York, tested on the —— day of ——, 1881, I was commanded to make of the personal property of E. F., the sum of $500, which said sum C. D. had lately recovered against the said E. F. for his damages and costs in an action in which the said C. D. was plaintiff and E. F. was defendant, which said judgment was entered and docketed in said county on the —— day of

———,1881, and for want of sufficient personal property of the said E. F. to make the damages aforesaid, that then I should cause the same to be made of the real property whereof the said E. F. was seized on the ——— day of ———. 1881. And for want of sufficient personal property whereof to make the damages aforesaid, I did seize and take the lands hereinafter described, to wit: (insert description) and having advertised the same according to law, did expose the same at public sale on the ——— day of ———, 1881, and the same was struck off to G. H. for the sum of ——— dollars, he being the highest bidder therefor, and that being the highest sum bid for the same, which said sum has been fully paid.

And the said A. B., sheriff as aforesaid, do hereby certify that the said G. H. will be entitled to a deed of said land from me as sheriff aforesaid, at the expiration of fifteen months from the date hereof, unless the same shall be before that time redeemed agreeably to the provisions of the statute in such case made and provided.

Given under my hand this ——— day of ———, 188 .

A. B.,

Sheriff of the county of ———.

No. 19.

ASSIGNMENT OF SHERIFF'S CERTIFICATE OF SALE.

I, M. N., of the city of Albany, in consideration of $500 to me in hand paid by L. R., do hereby sell, assign, transfer and set over to the said L. R. the within certificate, with all the right, title and interest which I have or can have therein, or to the land therein described by virtue hereof.

Dec. 19, 1881.

M. N. [L. S.]

No. 20.

MORTGAGE WITH POWER OF SALE.

This indenture, made this ——— day of ———, in the year of our Lord one thousand eight hundred and ———, between ————————, party of the first part, and ————, party of the second part: Witnesseth, that the said part of the first part, in consideration of the sum of ——— dollars, has sold, and by these presents does grant and convey to the said party of the second part, his heirs and assigns, all (insert description). This grant is intended as a security for the payment of the sum of one thousand dollars in five years from the date hereof, with interest thereon at six per cent. per annum, payable semi-annually according to the conditions of a

bond this day executed and delivered by the said A. B. to the said party of the second part; and this conveyance shall be void if such payment be made as herein specified. And in case default shall be made in the payment of the principal sum hereby intended to be secured, or in the payment of the interest thereof, or any part of such principal or interest, as above provided, it shall be lawful for the party of the second part, his executors, administrators or assigns, at any time thereafter, to sell the premises hereby granted, or any part thereof, in the manner prescribed by law, and out of the moneys arising from such sale, to retain the amount then due for principal and interest, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

Sealed and delivered in
the presence of

No. 21.

MORTGAGE WITHOUT NOTE OR BOND.

This indenture, made this —— day of ——, in the year of our Lord one thousand eight hundred and eighty-one, between ———— party of the first part, and ———— party of the second part: Witnesseth, that the said party of the first part, in consideration of the sum of two thousand dollars, to him duly paid, has sold, and by these presents does grant and convey to the said party of the second part, his heirs and assigns (insert description). This grant is intended as a security for the payment of the sum of two thousand dollars and interest as follows: Interest at six per cent. per annum, payable semi-annually from the date hereof, one thousand dollars of principal to be paid in one year from the date hereof, and the balance of said principal in five years from the date hereof, which said sum, principal and interest, the said party of the first part hereby covenants and agrees to pay to the party of the second part, in the manner and at the time or times aforesaid; and this conveyance shall be void if such payment be made as herein specified. And in case default shall be made in the payment of the principal sum hereby intended to be secured, or in the payment of the interest thereof, or any part of such principal or interest, as above provided, it shall be lawful for the party of the second part, his executors, administrators or assigns, at any time thereafter, to sell the premises hereby granted, or any part thereof, in the manner prescribed by law, and out of the moneys arising from such sale to retain

the amount then due for principal and interest, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs and assigns.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

Sealed and delivered
in the presence of

No. 22.

MORTGAGE — INSURANCE CLAUSE.

This indenture, made this —— day of ——, in the year of our Lord one thousand eight hundred and eighty-one, between ———, party of the first part, and ———, party of the second part: Witnesseth, that the said party of the first part, in consideration of the sum of three thousand dollars, by these presents does grant and convey to the said party of the second part, his heirs and assigns, all (insert description). This grant is intended as a security for the payment of the sum of three thousand dollars and interest as follows: interest at six per cent. per annum, payable semi-annually and the principal in five years from the date hereof, according to the condition of a bond this day executed and delivered by the said party of the first part,———. to the said party of the second part: and this conveyance shall be void if such payment be made as herein specified. And in case default shall be made in the payment of the principal sum hereby intended to be secured, or in the payment of the interest thereof, or any part of such principal or interest, as above provided, it shall be lawful for the party of the second part, his executors, administrators or assigns, at any time thereafter, to sell the premises hereby granted, or any part thereof, in the manner prescribed by law, and out of all the moneys arising from such sale to retain the amount then due for principal and interest, together with the costs and charges of making such sale; and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns:

And it is also agreed, by and between the parties to these presents, that the said party of the first part shall and will keep the buildings erected, and to be erected upon the lands above conveyed, insured against loss and damage by fire, by insurers, and in an amount approved by the said party of the second part, not exceeding $3,000, and assign the policy and certificate of renewal thereof to the said party of the second part; and in default thereof, it shall be lawful for the said party of the second part to

effect such insurance as mortgagee or otherwise, and the premium or premiums paid for effecting and continuing the same shall be a lien on the said mortgaged premises, added to the amount secured by these presents, and payable on demand, with interest at the rate of six per cent. per annum.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

Sealed and delivered
in the presence of

No. 23.

MORTGAGE — INTEREST, INSURANCE AND TAX CLAUSES.

This indenture, made this —— day of ——, in the year of our Lord one thousand eight hundred and eighty-one, between A. B., of the city of Albany, and E. F., his wife, parties of the first part, and ———, party of the second part: Witnesseth, that the said parties of the first part, in consideration of the sum of five thousand dollars to him duly paid, the receipt whereof is hereby acknowledged, has sold, and by these presents do grant and convey to the said party of the second part, his heirs and assigns, all (insert description). This grant is intended as a security for the payment of the sum of five thousand dollars in five years from the date hereof, with interest thereon at six per cent. per annum, payable semi-annually, with liberty to said party of the second part to pay any portion of said principal not less than one thousand dollars, on giving three months' written notice of such intended payment to the party of the first part, according to the conditions of a bond this day executed and delivered by the said A. B. to the said party of the second part. And in case default shall be made in the payment of the principal sum hereby intended to be secured, or in the payment of the interest thereof, or any part of such principal or interest, as above provided, or of the taxes hereinafter mentioned, it shall be lawful for the party of the second part, his executors, administrators or assigns, at any time thereafter, to sell the premises hereby granted, or any part thereof, in the manner prescribed by law, and out of the moneys arising from such sale, to retain the amount then due for principal, interest and taxes, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said parties of the first part, their heirs and assigns.

And it is hereby expressly agreed, that in case any instalment of principal, or any part thereof, or any interest moneys, or any part thereof, hereby secured to be paid, or any money paid for taxes, as hereinafter specified, shall remain due and unpaid by said parties of the first part, for

the space of sixty days after the same shall, by the terms thereof, become due and payable, that then and in that case, the whole principal sum hereby secured to be paid, together with all arrearage of interest thereon, shall, at the option of said party of the second part, his executors, administrators or assigns, become due and payable forthwith, anything hereinbefore contained to the contrary notwithstanding.

And it is also agreed by and between the parties to these presents, that the said parties of the first part shall and will keep the buildings erected and to be erected upon the lands above conveyed, insured in some solvent incorporated fire insurance company, against loss or damage by fire, in an amount not less than four thousand dollars, the insurers to be chosen or approved by the party of the second part, his heirs or assigns, and assign the policy and certificate of renewal thereof to the said party of the second part. And in default thereof it shall be lawful for the said party of the second part to effect such insurance, as mortgagee or otherwise, and the premium or premiums paid for effecting and continuing the same shall be a lien on the said mortgaged premises, added to the amount secured by these presents, and payable on demand, with interest, and shall be collectible in the same manner, at the same time, and upon the same conditions as the interest hereinbefore mentioned.

And it is hereby expressly agreed, by and between the parties to these presents, that the said parties of the first part, their heirs or assigns, will pay and discharge all taxes and assessments that now are or shall hereafter be levied or assessed upon the said above described premises, or any part thereof, when the same become due and payable, and in default thereof, for sixty days after the same shall be so levied or assessed, and become payable, the said party of the second part, his heirs or assigns, may pay such taxes and assessments, and expenses of the same; and the amount so paid and interest thereon, from the time of such payment, shall forthwith be due and payable from the said parties of the first part, their heirs or assigns, to the said second party hereto, his heirs, representatives, or assigns, by virtue hereof, and the same shall be deemed a part of and secured by these presents, and shall be collectible in the same manner, at the same time, and on the same conditions as the interest on the principal sum hereinbefore specified.

And this conveyance shall be void if full payment of the aforesaid moneys, both principal and interest, be made as hereinbefore specified, and if the aforesaid covenants and each of them be well and truly kept and performed as hereinbefore provided and specified.

In witness whereof, the parties of the first part have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in
the presence of

No. 24.

MORTGAGE — TAX, INTEREST AND INSURANCE CLAUSES.

This indenture, made the ——— day of ———, in the year one thousand eight hundred and eighty-one, between A. B., of the town of Knox, county of Albany, and C. D., his wife, parties of the first part, and G. H., of the city of Albany, ——— party of the second part. Whereas, the said A. B. is justly indebted to the said party of the second part, in the sum of six thousand dollars, lawful money of the United States of America, secured to be paid by his certain bond or obligation, bearing even date with these presents, in the penal sum of twelve thousand dollars, lawful money as aforesaid, conditioned for the payment of the said first mentioned sum of six thousand dollars in four years from the date hereof, with interest thereon at six per cent. per annum, payable semi-annually, which said bond also contains, among other provisions, the same covenants by the obligor, herein named, as to payment of principal and interest, taxes, assessments, water rents, insurances, and other charges laid or assessed on the hereinafter described premises, as is hereinafter provided, and also that in case of default in the payment of each or either of them, then the whole principal sum thereby secured to be paid, and all interest thereon, and all moneys paid for taxes, assessments, water rents, insurance, and other charges, shall become due and payable in sixty days after such default.

Now this indenture witnesseth, that the said parties of the said first part, for the better securing the payment of the said sum of money mentioned in the condition of the said bond or obligation, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar, to them in hand paid by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bar gained, sold, aliened, released, conveyed and confirmed, and by these presents, do grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, and to his ——— and assigns forever, all (insert description). Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and the reversions, remainder and remainders, rents, issues and profits thereof, and also, all the estate, right, title, interest, property, possession, claim and demand whatsover, as well in law as in equity, of the said part of the first part, of, in and to the same, and every part and parcel thereof, with the appurtenances: to have and to hold the above granted, bargained and described premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to his and their own proper use, benefit and behoof forever. Provided always, and these presents are upon this express condition, that if the said parties of the

first part, their heirs or assigns, shall well and truly pay unto the said party of the second part, his heirs or assigns, the said sum of money mentioned in the condition of the said bond or obligation, and the interest thereon, at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, together with all sums paid for taxes, water rents, or assessments, on said premises, together with interest thereon; that then these presents, and the estate hereby granted shall cease, determine and be null and void. And the said A. B. does covenant and agree to pay unto the said party of the second part, his heirs or assigns, the said sum of money and interest, as above mentioned and expressed in the condition of the said bond.

And the said A. B. further covenants for himself and his heirs and assigns, that he will, during all the time, until the said money secured by these presents shall be fully paid or satisfied, keep the buildings erected or to be erected on the said lot of land, insured in and by some solvent incorporated and to be approved of insurance company of good standing, against loss or damage by fire, in the sum of at least five thousand dollars, and will assign and deliver the policy or policies of such insurance and the receipts or certificates of renewal thereof, to the said party of the second part, his heirs or assigns, so and in such manner and form that they shall at all time and times, until the full payment of the said moneys, have and hold the said policy or policies, as a collateral and further security for the payment of all moneys due or to become due under this mortgage or the said bond. And in default of so doing, that the said party of the second part, his heirs or assigns, may make such insurance, from year to year, in a sum not exceeding $5,000 for the purposes aforesaid, and pay the premium or premiums therefor; which premium or premiums thus paid and the interest thereon from the time of payment, the said A. B. covenants as aforesaid to pay to the said party of the second part, his heirs or assigns, on demand, and that the same shall be deemed to be secured by these presents, and shall be collectible thereon and thereby in like manner as the said moneys mentioned in the said bond or obligation.

And the said A. B. further covenants for himself, his heirs and assigns, that he will during all the time, until all the said moneys secured by these presents shall be fully paid and satisfied, pay and discharge, immediately after they shall be or become due or payable, all taxes, water rents, or assessments, which may be levied, laid or assessed upon the above described premises, or any part thereof; and in case the said parties of the first part, their heirs or assigns, shall fail or neglect to pay all such taxes, assessments, water rents, or either of them, on said premises, or any part thereof within sixty days after the same shall be or become due or payable,

then the said party of the second part, his heirs or assigns, may pay the same, and the sum so paid, with interest thereon from the time of such payment, the said A. B., for himself, his heirs and assigns, covenants to pay to the said party of the second part, his heirs or assigns, on demand, and that the same shall be and be deemed to be secured by these presents, and shall be collectible thereon and thereby in like manner as the said moneys mentioned in the said bond or obligation.

And the said parties of the first part further covenant and agree, that in case any instalment of principal, or any part thereof, or any interest moneys, or any part thereof, or any premium or premiums of insurance, or any taxes, water rents, or assessments, on said premises hereby secured to be paid, or any or either one of them shall remain due or unpaid by the said parties of the first part, their heirs or assigns, for the space of sixty days after the same shall be due or payable; that then and in that case the whole principal sum hereby secured to be paid, together with all interest thereon, and all sums paid by said party of the second part for premium or premiums of insurance, taxes, water rents, or assessments, on said premises, together with interest thereon, shall (at the option of the said party of the second part, his heirs or assigns) be and become due and payable forthwith, anything herein contained to the contrary notwithstanding. And if default shall be made in the payment of the said sums of money above mentioned, or the interest that may grow due thereon, or any part of either, or in payment of the premiums of insurance and in keeping the policies and receipts, or certificate of such insurance assigned and delivered over, or in payment of taxes, water rents, or assessments on said premises, or either of them; that then and from thenceforth it shall be lawful for the said party of the second part, his heirs or assigns (at their option), to enter into and upon, all and singular, the premises hereby granted, or intended to be, and to sell and dispose of the same, and all benefit and equity of redemption of the said parties of the first part, their heirs or assigns therein, by public auction, according to the act in such case made and provided. And as the attorney of the said part of the first part, for that purpose by these presents, duly authorized, constituted and appointed, to make and deliver to the purchaser or purchasers thereof, a good and sufficient deed or deeds of conveyance in the law for the same, in fee simple, and out of the money arising from such sale, to retain the principal and interest which shall then be due on the said bond or obligation, together with all premiums of insurance, taxes, assessments, or water rents, on said premises, which have been paid by the said party of the second part, his heirs or assigns, together with interest thereon, and the costs and charges of advertisement and sale of the said premises, rendering the overplus of the purchase

money (if any there shall be), unto the said parties of the first part, their heirs or assigns; which sale, so to be made, shall forever be a perpetual bar, both in law and equity, against the said parties of the first part, their heirs and assigns, and against all other persons claiming or to claim the premises, or any part thereof, by, from or under them or any of them.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

In presence of

No. 25.

BOND.

Know all men by these presents, that I, A. B., of the city of New York, am held and firmly bound unto C. D., of the same place, in the sum of six thousand dollars, to be paid to the said C. D., or to his certain attorney, executors, administrators or assigns.

For which payment, well and truly to be made, I bind myself, my heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed this ——— day of ———, in the year of our Lord one thousand eight hundred and eighty-one.

The condition of this obligation is such, that if the above bounden A. B., his heirs, executors and administrators, shall and do well and truly pay, or cause to be paid unto the above named C. D., or to his certain attorney, executors, administrators or assigns, the sum of three thousand dollars in three years from the date hereof, with interest at six per cent. per annum, payable semi-annually, without fraud or delay, then the preceding obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered in
the presence of

No. 26.

BOND — WITH INSURANCE CLAUSE.

Know all men by these presents, that I, J. H., of Troy, New York, am held and firmly bound unto M. N., of the same place, in the sum of six thousand dollars, to be paid to the said M. N., or to his certain attorney, executors, administrators or assigns, for which payment, well and truly to be made, I bind myself and my heirs, executors or administrators, jointly and severally, firmly by these presents.

Sealed this ——— day of ———, in the year of our Lord one thousand eight hundred and eighty-one.

The condition of this obligation is such, that if the above bounden J. H.,

his heirs, executors, or administrators, shall and do well and truly pay or cause to be paid unto the above named M. N., or to his certain attorney, executors, administrators, or assigns, the sum of three thousand dollars and interest, as follows: interest, on all sums unpaid at six per cent. per annum, payable semi-annually, and will pay one thousand dollars of said principal in one year from the date hereof, one thousand dollars in two years from the date, and the balance in three years from the date hereof, without fraud or delay, then the preceding obligation to be void, otherwise to remain in full force and virtue.

And it is also agreed, by the said obligor, that he will keep the buildings, erected and to be erected upon the lands described in the mortgage accompanying this bond, insured against loss and damage by fire, by solvent insurers, and in an amount of at least $3,000, and assign the policy and certificate thereof to the said obligee, and in default thereof, it shall be lawful for the said obligee to effect such insurance, and the premium and premiums paid for effecting the same, shall be a lien on the said mortgaged premises, added to the amount secured by these presents and payable on demand, with interest at the rate of six per cent. per annum.

Sealed and delivered in
the presence of

No. 27.

BOND — WITH INTEREST AND INSURANCE CLAUSES.

Know all men by these presents, that I, A. B., of the town of Watervliet, county of Albany, am held and firmly bound unto C. D., of the city of Troy, in the sum of eight thousand dollars, to be paid to the said C. D., or to his certain attorney, executors, administrators or assigns. For which payment well and truly to be made, I bind myself and my heirs, executors or administrators, jointly and severally, firmly by these presents.

Sealed this ——— day of ———, in the year of our Lord one thousand eight hundred and eighty-one.

The condition of this obligation is such, that if the above bounden A. B., his heirs, executors or administrators, shall and do well and truly pay or cause to be paid unto the above named C. D., or to his certain attorney, executors, administrators or assigns, the sum of four thousand dollars, and interest as follows: interest at six per cent. per annum, payable semi-annually, and the principal, two thousand dollars, is to be paid in two years from the date hereof, and the balance of said principal in four years from the date hereof, without fraud or delay, then the preceding obligation to be void, otherwise to remain in full force and virtue.

And it is hereby expressly agreed, that should any default be made in the payment of the said principal or interest, or of any part thereof, on any day whereon the same is made payable, as above expressed; and should the same remain unpaid and in arrear for the space of thirty days, then and from thenceforth, that is to say, after the lapse of the said thirty days, the aforesaid principal sum, with all the arrearage of interest thereon, shall, at the option of the said obligee, his executors, administrators or assigns, become and be due and payable immediately thereafter, although the period above limited for the payment thereof may not then have expired, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

And it is also agreed by the said obligor, that he will keep the buildings, erected and to be erected upon the lands described in the mortgage accompanying this bond, insured against loss and damage by fire, by insurers, and in an amount of at least $4,000, and assign the policy and certificates thereof to the said obligee; and in default thereof it shall be lawful for the said obligee to effect such insurance, and the premium and premiums paid for effecting the same, shall be a lien on the said mortgaged premises, added to the amount secured by these presents, and payable on demand with interest at the rate of six per cent. per annum.

Sealed and delivered in
the presence of

No. 28.

BOND — WITH INTEREST, INSURANCE AND TAX CLAUSES.

Know all men by these presents, that I, A. B., of the city of Albany, am held and firmly bound unto C. D., of the same place, in the sum of ten thousand dollars, to be paid to the said C. D., or to his certain attorney, executors, administrators or assigns.

For which payment well and truly to be made, I bind myself and my heirs, executors or administrators, jointly and severally, firmly by these presents.

Sealed with my seal. Dated the ——— day of ———, in the year of our Lord one thousand eight hundred and eight-one.

The condition of this obligation is such, that if the above bounden A. B., his heirs, executors and administrators, or any of them, shall and do well and truly pay or cause to be paid unto the above mentioned C. D., or to his certain attorney, executors, administrators or assigns, the just and full sum of five thousand dollars, and interest as follows: interest at six per cent. per annum, payable semi-annually; principal in five years from the date hereof without any fraud or other delay, then this obligation to be void, otherwise to remain in full force and virtue.

And it is hereby expressly agreed, that in case any instalment of principal, or any part thereof, or any interest moneys, or any part thereof, hereby secured to be paid, or any money paid for taxes, as hereinafter specified, shall remain due and unpaid by said party of the first part, for the space of sixty days after the same shall, by the terms thereof, become due and payable, that then and in that case the whole principal sum hereby secured to be paid, together with all arrearage of interest thereon, shall, at the option of said party of the second part, his heirs, executors, administrators or assigns, become due and payable forthwith, anything hereinbefore contained to the contrary notwithstanding.

And it is also agreed by and between the parties to these presents, that the said party of the first part shall and will keep the buildings erected, and to be erected, upon the lands described in the mortgage herewith executed, insured in some solvent incorporated fire insurance company, against loss or damage by fire, in an amount not less than four thousand dollars, the insurers to be chosen or approved by the party of the second part, his heirs or assigns, and assign the policy and certificate of renewal thereof to the said party of the second part. And in default thereof it shall be lawful for the said party of the second part to effect such insurance, as mortgagee or otherwise, and the premium or premiums, paid for effecting and continuing the same, shall be a lien on the said mortgaged premises, added to the amount secured by these presents, and payable on demand, with interest, and shall be collectible in the same manner, at the same time, and upon the same conditions as the interest hereinbefore mentioned.

And it is hereby expressly agreed, by and between the parties to these presents, that the said party of the first part, his heirs or assigns, will pay and discharge all taxes and assessments that now are or shall hereafter be levied or assessed upon the premises described in the mortgage herewith executed, or any part thereof, when the same become due and payable, and in default thereof, for sixty days after the same shall be so levied or assessed, and become payable, the said party of the second part, his heirs or assigns, may pay such taxes and assessments, and expenses of the same, and the amount so paid and interest thereon, from the time of such payment, shall forthwith be due and payable from the said party of the first part, his heirs or assigns to the said second party hereto, his heirs, representatives, or assigns, by virtue hereof, and the same shall be deemed a part of and secured by these presents, and shall be collectible in the same manner, at the same time, and on the same conditions as the interest on the principal sum hereinbefore specified.

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

Sealed and delivered
in the presence of

No. 29.

BOND — TAX, INTEREST AND INSURANCE CLAUSES.

Know all men by these presents, that I, A. B., of the city of New York, party of the first part, am held and firmly bound unto C. D., of the same place, party of the second part, in the sum of ten thousand dollars, lawful money of the United States of America, to be paid to the said C. D., his heirs, executors, administrators or assigns: For which payment well and truly to be made, I bind myself, my heirs, executors and administrators, —— jointly and severally, firmly by these presents.

Sealed with my seal. Dated the —— day of ———, one thousand eight hundred and eighty-one.

The condition of the above obligation is such, that if the above bounden A. B. shall well and truly pay, or cause to be paid unto the above named C. D., his heirs, executors, administrators or assigns, the just and full sum of five thousand dollars and interest thereon as follows: interest on all sums unpaid at the rate of six per cent. per annum payable semi-annually, and two thousand dollars in one year from the date hereof, and the balance in five years from the date hereof, and shall keep the buildings erected, or to be erected on the premises, described in a certain mortgage executed by the said A. B. and M. B., his wife, and bearing even date herewith, and being collateral hereto, insured in some solvent incorporated and to be approved of fire insurance company of the State of New York, against loss or damage by fire to an amount not less than four thousand dollars; and shall assign and deliver the policy to be taken for such insurance and all renewal receipts or certificates of such insurance to the obligee herein, or his heirs or assigns, as collateral security hereto, and shall pay and discharge immediately after they shall become due or payable, all taxes, water rents, assessments and insurances which may be levied, laid, or assessed upon the premises described in said above mentioned mortgage, without any fraud or other delay, then this obligation to be void, or else to remain in full force and virtue.

And it is hereby further provided, that in case the insurance above mentioned shall not be effected or continued in the manner above provided, and the policy of such insurance and all renewal receipts or certificates of such insurance be assigned and delivered as aforesaid, that then the said obligee, his heirs or assigns, may effect or continue such insurance in the name of the said obligor or otherwise, and the premiums paid therefor shall be charged as part of the principal sum hereby secured to be paid, and shall (at the option of said obligee, his heirs or assigns) be and become immediately due and payable. And it is hereby further provided, that in case any taxes, water rents or assessments, ——— on the premises in said

mortgage described, or on any part of said premises, shall not be paid as above provided, within sixty days after they or either of them shall become due or payable, that then the said obligee, his heirs, executors, administrators or assigns may pay the same, and the sum so paid by either, with interest thereon from the time of said payment, the said obligor for himself, his heirs, executors, administrators or assigns, covenants to pay immediately.

And it is hereby further provided, that in case any instalment of principal or any part thereof, or any interest moneys, or any part thereof, hereby secured to be paid, or in case any premium or premiums of insurance or any taxes, water rents, or assessments, on the premises described in the said mortgage, or on any part of said premises, shall remain due and unpaid by the said obligor, his heirs or assigns, for the space of sixty days after the same shall become due and payable, or in case any default shall be made in keeping the policies of insurance and all renewal receipts and certificates thereof assigned and delivered to said obligee, his heirs or assigns, that then and in that case the whole principal sum hereby secured to be paid, together with the interest thereon, together with all sums which may have been paid by said obligee, his heirs, executors, administrators or assigns, for insurance, taxes, water rents, or assessments, on said premises, with interest thereon from the time of such payment, shall (at the option of said obligee, his heirs, executors, administrators or assigns) be and become due and payable forthwith, anything herein to the contrary notwithstanding.

Sealed and delivered
in the presence of

No. 30.

ASSIGNMENT OF MORTGAGE.

This instrument, made this ——— day of ———, 18 , between —— of the first part, and ——— of the second part: Witnesseth, that the party of the first part, for a good and valuable consideration to him in hand paid by the said party of the second part, has sold, assigned, transferred and conveyed, and does hereby sell, assign, transfer and convey, to the party of the second part, a certain mortgage, bearing date the ——— day of ——, 18 , made by ——— to ——— to secure the payment of the sum of —— dollars —— and interest thereon from the date thereof ——— recorded in the clerk's office of ——— county, in book ——— of mortgages, at page ———, on the ——— day of ———, 18 , at —— o'clock ——— M., together with the bond accompanying said mortgage, and therein referred to, and all sums of money due and to grow due thereon. And the part

of the first part hereby covenant that there is unpaid on said bond and mortgage the sum of

In witness whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

No. 31.

ASSIGNMENT OF MORTGAGE — SHORT FORM INDORSED ON MORTGAGE.

In consideration of one dollar to me paid by C. D., I hereby sell, assign and convey to the said C. D. the within mortgage and the bond accompanying the same, and all the money due and to grow due thereon, and all the right and interest thereby secured.

Albany, December 22, 1881.

No. 32.

ASSIGNMENT OF MORTGAGE — ANOTHER FORM WITH GUARANTY OF PAYMENT.

Know all men by these presents, that ———, of the first part, in consideration of the sum of —— dollars, to me in hand paid by ———, of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, ha granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over unto the said party of the second part, a certain indenture of mortgage, bearing date the —— day of ——, in the year one thousand eight hundred and ——, made by ———, and which said mortgage was recorded in the clerk's office of the county of ——, on the —— day of ——, in the year 18 , in book No.—— of mortgages, at page ——, etc., together with the bond or obligation therein described, and the money due or to grow due thereon, with the interest: to have and to hold the same unto the said party of the second part, his executors, administrators or assigns, —— subject only to the provisos in the said indenture of mortgage contained: and I do hereby make, constitute and appoint the said party of the second part, my true and lawful attorney, irrevocable, in my name or otherwise, but at his own proper costs and charges, to have, use and take all lawful ways and means for the recovery of the said money and interest, and, in case of payment, to discharge the same as fully as I might or could do if these presents were not made, * and in consideration of the payment aforesaid, I hereby guarantee the payment of the said bond and mortgage, according to the terms aud conditions thereof, and at the times specified in the said bond and mortgage.

In witness whereof, I have hereunto set my hand and seal this —— day of ——, in the year one thousand eight hundred and eighty-one.

Sealed and delivered
in presence of

No. 33.

ASSIGNMENT OF MORTGAGE WITH A GUARANTY OF COLLECTION.

(As in the last form to the * then insert):

And in consideration of the payment of the sum of money before mentioned, I hereby guarantee the collection of the said bond and mortgage, and all the sums of money due and to grow due thereon.

No. 34.

SATISFACTION OF MORTGAGE.

I do hereby certify, that a certain indenture of mortgage, bearing date the —— day of ——, one thousand eight hundred and ——, made and executed by ———, and recorded in the office of the clerk of the —— county of ——, in book No. —— of mortgages, page ——, on the —— day of ——, in the year one thousand eight hundred and ——, at —— o'clock —— minutes —— M., is with the bond accompanying it fully paid and satisfied.

And I do hereby consent that the same be discharged of record.

Dated the —— day of ——, 18 .

In presence of ,

No. 35.

CERTIFICATE OF ACKNOWLEDGMENT BY A SINGLE PERSON.

State of New York, County of Albany, ss.: On this —— day of ——, in the year one thousand eight hundred and ——, before me, the subscriber, personally came ———, to me known to be the person described in and who executed the within instrument, and —— acknowledged that he executed the same.

No. 36.

CERTIFICATE OF ACKNOWLEDGMENT OF HUSBAND AND WIFE.

State of New York, ——— *County, ss.:* On this —— day of ——, in the year one thousand eight hundred and eighty-one, before me appeared A.

B., of the city of Albany, merchant, and C. B., his wife, to me personally known to be the same persons described in, and who severally executed the foregoing instrument, and severally acknowledged that they severally executed the same.

No. 37.

CERTIFICATE OF ACKNOWLEDGMENT OF HUSBAND AND WIFE PREVIOUS TO LAW OF 1879.

State of New York, ——— *County of* ———, *ss.:* On this —— day of ——, in the year one thousand eight hundred ———. before me, the subscriber, personally came A. B., merchant, of the town of Knox, county of Albany, and C. B., his wife, to me known to be the same persons described in and who executed the within instrument, and severally acknowledged that they executed the same; and the said C. B., on a private examination by me, apart from her said husband, acknowledged that she executed the same freely, and without any fear or compulsion of her said husband.

No. 38.

CERTITICATE OF ACKNOWLEDGMENT MADE BY A GUARDIAN.

State of New York, —— *County of* ——, *ss.:* On this —— day of ——, in the year one thousand eight hundred and eighty ———, before me, the subscriber, personally appeared ——— of ———, N. Y., to me personally known to be the same person described in and who executed the foregoing instrument, as guardian of and for the infant therein named, and to me known to be such guardian, and acknowledged that he executed the same as such guardian, and for said infant as aforesaid.

No. 39.

CERTIFICATE OF PROOF BY A SUBSCRIBING WITNESS.

Rensselaer County, ss.: On this ——— day of ———, 1881, before me came E. C., to me known, the subscribing witness within named, who being by me sworn, did say that he resides in the town of East Greenbush, county aforesaid, that he knows A. B., the grantor within named, knows him to be the person described in and who executed the within instrument, that he was present and saw the said A. B. execute the same, and that he thereupon subscribed his name as witness thereto.

No. 40.

CERTIFICATE OF ACKNOWLEDGMENT BY ONE EXECUTING UNDER A POWER OF ATTORNEY.

State of New York, ——— *County of* ———, *ss.:* On this —— day of ——, in the year one thousand eight hundred and ——, before me, the subscriber, personally came A. B., acting under a power of attorney from L. M., duly recorded in Albany county clerk's office, Nov. 10, 1881, to me known to be the person described in and who executed the within instrument, and acknowledged that he executed the same as the act and deed of the said L. M. by virtue of the said power of attorney.

No. 41.

PROOF OF EXECUTION BY A CORPORATION.

Albany County, ss.: On this ——— day of ———, 1881, before me came A. M., to me known, who being by me sworn, did say that he resides in the city of Albany, and is president of the ——— bank in said city, that the seal affixed to the foregoing instrument is the corporate seal of said bank, and was hereto affixed by the order of the board of directors of said bank, and that he signed the same as president of said bank by a like order of said board of directors.

No. 42.

CERTIFICATE OF ACKNOWLEDGMENT BY EXECUTOR OR TRUSTEE.

County of Clinton, ss.: On this —— day of ——, 1881, before me came A. B., herein named, to me known to be the person described in and who executed the within instrument and acknowledged the execution thereof, and he acknowledged that he executed the same as the executor (or trustee) under the last will and testament of P. O., deceased.

No. 43.

LEASE SIGNED BY LANDLORD AND TENANT.

This instrument, made and executed this ——— day of ———, one thousand eight hundred and eighty-one, between ——— of the ——— party of the first part, and ——— of the ——— party of the second part: Witnesseth, that the party of the first part has hereby let and rented to the party of the second part, and the party of the second part has hereby hired and taken from the party of the first part, ——— for the term of ——— years, ——— to commence the ——— day of ———, one thousand

eight hundred and ——, at the yearly rent of —— dollars, payable ——. And the party of the second part hereby covenants to and with the party of the first part to make punctual payment of the rent in the manner aforesaid, and quit and surrender the premises at the expiration of said term in as good state and condition as they are now in, reasonable use and wear thereof and damages by the elements excepted, and further covenants that he , the party of the second part, will not use or occupy said premises for any business or purpose deemed extra hazardous on account of fire.

And further covenants that he, the party of the second part, will not assign this lease or underlet the said premises or any part thereof to any person or persons whomsoever, without first obtaining the written consent of said party of the first part, and in case of not complying with this covenant, the party of the second part agrees to forfeit and pay to the party of the first part the sum of —— dollars as and for liquidated damages, which are hereby liquidated and fixed as damages and not as a penalty.

This lease is made and accepted on this express condition, that in case the party of the second part should assign this lease or underlet the said premises or any part thereof without the written consent of the party of the first part, that then the party of the first part, his heirs or assigns, in his option, shall have the power and the right of terminating and ending this lease immediately, and be entitled to the immediate possession of said premises, and to take summary proceedings against the party of the second part, or any person or persons in possession as tenant, having had due and legal notice to quit and surrender the premises, holding over their term.

It is further agreed between the parties that in case said premises should be destroyed by fire before or during said term, that then this lease is to cease and determine, the rent, ——, to be paid up to that time.

In witness whereof, the parties have hereunto set their hands and seals the day and year first above written.

In the presence of

No. 44.

SECURITY GIVEN BY THE TENANT.

In consideration of the letting of the premises in the foregoing lease described, and of the sum of one dollar to me duly paid by the party of the first part in said lease, I hereby become surety for the punctual payment of the rent and performance of the covenants in the above written agreement mentioned, to be made and performed by ———, the lessee;

and if any default shall be made therein, I do hereby promise and agree to pay unto ———, the lessor , such sum or sums of money as will be sufficient to make up such deficiency and fully satisfy the conditions of the said agreement, without requiring any notice of non-payment or proofs of demand being made.

Given under my hand and seal the —— day of ——, 1881.

No. 45.

LEASE — SHORT FORM.

This indenture, made the —— day of ——, one thousand eight hundred and ——, between ———, party of the first part, and ———, party of the second part: Witnesseth, that the said party of the first part has let, and by these presents does demise, and to farm let, unto the said party of the second part (insert description). With the appurtenances, for the term of ——, from the —— day of ——, one thousand eight hundred and ——, at the yearly rent or sum of ——, to be paid in equal —— yearly payments, to wit, on the —— day of —— in each and every year. And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, on the part of the said party of the second part, then it shall be lawful for the said party of the first part, his heirs or assigns, to re-enter the said premises, and to remove all persons therefrom. And the said party of the second part does hereby covenant to pay the said party of the first part the said yearly rent as herein specified. And that at the expiration of the said term, the said party of the second part will quit and surrender the premises hereby demised, in as good state and condition as reasonable use and wear thereof will permit, damages by the elements excepted.

And the said party of the first part does covenant that the said party of the second part, on paying the said yearly rent, and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

In witness whereof, the parties to these presents have hereunto set their hands and seals.

No. 46.

LEASE.

This indenture, made the —— day of ——, in the year of our Lord one thousand eight hundred and eighty-one, between ——, party of the first part, and ——, party of the second part: Witnesseth, that the said party of the first part, for and in consideration of the rents, covenants and agreements

hereinafter mentioned, reserved and contained on the part and behalf of the said party of the second part, his executors, administrators and assigns, to be paid, kept and performed, has granted, demised and to farm let, and by these presents does grant, demise and to farm let, unto the said party of the second part, his heirs, executors, administrators and assigns, all (insert description). To have and to hold the said above mentioned and described premises, with the appurtenances, unto the said party of the second part, his heirs, executors, administrators and assigns, from the —— day of ———, one thousand eight hundred and eighty-one, for and during and until the full end and term of ——— then next ensuing, and fully to be complete and ended, yielding and paying therefor, unto the said party of the first part, his heirs or assigns, yearly and every year during the said term hereby granted, the yearly rent or sum of ———, lawful money of the United States of America, in equal ——— yearly payments, to wit, on the first day of ———— in each and every of the said years: Provided, that if the yearly rent above reserved, or any part thereof, shall be behind or unpaid on any day of payment whereon the same ought to be paid as aforesaid; or if default shall be made in any of the covenants herein contained, on the part and behalf of the said party of the second part, his executors, administrators and assigns, to be paid, kept and performed, then and from thenceforth it shall and may be lawful for the said party of the first part, his heirs or assigns, into and upon the said demised premises, and every part thereof, wholly to re-enter, and the same to have again, repossess, and enjoy as in their first and former estate. And the said party of the second part, for his heirs, executors and administrators, does covenant and agree, to and with the said party of the first part, his heirs and assigns, by these presents, that the said party of the second part, his executors, administrators or assigns, shall and will yearly and every year during the said term hereby granted, well and truly pay, or cause to be paid, unto the said party of the first part, his heirs or assigns, the yearly rent above reserved, on the days and in manner limited and prescribed as aforesaid, for the payment thereof, without any deduction, fraud or delay, according to the true intent and meaning of these presents. And that the said party of the second part, his executors, administrators or assigns, shall and will at their own proper costs and charges, bear, pay and discharge all such taxes, duties and assessments whatsoever, as shall or may, during the said term hereby granted, be charged, assessed or imposed upon the said demised premises. And such payment shall be made within sixty days after such taxes or assessments shall be imposed. And that on the last day of the said term, or other sooner determination of the estate hereby granted, the said party of the second part, his executors, administrators or assigns, shall and will peaceably and quietly leave, surrender and yield up unto the said party of

the first part, his heirs or assigns, all and singular, the said demised premises in as good state and condition as they are now in, ordinary wear and damages by the elements excepted. And the said party of the first part, for himself, his heirs, executors and administrators, does covenant and agree to and with the said party of the second part, his executors, administrators and assigns by these presents, that the said party of the second part, his executors, administrators and assigns, paying the said yearly rent above reserved, and performing the covenants and agreements aforesaid on his part, the said party of the second part, his executors, administrators and assigns, shall and may at all times during the said term hereby granted, peaceably and quietly have, hold and enjoy the said demised premises, without any manner of let, suit, trouble or hindrance of or from the said party of the first part, ——— heirs or assigns, or any other person or persons whomsoever.

In witness whereof, the parties to these presents have hereunto set their hands and seals.

Sealed and delivered in
the presence of

No. 47.

CONTRACT FOR SALE OF LAND.

Article of agreement, made this ——— day of ———, in the year of our Lord one thousand eight hundred and eighty-one, between ———, party of the first part, and ———, party of the second part, in the manner following: The said party of the first part, in consideration of the sum of ——— dollars to him duly paid, hereby agrees to sell unto the said party of the second part (describe premises), for the sum of ——— which the said party of the second part hereby agrees to pay the party of the first part as follows: one hundred dollars on the signing of this contract and the balance of said purchase-money on the first day of April, 1882. Said party of the second part also agrees to pay all taxes and assessments that shall be taxed or assessed on said premises from the date hereof, until said sum shall be fully paid as aforesaid. And the said party of the first part, on receiving such payment at the time and in the manner above mentioned, shall at his own proper cost, and expense, execute and deliver to the said party of the second part, or to his assigns, a good and sufficient deed with the usual covenants of warranty. It is mutually agreed between said parties, that said party of the second part shall have possession of said premises on the execution of this contract, and he shall keep the same in as good condition as they are in at the date hereof, until the said sum shall be paid as aforesaid; and in case of failure on the part of the said

party of the second part, to fulfil this contract, he will pay to the said party of the first part five hundred dollars which are hereby affixed as damages and not as a penalty.

And it is agreed, that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns, of the respective parties.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

Sealed and delivered in
presence of

No. 48.

AGREEMENT TO SELL REAL PROPERTY.

Articles of agreement, made this ——— day of ———, eighteen hundred and eighty-one, between ———, party of the first part, and ———, party of the second part, witnesseth:

Article First.—That the said party of the first part, in consideration of the sum of ——— dollars, money of the United States, to him in hand paid, at the ensealing and delivery of these articles, by the said party of the second part, and of the covenants of the said party of the second part in these articles contained, doth covenant and agree to and with the said party of the second part that the said party of the first part shall and will (provided all the covenants of the said party of the second part in these articles contained have been duly kept and performed), upon payment of the sum of ——— dollars, money as aforesaid, according to the covenant of the said party of the second part, contained in the second of these articles, convey or cause to be conveyed unto the said party of the second part, by common warranty deed, an absolute estate in fee simple, clear of all incumbrances, and free from all dower and incohate rights of dower, in the following described premises, viz. (insert description of premises).

The aforesaid deed to be delivered at ———.

Article Second.—The said party of the second part, in consideration of the covenants of the said party of the first part in these articles contained, doth covenant and agree to and with the said party of the first part, that he, the said party of the second part, shall and will pay unto the said party of the first part, the sum of ———, on the ——— day of ———, eighteen hundred and ———, at ———, and also interest upon the said sum of ———, until the said sum shall be paid, such interest to be computed at the rate of six per cent. per annum, from and after the date of these articles, and to be paid semi-annually from and after said date, at the

place last aforesaid. But the said party of the second part may, if he shall elect so to do, and shall give to the said party of the first part six weeks' previous notice thereof, pay to the said party of the first part, the whole of said principal sum of ——— and the interest then accrued thereon, at any time before the said ——— day of ———, eighteen hundred and ———, at the said place last aforesaid, and such payment shall be a full compliance with the covenant in this second article contained.

Article Third.—The said party of the first part, for the same consideration aforesaid mentioned in the first of these articles, doth further covenant and agree to and with the said party of the second part, that the said party of the second part may take possession of said premises above described in the first of these articles, on the ———, and may continue in possession of the same so long as all the covenants of the said party of the second part in these articles contained are duly kept and performed.

Article Fourth.—The said party of the second part, for the same consideration aforesaid mentioned in the second of these articles, covenants and agrees to and with the said party of the first part, that he, the said party of the second part, shall and will pay all taxes, water rates and assessments that shall be assessed or in any manner charged, by virtue of any law or laws now in force or that may hereafter be passed, upon or to the said premises or any part thereof, or upon or to any person for, or on account of the said premises or any part thereof, after the date of these articles, and until the payment of the said sum of ——— dollars and interest, in the foregoing second article covenanted to be paid, and will allow the tenant of the party of the first part to enter, to harvest and remove the grain of such tenant.

In witness whereof, the parties hereto have set their hands and seals the day and year first above written.

Sealed and delivered in
presence of

No. 49.

ASSIGNMENT OF LEASE.

Know all men by these presents, that I, L. M., the within named lessee, for and in consideration of $100, to me in hand paid by R. P., of the town of Knox, county of Albany, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, assigned and set over, and by these presents do grant, assign and set over unto the said R. P., his executors, administrators and assigns, the within indenture of lease, and all that house and farm therein described, with the appurtenances; and also all my estate, right, title, term of years yet to come, claim, and demand whatsover, of, in, to, or out of the same. To

have and to hold the said house and farm, and the appurtenances thereof unto the said R. P., his executors, administrators and assigns, for the residue of the within term mentioned, subject to the yearly rents and covenants within reserved and contained, on my part and behalf to be done, kept and performed, and in case the said R. P. shall fail to pay the said rent and perform the other conditions to be performed in said lease, then this assignment to be void, otherwise to be in full force and virtue.

Witness my hand and seal this Dec. 22, 1881.

O

No. 50.

GENERAL ASSIGNMENT WITHOUT PREFERENCES.

This indenture, made this —— day of ——, 1881, between ———, of ——, party of the first part, and ———, of ——, party of the second part: Witnesseth that, whereas the party of the first part is indebted to divers persons in sundry sums of money which he is unable to pay in full, and is desirous of providing for the payment of the same so far as is in his power by an assignment of all his property for that purpose. Now, therefore, the said party of the first part, in consideration of the premises, and of the sum of one dollar to him paid by the party of the second part, upon the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over, and by these presents does grant, bargain, sell, assign, transfer and set over unto the said party of the second part, his successors and assigns, all and singular the lands, tenements, hereditaments, appurtenances, goods, chattels, stock, promissory notes, debts, claims and demands, property and effects of every description belonging to the party of the first part, wherever the same may be, except such property as is exempt by law from levy and sale under execution, to have and to hold the same and every part thereof unto the said party of the second part, his successors and assigns; in trust nevertheless, to take possession of the same, and to sell the same with all reasonable despatch, and to convert the same into money, and also to collect all such debts and demands hereby assigned as may be collectible, and with and out of the proceeds of such sales and collections:

1. To pay and discharge all the just and reasonable expenses, costs and charges of executing this assignment, and of carrying into effect the trust hereby created, together with a lawful commission to the party of the second part for his services in executing said trust.*

2. To pay and discharge in full, if the residue of said proceeds are sufficient for that purpose, all the debts and liabilities † now due or to grow due from the said party of the first part, with all interest money due

or to grow due, and if the residue of said proceeds are not sufficient to pay the said debts and liabilities and interest money in full, then to apply the said residue of said proceeds to the payment of said debts and liabilities ratably and in proportion.

3. And if, after the payment of all said debts and liabilities in full, there shall be any remainder or residue of said property or proceeds, to repay and return the same to the said party of the first part, his executors, administrators and assigns. And in furtherance of the premises, the said party of the first part does hereby make, constitute and appoint the said party of the second part, his true and lawful attorney, irrevocable, with full power and authority to do all acts and things which may be necessary in the premises to the full execution of the trust hereby created, and to ask, demand, recover and receive of and from all and every person or persons all property, debts, demands due and owing and belonging to the said party of the first part, and to give acquittances and discharges of the same, to sue, prosecute, defend and implead for the same, and to execute, acknowledge and deliver all necessary deeds, instruments and conveyances.

And the party of the first part does hereby authorize the said party of the second part to sign the name of the said party of the first part to any check, draft, promissory note or other instrument in writing which is payable to the order of the said party of the first part, or to sign the name of the party of the first part to any instrument in writing, wherever it shall be necessary so to do to carry into effect the object, design and purpose of this trust.

The said party of the second part doth hereby accept the trust created and reposed in him by this instrument, and covenants and agrees to and with said party of the first part that he will faithfully and without delay execute the trust so created according to the best of his skill, knowledge and ability.

In witness whereof, the parties to these presents have hereto set their hands and seals the day and year first above written.

[L. S.]
[L. S.]

Sealed and delivered
in presence of

No. 51.

ASSIGNMENT WITH PREFERENCES.

(As in the last form to the *, then insert):

2. To pay all and singular the debts specified and set forth in the schedule A hereto annexed in full with interest, if the residue of said

proceeds shall be sufficient for that purpose, and if the same be not sufficient, then the said party of the second part shall apply the residue of said proceeds to and in the payment of the said debts ratably and in proportion to the respective amounts thereof.

3. To pay and discharge in full, if the residue of said proceeds are sufficient for that purpose, all the remaining debts and liabilities (continued as in the last form from †).

No. 52.

POWER OF ATTORNEY TO SELL REAL PROPERTY.

Know all men by these presents, that I, A. B., of the city of Troy, have made, constituted and appointed, and by these presents do make, constitute and appoint C. D., of the city of Buffalo, my true and lawful attorney for me and in my name, place and stead, to enter into and take possession of all such lands, tenements and hereditaments and real estate whereof I am seized, or possessed or entitled to, in the county of Erie, in the State of New York, or in which I have any interest; and to grant, bargain and sell the same, or any part or parcel thereof, for such price or sum, and on such terms as to him shall seem proper; and for me and in my name to make, execute and acknowledge and deliver good and sufficient deeds and conveyances for the same, either with or without the usual covenants of warranty; and until the sale thereof, to let the same, or any part thereof, for the best rent that can be procured for the same, and to ask, demand, collect, recover and receive all sums of money which shall become due and owing by means of such leasing or renting, giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue thereof.

In witness whereof, I have hereunto set my hand and seal the ——— day of ———, one thousand eight hundred and eighty-one.

Sealed and delivered in
the presence of.

No. 53.

REVOCATION OF POWER OF ATTORNEY.

Know all men by these presents, that whereas, I, A. B., of Troy, in and by my letter of attorney, bearing date the ——— day of ———, 1881,

did make, constitute and appoint C. D., of Buffalo, my true and lawful attorney for me and in my name to grant, bargain and sell, and (as in the power of attorney) as by the said power of attorney will more fully appear; now know ye that I, the said A. B., have revoked, annulled, countermanded and made void, and by these presents do revoke, annul, countermand and make void the said letters and power of attorney and all power and authority thereby given or intended to be given to the said C. D.

In witness whereof, I have hereunto set my hand and seal this ——— day of ———, 1882.

In presence of

No. 54.

COVENANT TO KEEP IN REPAIR.

(To be inserted in a lease).

And that the said M. N., his executors, administrators and assigns, shall and will, from time to time, and at all times hereafter during the said term herein granted, at his and their own proper cost and charges, well and sufficiently keep in repair the said devised premises with every part and parcel thereof, and the appurtenances thereto belonging and appertaining.

No. 55.

COVENANT TO PAY TAXES.

And that he, the said C. D., his executors, administrators and assigns, shall and will from time to time during the term of this present lease, bear, pay and discharge all taxes, charges and assessments, ordinary and extraordinary, which may hereafter, at any time during the continuance of the said term, be imposed or charged on the said premises or any part thereof, which payment shall be made within sixty days after such taxes, charges and assessments are respectively imposed.

No. 56.

COVENANT TO RENEW THE LEASE.

And the said party of the first part for himself, his heirs and assigns, covenants and agrees to and with the said party of the second part, that if the said party of the second part shall well and truly keep and perform the agreements herein contained, he, the said party of the first part, his heirs and assigns will, upon the written request of the said party of the second part duly made at least three months before the termination of his

lease, make, execute and deliver unto the said party of the second part a new lease, similar in all respects to this, and for the further period of ten years, of the premises herein mentioned and described.

No. 57.

FORECLOSURE OF MORTGAGE BY ADVERTISEMENT AND SALE.—NOTICE OF SALE.

Mortgage sale.—By virtue of a mortgage, bearing date the first day of July, 1877, L. M. and P., his wife, of the town of Bethlehem, conveyed to B. G., of the town of New Scotland, certain premises described in said indenture as follows (insert description). Said mortgage, with the power of sale therein contained, was recorded in the clerk's office of the county of Albany, the 2d day of July, 1877, at nine o'clock A. M., in Book of Mortgages, No. 288, page 310, etc. (Which said mortgage, with the power of sale therein contained, was duly and in due form sold and assigned by an instrument in writing on the 10th day of August, 1878, by the said B. G. to O. P., which assignment is duly recorded in the Albany county clerk's office, in Book of Mortgages, No. 289, page 28, etc.) The amount due on said mortgage on the first publication of this notice is five hundred dollars. Now, therefore, notice is hereby given that the said mortgaged premises by virtue of said mortgage and by the power of sale therein contained, will be sold at public auction to the highest bidder on the ——— day of ———, 1881, at 12 o'clock noon, at the ———, in city of Albany. Dated ———, 1881.

O. P., Assignee of Mortgage.

C. C., Attorney.

No. 58.

FORECLOSURE BY ADVERTISEMENT — PROOF OF PUBLICATION.

State of New York, county of ——— ss.: A. B., of the city of Albany, county of Albany and State of New York, being duly sworn, deposeth and saith, that he is, and during the time of the publication of the notice hereinafter mentioned was the publisher of the newspaper called the Albany Evening Journal, a public newspaper, printed and published in the city of Albany, county of Albany, that being the county where the premises described in the annexed printed notice of sale, or a part thereof are situated. Deponent further says that the notice of the mortgage sale, of which a printed copy is hereto annexed, was published in said newspaper for twelve weeks successively, at least once in each week, immediately preceding the time specified in said notice for the sale of the said premises; said publica-

tion having been commenced on the ——— day of ———, 1881, and ending on the ——— day of ———, 1881.

Subscribed and sworn to before me, this ——— day of ———, 1881.

No. 59.

PROOF OF POSTING AND AFFIXING NOTICE.

County of Albany, ss.: R. H., of the city of Albany, being duly sworn, says that he did on the ——— day of ———, 1881, and at least eighty-four days prior to the time specified in the annexed printed notice for sale of the mortgaged premises therein described, affix in a proper and substantial manner a copy of the annexed printed notice, in a conspicuous place, at or near the entrance of the city hall in the city of Albany, that being the building where the County Court of the county of Albany is held, and in the county where the said mortgaged premises are situated, and that on the same day, to wit, the ——— day of ———, 1881, and at least eighty-four days prior to the time specified in the annexed printed notice for the sale of the said mortgaged premises, he delivered to the said G. H., the county clerk of the county of Albany, a copy of the annexed printed notice, who did forthwith, in the presence and sight of this deponent, affix said notice in a book kept in the office of said county clerk for the purpose of affixing such notices of sale of the foreclosure of mortgaged premises; and the said clerk did make and subscribe a minute, at the bottom of said copy notice, of the time when he received and affixed said notice, and did at the same time index the notice to the name of the mortgagor in the book aforesaid.

Subscribed, etc.

No. 60.

PROOF OF SERVING NOTICE OF SALE.

Albany County, ss.: N. M., of said city, being sworn, says that, at the city of Albany, on the ——— day of ———, 1881, and at least fourteen days prior to the time mentioned in the annexed printed notice for sale of the mortgaged premises therein described, he served upon P. D., the mortgagor, a notice of sale of which the annexed is a copy, and such service was made by giving to and leaving with the said B. D. a copy of said notice of sale; and that at the city of Albany on the ——— day of ———, 1881, and at least twenty-eight days prior to the time specified in the annexed printed notice for the sale of the mortgaged premises therein described, did serve upon B. C. a copy of the annexed printed notice of

sale, and such service was served by depositing a copy of such notice in the post office, at Albany, properly inclosed in a post-paid wrapper, directed to the said B. C., at Troy, Rensselaer County, New York, his place of residence.

Subscribed etc

No. 61.

AFFIDAVIT OF AUCTIONEER WHO MADE THE SALE.

County of Albany, ss: P. R., of the city of Albany, being duly sworn deposes and says, that he officiated as auctioneer at the sale of the mortgaged premises described in the annexed printed copy of notice of sale. Deponent further says, that such sale was made at public auction in the day time, and was conducted fairly and openly in pursuance of said notice, that such sale took place at 12 o'clock at noon on the ——— day of ———, 1881, at the place mentioned in said printed notice, to wit, the ——— in the county of Albany, where the premises sold or some part thereof are situated; that the premises so far as the same consisted of distinct tracts, farms or lots, were sold separately, and no more tracts, farms or lots were sold than were necessary to satisfy the amount claimed to be due on said mortgage in said notice at the day of the first publication thereof and interests and costs and expenses allowed by law. Deponent further says, that every part of said premises sold by deponent was fairly struck off and sold to the highest bidder, and that the sum of one thousand dollars was the highest sum bid, and B. L. was the highest bidder for, and the purchaser of the premises described in said notice of sale.

Subscribed, etc.

No. 62.

WILL — SHORT FORM.

I, A. B., of the city of Albany, do hereby give, devise and bequeath all of my property, real and personal, to my wife, C. B., and do hereby appoint her the executrix of this my last will and testament.

Witness my hand this December 27, 1881.

A. B.

Signed, published and declared by the said testator to be his last will and testament, in our presence, who at his request, in his presence and in presence of each other, have signed our names as witnesses, this Dec. 27, 1881.

A. W., of the city of Albany, N. Y.
G. W., of the city of Albany, N. Y.

No. 63.

WILL — ANOTHER FORM.

I, A. B., of the town of New Scotland, county of Albany, N. Y., do make this my last will and testament, as follows:

First. I give and bequeath to my wife, C. B., the sum of five thousand dollars, to be paid her in one year from my decease; which said sum is given and to be received by her in lieu of dower in my estate.

Second. I give and devise to my son John the farm, buildings and premises known as the home farm.

Third. I give and devise to my son George the rent, use and occupation of my farm known as the Globe farm, to be used and occupied by him during his life; and from and after his decease the same is to be divided equally among all of the children of my son George, share and share alike.

Fourth. I give and devise to my executors, hereinafter named, my farm and premises known as the Hill farm, of one hundred and fifty acres, in trust, to lease and rent the same, and out of the rent and income thereof to pay all taxes and assessments and necessary repairs thereon; and to pay the remaining rent and income to my daughter Sarah, semi-annually, during her life, and from and after her decease, to pay so much of the amount of rent and income as may be necessary for the support, maintenance and education of my grandson John, son of my daughter Sarah, until he becomes twenty-one years of age, and when he becomes twenty-one years of age, my said executors are to transfer and deliver to him all the accumulated income in their hands, and to convey to him the real property, mentioned in this item of my will. In case my said grandson shall die before he becomes twenty-one years of age leaving no child or children, then upon the decease of my daughter Sarah, my executors are to sell and convey the real estate in this item mentioned, and distribute the proceeds among my heirs in accordance with the law of inheritance of this State.

Fifth. I hereby give, devise and bequeath unto my daughter Mary, for and during the term of her natural life, one annuity, or clear yearly rent or sum of six hundred dollars free of all taxes and other deductions, to be paid her in semi-annual instalments, and which I charge upon all of my real estate not hereinbefore disposed of.

Sixth. I hereby nominate and appoint my wife C. B., to be the general guardian of the person and estate of my son James until he becomes twenty-one years of age.

Seventh. All the rest, residue and remainder of my estate I give, devise and bequeath to my executors hereinafter named, in trust, to pay all

my debts and funeral expenses, to pay the specific legacies above named and the annuity above provided so long as they have charge of my estate; and for that purpose and for the settlement of my estate I hereby authorize and empower them and the survivor of them, at public or private sale, to sell and convey such portions of my real estate as they or the survivor of them shall deem best, and when my grandson James shall arrive at his majority, then to transfer to my grandson James all the property of my estate then remaining, subject to the annuity charge above mentioned.

Eighth. I hereby nominate and appoint L. K. and G. D., farmers of the town of New Scotland, and my son John, the executors and trustees of this my last will and testament.

In witness whereof, I have hereto set my hand and seal this —— day of ——, 1881.

A. B. [L. S.]

The foregoing instrument, of three sheets, was on the day of the date thereof, signed, sealed, published and declared by the said testator to be his last will and testament in our presence, who, at his request, in his presence and in presence of each other, have signed our names as witnesses.

F. G., of the town of ———.
G. F., of the town of ———.

No. 64.

CODICIL.

I, A. B., of the town of ——, having made my last will and testament in writing, bearing date ———: Now, I do by this my writing, which I hereby declare to be a codicil to my said will, and to be taken as a part thereof (insert modifications or new provisions). And, lastly, it is my desire that this, my present codicil, be annexed to, and made a part of my last will and testament, to all intents and purposes.

In witness whereof, I have hereunto set my hand and seal this —— day of ——, 1881.

A. B. [L. S.]

Signed, sealed, published and declared by the said testator to be a codicil to his last will and testament, in our presence, who, at his request, in his presence, and in presence of each other, have signed our names as witnesses this —— of ———, 1881.

R. C., residing in the town of ———.
C. R., residing in the town of ———.

No. 65.

INSTRUCTIONS TO COUNTY CLERK FOR AN OFFICIAL SEARCH.

To the Clerk of the County of———. Sir: You will please search the respective records in your office against ———, the grantor mentioned in ———, and against ———, immediate and remote grantors, and all other successive persons through whom it shall appear that the title to, or any interest in the premises in said instrument described, has come to said grantor, up to the first person in whom it shall appear that the title to said premises, or any interest therein, has been.

Also search against ———, immediate and remote grantees, and all other successive persons into or through whom it shall appear that the title to, or any interest in the premises in said deed described, has passed, including the person in whom it shall appear that the title to said premises, or any interest therein, now is.

For powers of attorney, deeds (including ante-nuptial agreements, general assignments, contracts of sale, leases, releases of mortgaged premises, wills, partition decrees, and since 1866 certificates describing said premises executed by the president, and countersigned by the secretary of any board of health — chap. 790, of 1867, sec. 2). Mortgages (including those to loan commissioners under chap. 40, laws of 1786, chap. 25, laws of 1792 (Greenleaf edt.), chap. 216, laws of 1808 (Webster & Skinner edt.), and chap. 150, laws of 1837, assignments of mortgages, and since 1835 memoranda of deposit notes of members of mutual insurance companies — chap. 41, of 1836, sec. 8), conveying or affecting said premises, executed (except certificates of the board of health), by either of the respective persons above referred to, from the day prior to the time that the title to, or any interest in said premises passed to each such person, until the expiration of —— from the time that the title or interest of such person, in said premises, passed out of him or her.

For sheriff's certificates of sale, affecting or describing said premises, filed or recorded against each such person, from the day prior to the time that the title to, or any freehold interest in said premises passed to such person, until the expiration of ten years from the time that such title or interest passed out of him or her.

For notices of pendency of actions, notices of mortgage foreclosure, affidavits of mortgage sale and mechanics' liens, affecting or describing said premises filed or recorded against; and orders appointing receivers of judgment debtors, recorded against each of the persons above referred to, in whom any title to, or any interest in said premises has been, from the day prior to the time that the title to, or any interest in said premises

passed to each such persons, until the expiration of ———, from the time that the title or interest of such person in said premises passed out of him, or her, except that for notices of mortgage foreclosure, you shall not search farther back than April 9, 1857 — chap. 308, of 1857, sec. 1.

For judgments (including entries of collectors' bonds, in which the owner of the whole or any part of said premises in either principal or surety — 1 R. S., 346, sec. 20 — and surrogate's certificates — Code, sec. 2554), transcripts of judgments and decrees, for ten years, last past, against each person above referred to, in whom the title to, or any freehold interest in, the whole or any part of said premises has been during that time.

For notices specifying any injunction in writ of error by which proceedings on any judgment or decree against any such person has been restrained (Code, sec. 1255) for ——— last past, against each person above referred to, in whom the title to, or any freehold interest in, the whole or any part of said premises has been during that time.

For powers of attorney, deeds and mortgages as above defined, and assignments of his or her interest or title, against each person, to whom any mortgage ——————— or other instrument has been executed, or by whom any mechanics' lien ——————— or other instrument has been filed or recorded, by reason of which the title to, or any interest in said premises could or shall have been transferred, from the day prior to the time that the title to, or any interest in said premises passed to such person, until the expiration of ———, from the time that the title or interest of such person in said premises passed out of him or her.

Against each person, to whom any power over said premises shall appear by the records in your office to have been given, by any of the persons above referred to, by power of attorney, will or otherwise, search in the respective records in which instruments in execution of such power should appear, during the time that any title or interest in said premises shall remain in the person giving such power, and also during the continuance of such power over said premises.

The word person, in these instructions, includes both natural and artificial persons.

You will please state the residences of the parties and the names of their wives, the date, date of record, and book and page of record, the character of, and a memorandum of the property affected by, each instrument returned by you in answer to these instructions.

Also search against each of the following named persons in the records hereinafter mentioned, for the times hereinafter mentioned :

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