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

GENERAL DEFINITIONS AND DIVISIONS.

Section 1. This act shall be known as the Civil Code of the State of New York.

§ 2. Law is a rule of property and of conduct prescribed by the sovereign power of the state.

§ 3. The will of the sovereign power is expressed:

1. By the constitution, which is the organic act of the people;

2. By statutes, which are the acts of the Legislature, or by the ordinances of other and subordinate legislative bodies;
3. By the judgments of the tribunals enforcing those rules which, though not enacted, form what is known as customary or common law.

§ 4. The common law is divided into:
1. Public law, or the law of nations;
2. Domestic, or municipal law.

§ 5. The evidence of the common law is found in the decisions of the tribunals.

§ 6. In this state there is no common law in any case where the law is declared by the five Codes.

§ 7. All original civil rights are either:
1. Rights of person; or,
2. Rights of property.

§ 8. Rights of property and of person may be waived,1 surrendered or lost by neglect, in the cases provided by law.

1 Cookeley v. King, 10 N. Y., 440.

§ 9. This Code has four general divisions:
1. The first relates to Persons;
2. The second to Property;
3. The third to Obligations;
4. The fourth contains General Provisions relating to Persons, Property and Obligations.
DIVISION FIRST.

PERSONS.

PART I. Persons.
II. Personal Rights.
III. Personal Relations.

PART I.

PERSONS.

SECTION 10. Minor, what.
11. Adult, what.
12. Unborn child.
13. Persons of unsound mind.
14. Custody of minors, etc.
15. Powers of minors.
17. When minor may disaffirm.
18. Cannot disaffirm contract for necessaries.
19. Nor certain obligations.
20. Contracts of persons without understanding.
22. Powers of persons whose incapacity has been adjudged.
23, 24. Wrongs.
25. Minors may enforce their rights.
26. Indians.

§ 10. A minor is a person under the age of twenty-one years.

§ 11. All other persons are adults.
§ 12. A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth.


§ 13. Persons of unsound mind, within the meaning of this Code, are idiots, lunatics, imbeciles and habitual drunkards.

§ 14. The custody of minors and persons of unsound mind is regulated by Part III of this Division.

§ 15. A minor cannot give a delegation of power.

Bennet v. Davis, 6 Cow., 399. Such a delegation is not merely voidable, but absolutely void (See Bool v. Mix, 17 Wend., 119). The propriety of this rule has, however, been seriously doubted (Whitney v. Dutch, 14 Mass., 462).

§ 16. A minor may make a conveyance or other contract in the same manner as any other person, subject only to his power of disaffirmance under the provisions of this Title, and to the provisions of the Title on MARRIAGE.

1 Palmer v. Miller, 25 Barb., 399; Slocum v. Hooker, 13 Barb., 536; Bool v. Mix, 17 Wend., 119; Gillett v. Stanley, 1 Hill, 121; Van Nostrand v. Wright, Hill & D. Supp., 260; Clark v. Levi, 10 N. Y. Leg. Obs., 184. It has been doubted whether a minor who has a guardian, can make a contract (Stafford v. Roof, 9 Cow., 628, 830; Kline v. L'Amoureux, 2 Paige, 419); but it seems now to be settled that he can (Bartholomew v. Finlemore, 17 Barb., 428).

§ 17. In all cases other than those specified by sections 18 and 19, the contract of a minor may, upon restoring the consideration to the party from whom it was received, be disaffirmed by the minor himself, either before his majority, or within a reasonable time afterwards, or, in case of his death
within that period, by his heirs or personal representatives.3

1 Conroe v. Birdson, 1 Johns. Cas., 127; Brown v. McCune, 5 Sandf., 224; Morriam v. Cunningham, 11 Cush. 43.
3 By the existing law he cannot in all cases conclusively disaffirm his conveyance of real property before he comes of age (Boole v. Mix, 17 Wend., 119, 132, 134).
4 Taft v. Sergeant, 18 Barb., 250.
5 Bac. Abr., Infant, I, 6; 8 Co., 425.

§18. A minor, or a person of unsound mind of whatever degree, cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support, or for that of his family, entered into by him when not under the care of a parent or guardian able to provide for him.

1 Ingraham v. Baldwin, 9 N. Y., 45.
2 Smith v. Oliphant, 2 Sandf., 306; Randall v. Sweet, 1 Dem., 486.
3 Turner v. Frisky, Strange, 166.
4 Wailing v. Toll, 9 Johns., 141.
5 Kline v. L'Amoureux, 2 Payne, 410.

§19. A minor cannot disaffirm an obligation, otherwise valid, entered into by him under the express authority or direction of a statute.

This is intended to provide for such cases as the execution of a bond in bastardy proceedings, or a voluntary assignment under the statute relating to the imprisonment of insolvent debtors, or an enlistment, or articles of apprenticeship.

§20. A person entirely without understanding has no power to contract, except in the case mentioned in section 18, unless expressly authorized by statute.

See Jackson v. King, 4 Coe., 207.

§21. A person of unsound mind, but not entirely without understanding, may make a conveyance or other contract, before his incapacity has been judicially determined, subject to rescission, as provided in the chapter on rescission.
§ 22. After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power, nor waive any right, until his restoration to capacity is judicially determined. But if actually restored to capacity, he may make a will, though his restoration is not thus determined.

See 1 R. S., 719, § 10; Fitzhugh v. Wilcox, 12 Barb. 235.

Wrong.

§ 23. A minor, or a person of unsound mind, of whatever degree, is liable for a wrong done by him, in like manner with any other person.

1 Fish v. Ferris, 5 Duer, 49; Campbell v. Stakes, 2 Wend., 139; Hartfield v. Roper, 21 id., 615; Green v. Burke, 23 id., 490; Bullock v. Babcock, 3 id., 391; Wallace v. Mores, 5 Hull, 391; Coulkin v. Thompson, 29 Barb., 218; Burnard v. Haggis, 14 C. R. [N. S.], 45; Krom v. Schoonmaker, 3 Barb., 647; see Williams v. Cameron, 26 id., 112.

§ 24. A minor, or person of unsound mind, cannot be subjected to exemplary damages, unless at the time of the act he was capable of knowing that it was wrongful.

Krom v. Schoonmaker, 3 Barb. 647.

§ 25. A minor may enforce his rights by civil action, or other legal proceedings, in the same manner as a person of full age, except that a guardian must be appointed to conduct the same.

2 R. S., 445, § 1.
§ 26. Indians resident within this state have the same rights and duties as other persons; except that:

1. They cannot vote or hold office; and that,

2. They cannot grant, lease, or incumber Indian lands, except in the cases provided by special laws.¹

¹ The course of legislation and of decision, following the modifications which time has made in the actual condition of the Indians, is such that, by the act of 1843, Indians are authorized to purchase, hold and convey lands; and such as become freeholders to the value of $100, are liable on contracts and to taxation and the jurisdiction of the courts, as if citizens. There seems to be no sufficient reason why a simple general provision like that here proposed, should not now be adopted.

PART II.
PERSONAL RIGHTS.

SECTION 27. General personal rights.

29. Libel, what.
30. Slander, what.
31. What communications are privileged.
32. Protection to personal relations.
33. Right to use force.

§ 27. Besides the personal rights mentioned or recognized in the Political Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.

There is no doubt that persistent public insults, e.g., continually shouting at a person in the street, or even silently dogging him, are personal injuries, against which he ought to be protected. Why is not an act which the law admits almost to justify, certainly to mitigate, the crime of assault and battery, sufficient foundation for a civil action? Compare Adams v. Rivers, 11 Barb., 398, where an action for use of insulting words, by one standing in the highway in front of plaintiff's land, was sustained on the ground of the trespass involved in standing in the highway after being ordered to depart, for the malicious purpose evinced.

§ 28. Defamation is effected by:

1. Libel; or,
2. Slander.

In all definitions of libel or slander at common law, malice is treated as a necessary ingredient. But in the absence of a proper notice for the publication, malice is conclusively presumed, and the publisher of a libel is responsible, although clearly free from actual malice.
§ 29. Libel is a false and unprivileged publication by writing, printing, picture, effigy or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.

2 Kent Com., 17; Stone v. Cooper, 2 Den., 293; Cooper v. Greeley, 1 id., 347; Steele v. Southwick, 9 Johns., 214.

The law of libel has passed in the last hundred years from one extreme to another; from excessive severity to excessive laxity. The abuse of the freedom of the press, not only in the wantonness of its attacks upon public men, but in its assaults upon private citizens, has become so great, that a remedy for the evil must be sought, or violence will take the place of law. The license into which this freedom has degenerated leads, not only to the frequent invasion of private rights, but to the corruption of public morals. If the Commissioners had been certain of the true remedy, they would have proposed it in the text of the Code. They will venture only to suggest that a more certain punishment for wanton or careless defamation being needed, a remedy may perhaps be found in affixing to it a penalty, to be recovered in every civil action for libel, in addition to the damages which the jury may find. This would, at least, render it unsafe for libellors to rely upon the caprice or prejudice of juries as the means of escape with nominal damages. Requiring the name of the writer to be signed to every personal article, might also have a salutary effect. If the Legislature should think these provisions desirable, two sections like the following would answer the purpose:

§ . Any article published in a newspaper containing matter which would be libellous if it were false, must be signed by the writer, and his name must be published at the foot of the article. A violation of this section is a misdemeanor.

§ . In every civil action for libel, if the plaintiff recovers a verdict, he shall be entitled to judgment against
§ 30. Slander is a false and unprivileged publication, other than libel, which:

1. Charges any person with crime, or with having been indicted, convicted or punished for crime;

2. Imputes in him the present existence of an infectious, contagious or loathsome disease;

3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit;

4. Imputes to him impotence or a want of chastity; or,

5. Which, by natural consequence, causes actual damage.

§ 31. A privileged publication is one made:

1. In the proper discharge of an official duty;

2. In testifying as a witness, in any proceeding authorized by law, to a matter pertinent and material, or in reply to a question allowed by the tribunal;

3. In a communication, without malice, to a person interested therein, by one who was also interested, or who stood in such a relation to the former as to afford a reasonable ground for supposing his motive
innocent, or who was requested by him to give the information; or,

4. By a fair and true report in a newspaper, without malice, of a judicial, legislative or other public official proceeding, or of anything said in the course thereof.¹

² Lewis v. Chapman, 16 N. Y., 369.
³ Laws 1854, ch. 130.

§ 32. The rights of personal relation forbid:

1. The abduction of a husband from his wife, or of a parent from his child;¹

2. The abduction or enticement of a wife from her husband;² of a child from a parent, or from a guardian entitled to its custody;³ or of a servant from his master;⁴

3. The seduction of a wife, daughter, orphan sister, or servant;⁵ and,

4. Any injury to a servant, which affects his ability to serve his master.⁶

¹ Perhaps this provision is new, and doubtless as a matter of fact it would rarely be taken advantage of. Nevertheless, the injury is a very great one, and one, unhappily, not entirely unknown.
² Bennett v. Smith, 21 Barb., 439; Scherpf v. Szadeczky, 4 E. D. Smith, 110.
⁴ Lumley v. Gye, 2 Eq. & Bl., 216.
⁵ This provision is new, as to the sister and daughter (Dain v. Wyckoff, 7 N. Y., 191). The legal fiction, by which the action of seduction has long been sustained, has always been considered too narrow for the purposes of justice.

§ 33. Any necessary force may be used to protect from wrongful injury the person¹ or property² of oneself, or of a wife, husband, child, parent or other relative to the third degree, a ward, servant or master.

² Blades v. Higgs, 10 C. B. (N. S.), 713.
PART III.
PERSONAL RELATIONS.

TITLE I. Marriage.
II. Parent and Child.
III. Guardian and Ward.
IV. Master and Servant.

TITLE I.
MARRIAGE.

CHAPTER I. The Contract of Marriage.
II. Divorce.
III. Husband and wife.

CHAPTER I.
THE CONTRACT OF MARRIAGE.

ARTICLE I. Validity.
II. Authentication.

ARTICLE I.
VALIDITY.
§ 34. Marriage is a personal relation, arising out of a civil contract, to which the consent of parties capable of making it is alone necessary.

By 2 R. S., 138, § 1, marriage is declared to be a civil contract to which consent is necessary; but whether anything more than consent is necessary has been mooted; some authorities deeming that either consummation or solemnization is also requisite (Jacques v. Public Administrator, 1 Bradf., 499; and see 2 Parsons on Contracts, 5th ed., 74). This provision makes consent alone sufficient, and is in accordance with the views declared in Starr v. Peck, 1 Hill, 270; Jackson v. Winne, 7 Wend., 47; Caujolle v. Ferrie, 23 N. Y., 106; Hayes v. People, 25 N. Y., 390.

§ 35. Consent to a marriage may be manifested in any form, and may be proved like any other fact.

Starr v. Peck, 1 Hill, 270; Clayton v. Wardell, 4 N. Y., 230.

§ 36. Any unmarried male of the age of fourteen years or upwards, and any unmarried female of the age of twelve years or upwards, and not otherwise disqualified, is capable of consenting to marriage; subject, however, to the provisions of section 54 of this Code.

Bennett v. Smith, 21 Barb., 439. The reference is to the provision below, allowing a divorce where a female is married under fourteen against consent of parent or guardian.

§ 37. The consent to a marriage must be to one commencing instantly, and not to an agreement to marry afterwards.

Cheney v. Arnold, 15 N. Y., 345.

§ 38. Marriages between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as of the whole blood, are incestuous, and void from the beginning; whether the relationship is legitimate or illegitimate.

2 R. S., 139, § 3.

§ 39. If either party to a marriage is incapable of consent for want of age or understanding, or is incapable, from physical causes, of entering into the
marriage state, or if the consent of either is obtained by fraud or force, the marriage is void from the time its nullity is adjudged by a competent tribunal.

§ 40. A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

1. The former marriage had been annulled or dissolved for some cause other than the adultery of such person; or,

2. Unless such former husband or wife had been finally sentenced to imprisonment for life; or,

3. Unless such former husband or wife was absent, and not known to such person to be living, for the space of five successive years immediately preceding such subsequent marriage; in which case the subsequent marriage is void only from the time its nullity is adjudged by a competent tribunal.\footnote{This exception is new.}

\footnote{2 R. S., 139, §§ 5, 6. The language of subdivision 3 has been modified to make it appropriate to the retrospective effect given to section 6, by the construction adopted by the Court of Appeals in Bowers v. Brower, 9 N. Y. Leg. Obs., 196.}

§ 41. No pardon granted after the twelfth day of April, one thousand eight hundred and twenty-two, to any person sentenced to imprisonment for life in this state, restores such person to the rights of any previous marriage, or to the guardianship of any issue of such marriage.

\footnote{2 R. S., 139, § 7.}

§ 42. Indians contracting marriage according to the Indian custom, and cohabiting as husband and wife, are lawfully married.

\textit{Laws 1849, ch. 420, § 4.}
§ 43. The provisions of other portions of this Code in relation to contracts and the capacity of persons to enter into them, have no application to the contract of marriage.

§ 44. A promise of marriage is subject to the same rules as contracts in general, except that neither party is bound by a promise made in ignorance of the other's want of personal chastity, and that either is released therefrom by unchaste conduct on the part of the other.\(^1\)


\(^2\) Palmer v. Andrews, 7 Wend., 142.

ARTICLE II.

AUTHENTICATION.

Section 45. Mode of authenticating marriages.

46. Form of marriage.

47, 48. Duties of the officer before whom a marriage is solemnized.

49. Certificate to be given to either contracting party, if desired.

50. The certificate.

51. The entry thereof.

52. Authentication of the certificate.


§ 45. For the purpose of authentication, according to the provisions of this article, a marriage must be solemnized in this state, in the manner herein prescribed, by one or more of the following persons, namely: Ministers of the gospel or priests of any denomination; mayors, recorders or aldermen of cities; judges of the county courts or justices of the peace; and, in case of Indians, also the peacemakers acting within their respective jurisdictions.

\(^3\) R. S., 139, § 8; applied to Indians by Laws of 1849, ch. 420, § 4.

In 2 Kent's Com., 89, note, it is said that these provisions of the Revised Statutes are not law, because by the act of 1830, which declared that marriages contracted
without this form of solemnization should be valid, they no longer are required to be obeyed. They are here embodied, however, for the obvious reason that, though solemnization is not compulsory, it is optional, and the form prescribed may be and constantly is resorted to, for the sake of the convenient authentication of the contract which it affords.

§ 46. No particular form is required upon a marriage, but the parties must solemnly declare, in the presence of the person solemnizing the marriage, and of at least one witness, that they take each other as husband and wife.

2 R. S., 139, § 9.

§ 47. The person solemnizing a marriage must ascertain, to his satisfaction:

1. The identity of the parties;
2. Their real and full names, and places of residence;
3. That they are of sufficient age to be capable of contracting marriage; and,
4. The name and place of residence of the witness, or of two witnesses, if more than one is present.

2 R. S., 140, § 10.

§ 48. The person solemnizing a marriage must enter the facts ascertained by him pursuant to the last section, and the date of the solemnization, in a book to be kept by him for that purpose.

2 R. S., 140, § 11.

§ 49. The person solemnizing a marriage must furnish to either party, on request, a certificate thereof, signed by him, specifying:

1. The names and places of residence of the parties married:
2. That they were known to him, or were satisfactorily proved, by the oath of a person known to him, to be the persons described in such certificate:
3. That he had ascertained that they were of sufficient age to contract marriage;
4. The name and place of residence of the attesting witness or of two witnesses;
5. The time and place of such marriage; and,
6. That, after due inquiry made, there appeared to be no lawful impediment to such marriage.

2 R. S., 140, § 13.

§ 50. The certificate mentioned in the last section may, within six months after the marriage, be filed with the clerk of the city or town where the marriage was solemnized, or where either of the parties reside, and when thus filed, must be entered in a book to be provided by the clerk, in the alphabetical order of the name of each party, and in the order of time in which it is filed.

§ 51. The entry required by the last section must specify:
1. The name and place of residence of each party;
2. The time and place of marriage;
3. The name and official station of the person signing the certificate; and,
4. The time when the certificate was filed.

§ 52. If a certificate of marriage is signed by a minister or priest, there must be indorsed or annexed, before filing, a certificate of a magistrate residing in the same county with the clerk, that the person by whom it is signed is personally known to such magistrate, and has acknowledged the execution of the certificate in his presence; or, that the execution of the certificate, by a minister or priest of some religious denomination, has been proved to the magistrate, by the oath of a person known to him, and who saw the certificate executed.

2 R. S., 141, §§ 14–16.

§ 53. A certificate of marriage, or the entry thereof, made as above directed, or a copy of the certificate or entry, duly certified, is presumptive evidence of the fact of the marriage.

2 R. S., 141, § 17.
CHAPTER II.

DIVORCE.

The provisions of this chapter have been modified from those of the Revised Statutes, with a view to produce conformity with the present procedure, and to establish the rule that in one action between husband and wife, in which a judgment of nullity or a dissolution of marriage or separation is sought, the whole controversy may be passed on and settled; and for this purpose to allow a defendant to interpose a demand for affirmative relief, asking a divorce or separation against the plaintiff, instead of requiring cross actions.

ARTICLE I. Nullity.

II. Dissolution.

III. Separation.

IV. General Provisions.

ARTICLE I.

NULLITY.

Section 54. Cases where marriages may be annulled.

55. Application for a decision of nullity.

56. Children of annulled marriage.

57. Custody of children.

58. Effect of judgment of nullity.

§ 54. A marriage may be annulled for any of the following causes, existing at the time of the marriage:

1. That the party seeking to have the marriage annulled was under the age of legal consent; unless, after attaining the age of consent, such party for any time freely cohabited with the other as husband or wife;

2. That the former husband or wife of either party was living, and the marriage with such former husband or wife was then in force;

3. That the wife was under the age of fourteen years, and that the marriage was without the cons-
sent of the person having the legal charge of her person, and was a punishable offense on the part of the husband, and has not been followed by cohabitation, nor ratified by any mutual assent of the parties since the wife attained the age of fourteen years;  

4. That either party was of unsound mind; unless such party, after coming to reason, freely cohabited with the other as husband or wife;  

5. That the consent of either party was obtained by fraud, unless such party afterwards, with full knowledge of the facts constituting the fraud, freely cohabited with the other as husband or wife;  

6. That the consent of either party was obtained by force, unless such party afterwards freely cohabited with the other as husband or wife; or,  

7. That either party was, at the time of marriage, physically incapable of entering into the married state; and such incapacity continues, and appears to be incurable.  

1 2 R. S., 142, § 20.  
2 Id.  
3 Id., § 21.  
4 Id., § 20.  
6 2 R. S., 142, § 20.  
7 Id., 143, § 27.  
8 Laws of 1862, ch. 246.  
9 2 R. S., 142, § 20.  
10 Id., 143, § 31.  
11 2 R. S., 142, § 20.  
12 New, but in accordance with the decisions in Devanbgh v. Devanbgh, 5 Paige, 554; 6 id., 175.  

§ 55. Within the time limited by law for the commencement of actions, application to annul a marriage may be made:  

1. If for the cause that a former husband or wife was living; by either party during the life of the other, or by such former husband or wife;  
2. If for the cause of idiocy; by any relative of
the idiot, interested to avoid the marriage, during the life of either party;

3. If for the cause of insanity other than idiocy; by any relative of the insane party interested to avoid the marriage, and at any time during such insanity, or after the death of the insane party in that condition, and during the life of the other party; or by the insane party after the restoration of reason;

4. If for the cause of fraud or force; by the injured party, or the parent or guardian of such party, or a relative of such party interested to avoid the marriage, during the life of either party;

5. If no application has been made by the party or a relative, application may be made in any of the foregoing cases, at any time during the life of both parties, by a guardian of the insane or injured party, appointed by the court for the purpose;

6. If for the cause of physical incapacity; application can only be made by the injured party against the incapacitated party, and in all cases must be made within two years from the time of contracting the marriage;

7. If for the cause specified in subdivision 3 of section 54, by the wife only.

2 R. S., 142, §§ 22, 24, 27, 30, 33.

2 R. S., 144, § 36, should be inserted in the Code of Civil Procedure.

The words "within the time limited by law" have been inserted in accordance with the construction put upon a similar provision (§ 30), in Montgomery v. Montgomery, 3 Dar. Ch., 132, where it was held that the intent of the reference to the lifetime of the parties, was to prohibit the annulling of the marriage after the death of the parties, but not to extend the limitation to any period within the lifetime of the other.

§ 56. Where a marriage is annulled on the ground that a former husband or wife was living, and it is adjudged that the subsequent marriage was contracted in good faith, and with the full belief of the parties

Children of annulled marriage.
that the former husband or wife was dead, or where a marriage is annulled on the ground of insanity, children begotten before the judgment must be specified in the judgment, and are entitled to succeed in the same manner as legitimate children to the estate of the parent, who, at the time of the marriage, was competent to contract.

2 R. S., 142, §§ 23, 28.

§ 57. The court must award the custody of the children of a marriage annulled on the ground of fraud or force, to the innocent parent, and may also provide for their education and maintenance out of the property of the guilty party.

2 R. S., 142, § 32.

§ 58. A judgment of nullity of marriage rendered during the life of the parties, is conclusive evidence of nullity; but if rendered after the death of either party to the marriage, it is conclusive only as against the parties to the action, and those claiming under them.

2 R. S., 144, § 37.

ARTICLE II.

DISSOLUTION.

SECTION 59. Marriage, how dissolved.

60. Divorce for adultery.

61. Cases in which divorce for adultery is denied.

62, 63. Legitimacy of issue.

64. When re-marriage is forbidden.

§ 59. Marriage is dissolved:

1. By the death or sentence to imprisonment for life of either of the parties; or

2. By the judgment of a competent tribunal.

§ 60. The dissolution of a marriage may be adjudged, whenever adultery has been committed by husband or wife, in any of the following cases:
OF THE STATE OF NEW YORK.

1. Where both husband and wife were actual inhabitants of this state at the time of the commis­sion of the adultery;

2. Where the marriage took place within this state;

3. Where the injured party, at the time of the com­mission of the adultery, and at the commence­ment of the action, was an actual inhabitant of this state;

4. Where the adultery was committed in this state, and the injured party, at the commencement of the action, was an actual inhabitant of this state.

2 R. S., 144, § 38; modified by substituting “took place” for “was contracted or solemnized,” and the word “inhabitant” for “resident,” wherever the latter occurs.

§ 61. Although the fact of adultery is established, a judgment of divorce may be denied:

1. Where the application for divorce was not made within five years after the discovery by the applicant of the adultery charged;

2. Where the adultery appears to have been com­mitted by the procurement, or with the connivance of the party asking the divorce;

3. Where the injured party has expressly forgiven the adultery charged, or has voluntarily cohabited with the guilty party as husband or wife, with full knowledge of the fact; and has ever since been treated by the latter party with conjugal kindness; or,

4. Where it appears that the applicant has also been guilty of adultery, without the procurement or connivance of the other party.

2 R. S., 145, § 42, subd. 1, 2.


* 2 R. S., 145, § 42, subd. 4.

* These words are substituted for “under such circum­stances as would have entitled the other party, if innocent, to a divorce,” in accordance with the opinion in Leseuer v. Leseuer, 31 Barb., 330; see Morrell v. Morrell, 3 id., 236, 241; doubting S. C., 1 id., 318.
§ 62. When a divorce is granted for the adultery of the husband, the legitimacy of children of the marriage, begotten of the wife before the commencement of the action, is not affected.

§ 63. When a divorce is granted for the adultery of the wife, the legitimacy of children begotten of her before the commission of the adultery is not affected; but the legitimacy of other children of the wife may be determined by the court, upon the evidence in the case. In every such case all children, begotten before the commencement of the action, are to be presumed legitimate until the contrary is shown.

2 R. S., 145, §§ 43, 44.

§ 64. When a divorce is granted for adultery, the innocent party may marry again during the life of the other; but the guilty party cannot marry any person except the innocent party, until the death of the other.

2 R. S., 146, § 49, modified by the exception. Several other provisions of the Revised Statutes, in respect to the effect of the judgment on the rights of property of the parties, are omitted as being superseded by other provisions of this Code.

Should the last clause be retained? After much discussion, it was abandoned in England. Its operation in this state is much less a punishment of the guilty than a trap for the innocent (See Cropsey v. Sweeney, 27 Barb., 310; 7 Abb. Pr., 129).

ARTICLE III.

SEPARATION.

SECTION 65. When separation may be adjudged.
66. Causes for separation.
67. When denied.
68. Relief may be adjudged in some cases where separation is denied.
69. Judgment of separation, when revoked.

§ 65. A separation of husband and wife from bed and board, for life or for a limited time, may be
adjudged for the causes mentioned in the next section:

1. When the husband and wife are both actual inhabitants of this state;

2. When the marriage took place within this state, and the applicant is an actual inhabitant at the time of the application; or,

3. When the marriage did not take place within this state, but the parties have since been actual inhabitants of this state for at least one year, and the applicant is an actual inhabitant at the time of the application.

1 2 R. S., 146, § 50. The restriction of this provision to applications by the wife for relief against the husband has been omitted. This is doubtless the just rule, and probably it does not change the existing law (Laws of 1824, ch. 205, § 12; Perry v. Perry, 2 Paige, 501; 2 Barb. Ch., 311).

2 The words “took place” are substituted for “contracted or solemnized,” for the reason that the latter words might be construed as including a marriage contracted and consummated out of the state, but celebrated publicly for the first time in this state.

3 The statute uses the word “resident” here, for which the commissioners substitute “inhabitant” for the sake of uniformity.

4 The present statute is a little ambiguous on this point. The commissioners have expressed more clearly what they suppose to be its actual meaning, as it stands. “Since been” substituted for “become and remained,” as more accurately expressing the meaning of the statute.

§ 66. A separation of husband and wife may be adjudged for any of the following causes:

1. Cruel treatment of one party by the other;

2. Conduct on the part of one towards the other, rendering cohabitation unsafe or improper; or,

3. Abandonment, accompanied by refusal to fulfill the obligations of husband or wife, as they are prescribed by the chapter on Husband and Wife.

1 Ahrenfeldt v. Ahrenfeldt, Hoffm., 47.

2 2 R. S., 147, § 51; see notes to the last section.
§ 67. Notwithstanding the existence of a cause for separation as declared in section 66, a judgment of separation may be denied, when it appears that the applicant has been guilty of a cause of divorce.

2 R. S., 147, § 53.

§ 68. Though judgment of separation be denied, the court may, in an action for divorce, provide for the maintenance of the wife and her children, or any of them by the husband, or out of his property.


§ 69. A judgment for separation, whether for life, or for a limited period, may be at any time revoked, under such regulations as the court may impose, upon the joint application of the parties, with satisfactory evidence of their reconciliation.

2 R. S., 147, § 56.

ARTICLE IV.

GENERAL PROVISIONS.

SECTION 70. Residence of wife.

71. Expense of action.

72. Orders respecting custody of children.

73. Support of wife and children on divorce or separation granted to wife.

74. Security for maintenance and alimony.

§ 70. A wife who resides in this state at the time of applying for a divorce, under article II or III, is to be deemed an actual inhabitant, though her husband resides elsewhere.

2 R. S., 147, § 57.

§ 71. While an action for divorce is pending, the court may, in its discretion, require the husband to pay any money necessary to enable the wife to sup-
port herself or her children, or to prosecute or defend

the action.

2 R. S., 148, § 58. This provision is extended to the
cases of actions to annul a marriage, in accordance
with the decision in North v. North, 1 Burr. Ch., 241;
and amended by inserting the words "or her children."

§ 72. In an action for divorce, the court may, before
or after judgment, give such direction for the custody,
care and education of the children of the marriage, as
may seem necessary or proper, and may at any time
vacate or modify the same.

2 R. S., 148, § 69.

§ 73. Where a divorce is granted for an offense of
the husband, the court may compel him to provide
for the maintenance of the children of the marriage,
and to make such suitable allowance to the wife, for
her support, during her life, or for a shorter period, as
the court may deem just, having regard to the cir-
cumstances of the parties respectively; and the court
may from time to time modify its orders in these

§ 74. The court may require the husband to give
reasonable security for providing maintenance, or
making any payments required under the provisions
of this chapter, and may enforce the same by the ap-
pointment of a receiver, or by any other remedy
applicable to the case.

2 R. S., 148, § 60. Modified to conform to the practice
under the Code of Procedure.
CHAPTER III.

HUSBAND AND WIFE.

The provisions of this chapter are intended to complete, so far as seems just and desirable, the removal of the disabilities of married women, and thus to simplify the law of this vexed subject.

Section 75. Mutual obligations of husband and wife.

76. Rights of husband as head of the family.
77. Duties of husband to wife as to support.
78. In other respects their interests separate.
79. Husband and wife may make contracts.
80. How far may impair their legal relation.
81. Consideration.
82. May be joint tenants, etc.
83. Neither answerable for the acts of the other.
84. Support of wife.
85. Abandonment of husband by the wife.

§ 75. Husband and wife contract towards each other obligations of mutual respect, fidelity and support.

§ 76. The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto.

§ 77. The husband must support himself and his wife out of his property or by his labor. If he is unable to do so, she must assist him so far as she is able.

§ 78. Except as mentioned in section 77, neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling.

§ 79. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the
actions of persons occupying confidential relations with each other, as defined by the Title on TRUSTS.¹

¹ This provision is new.
² See Jaques v. Methodist Ch., 17 Johns., 548; Fry v. Fry, 7 Paige, 461.

§ 80. A husband and wife cannot by any contract with each other alter their legal relation, except that they may agree to an immediate separation, and may make provision for the support of either of them and of their children during such separation.

Beach v. Beach, 2 Hill, 260; 1 Scharw. Black, 441, and nota.

§ 81. The mutual consent of the parties is a sufficient consideration for such an agreement as is mentioned in the last section.

A special consideration is now necessary to support such an agreement (Cropsey v. M'Kinney, 30 Barb., 47).

§ 82. A husband and wife may hold real or personal property together, jointly or in common.

The contrary was held under the Acts of 1848 and 1849 in Goelet v. Gori, 31 Barb., 314.

§ 83. Neither husband nor wife, as such, is answerable for the acts of the other.

This provision is new, but manifestly just, under the present state of the law.

§ 84. If the husband neglects¹ to make adequate provision for the support of his wife, any other person may, in good faith, supply her with articles necessary for her support, and recover the reasonable value thereof from the husband.³

¹ If the husband and wife separate by consent, and the husband, by agreement, secures to her a separate maintenance, suitable to their circumstances, he is not liable for anything furnished to her, so long as he performs such agreement (Calkins v. Long, 22 Barb., 97, and cases there cited).
² Cromwell v. Benjamin, 41 Barb., 558. This obligation is not founded merely upon a supposed agency of the wife (Road v. Legard, 6 Exch., 636: see Sykes v. Haistoad, 1 Sandf., 483).
§ 85. If the wife abandons the husband, he is not liable for her support until she offers to return, unless she was justified, by his misconduct, in abandoning him.

1 Blowers v. Sturtevant, 4 Denio, 46, and cases there cited.
2 McGalay v. Williams, 12 Johns., 293.

CHAPTER I.

CHILDREN BY BIRTH.

SECTION 86. Legitimacy of children born in wedlock.
87. Legitimacy of children born out of wedlock.
88. Who may dispute the legitimacy of a child.
89. Obligation of parents for the support and education of their children.
90. Custody of legitimate child.
91. Custody of an illegitimate child.
92. Allowance to parent.
93. Parent cannot control the property of child.
94. Remedy for parental abuse.
95. When parental authority ceases.
96. Remedy when a parent dies without providing for the support of his child.
97. Reciprocal duties of parents and children in maintaining each other.
98. When a parent is liable for necessaries supplied to a child.
99. When a parent is not liable for support furnished his child.
100. Husband not bound for the support of his wife's children by a former marriage.
101. Compensation and support of adult child.
102. Parent may relinquish services and custody of child.
§ 86. All children born in wedlock are presumed to be legitimate.

Casjolle v. Ferrie, 23 N. Y., 129.

§ 87. All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate. But if during such period she marries again, and afterwards has a child, it is presumed to be her legitimate offspring by the second husband.

§ 88. The presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact.

§ 89. The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability.

1 At present the mother is released from this obligation, if indeed it exists at common law (see Raymond v. Loyl, 10 Barb., 483; Fray v. Gorham, 31 Ala., 241; Tilton v. Russell, 11 Ala., 497; Com. v. Murray, 4 Blinn., 487), by marrying again (Williams v. Hutchinson, 5 Barb., 122; Wilkes v. Rogers, 6 Johns., 576, 578, 593). This exception is inconsistent with the control now given to the wife over her own property.

§ 90. The father of a legitimate unmarried minor is entitled to its custody, services and earnings, but he cannot transfer such custody or services to any other person, except the mother, without her written consent, if she is living and capable of consent. If the father is dead, or is unable, or refuses to take the
same, or has abandoned his family, the mother is entitled thereto.  

1 Cartlidge v. Cartlidge, 2 Stowell & Tristram, 567; People v. Humphrey, 24 Barb., 321.

2 Emery v. Kempton, 2 Gray, 251.


4 Regina v. Clarke, 1 Ell. & El., 186; People v. Bolce, 39 Barb., 307.

5 At present the mother's right of guardianship is terminated by her remarriage, or by the child's attaining the age of fourteen (Williams v. Hutchinson, 5 Barb., 122; 3 N. Y., 321; Fretto v. Brown, 4 Mass., 675; Worcester v. Marchant, 14 Pick., 512). This distinction is incompatible with the spirit of the statutes of 1848, 1860, and 1862, which have to a great extent released married women from the control of their husbands.

§ 91. The mother of an illegitimate unmarried minor is entitled to its custody, services and earnings.

§ 92. The supreme court may direct an allowance to be made to the parent of a child, out of its property, for its past or future support and education, on such conditions as may be proper, whenever such direction is for its benefit.

1 Matter of Rostwick, 4 Johns. Ch., 160; Matter of Kane, 2 Barb. Ch., 375.

2 Maberly v. Turton, 14 Ves., 469; Simon v. Barber, 1 Term., 22.

3 Wilkes v. Rogers, 6 Johns., 577, 578.

4 Matter of Burke, 4 Sanford, Ch., 611.

§ 93. The parent, as such, has no control over the property of the child.


§ 94. The abuse of parental authority is the subject of judicial cognizance in a civil action brought by the child, or by its relative within the third degree, or by the supervisor of the town where the child resides; and when the abuse is established, the child may be freed from the dominion of the parent, the parent
punished, and the duty of support and education enforced.

This provision is in part new.

§ 95. The authority of a parent ceases:

1. Upon the appointment by a court of a guardian of the person of the child;
2. Upon the marriage of the child; or,
3. Upon its attaining majority.

§ 96. If a parent chargeable with the support of a child dies, leaving it chargeable to the town, and leaving an estate sufficient for its support, the supervisor of the town may claim provision for its support from the parent’s estate by civil action, and for this purpose may have the same remedies as any creditor against that estate, and against the heirs, devisees and next of kin of the parent.

§ 97. It is the duty of the father, the mother, and the children, of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished to such parent is binding.

The provisions of the Poor Laws declare the duty of parents and children to support each other (1 R. S., 614, § 1); but it is held that the obligation on the part of children is purely statutory, and no other remedy exists except that provided by proceedings under those laws (Edwards v. Davis, 16 Johns., 281). It is the object of this section to recognize the obligation as a ground of legal liability independent of those provisions. On the part of parents, the obligation is not now merely statutory (Cromwell v. Benjamin, 41 Barb., 558). But in England it has been so held (Shelton v. Springett, 11 C. B., 452; Mortimore v. Wright, 6 M. & W., 488).

§ 98. If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith
supply such necessaries, and recover the reasonable value thereof from the parent.

When a parent is not liable for support furnished his child.

§ 99. A parent is not bound to compensate the other parent or a relative for the voluntary support of his child without an agreement for compensation, nor to compensate a stranger for the support of a child who has abandoned the parent without just cause.

§ 100. A husband is not bound to maintain his wife's children by a former husband, but if he receives them into his family and supports them, it is presumed that he does so as a parent, and where such is the case, they are not liable to him for their support, nor he to them for their services.

§ 101. Where a child, after attaining majority, continues to serve and to be supported by the parent, neither party is entitled to compensation, in the absence of an agreement therefor.

§ 102. The parent, whether solvent or insolvent, may relinquish to the child the right of controlling him and receiving his earnings. Abandonment by
the parent is presumptive evidence of such relinquishment.\(^3\)

\(^{1}\) McCloskey v. Cyphert, 27 Penn. St., 220.
\(^{2}\) McCoy v. Huffman, 3 Cow., 34; Burlingame v. Burlingame, 7 id., 92; Whiting v. Earle, 3 Pick., 201; Morse v. Welton, 6 Conn., 547; Varney v. Young, 11 Vnn., 252.


§ 103. The wages of a minor employed in service may be paid to him, unless, within thirty days after the commencement of the service, the parent or guardian entitled thereto gives the employer notice that he claims such wages.


§ 104. A parent entitled to the custody of a child has a right to change his residence, subject to the power of the supreme court to restrain a removal which would prejudice the rights or welfare of the child.

\(^5\) Wood v. Wood, 5 Paige, 596.

§ 105. Neither parent nor child is answerable, as such, for the acts of the other.

\(^6\) Tift v. Tift, 4 Dem., 175.

§ 106. When a husband and wife live in a state of separation, without being divorced, any court or officer of competent jurisdiction, upon application of the wife, if she is an inhabitant of this state, may grant the proper writ to inquire into the custody of any minor unmarried child of the marriage, and may award the custody of the child to either party for such time, and under such regulations, as the case may require. The decision of the tribunal is to be guided by the rules prescribed in section 127.

\(^7\) 2 R. S., 149, §§ 1-6.
CHAPTER II.
ADOPTION.

The provisions of this chapter are new.

Section 107. Child may be adopted.
108. Who may adopt.
109. Consent of wife necessary.
110. Consent of child’s parents.
111. Consent of child.
112. Proceedings on adoption.
113. Judge’s order.
114. Effect of adoption.
115. Effect on former relations of child.
116. Adoption of illegitimate child.

§ 107. Any minor child may be adopted by any adult person, in the cases, and subject to the rules, prescribed in this chapter.

The total absence of any provision for the adoption of children is one of the most remarkable defects of our law. Thousands of children are actually, though not legally, adopted every year; yet there is no method by which the adopting parents can secure the children to themselves, except by a fictitious apprenticeship, a form which, when applied to children in the cradle, becomes absurd and repulsive. It is, indeed, so inappropriate in every case, that it is rarely resorted to. The consequence is, almost invariably, that if the natural parents of the child live to see it grow to an age of usefulness and intelligence, they are certain to attempt to reclaim it, sometimes through the mere selfishness of natural affection, but more commonly from base and sordid motives. The chances of an adopting parent for the retention of the child upon which, perhaps, his whole heart is centered, are therefore in the inverse ratio to the degree of his benevolence in its selection, and of his care and affection in its training. Benevolence dictates a choice from among children whose parents are least able or willing to take care of them. To relieve a child from a cruel and heartless parent is a greater mercy than to take even an orphan. Yet these are the parents who are, of all others, most likely to reclaim the child as soon as any money can be made out of it. Affection will give the child such a training as will develop its beauty and intelligence to the
highest degree. Yet every grace of the child is but a premium upon the extortion of its heartless parents. This is not mere theory. Facts within the knowledge of almost every one justify these statements. There are very many childless parents who would gladly adopt children, but for their well founded fears that they could never hold them securely.

§ 108. The person adopting a child must be at least twenty years older than the person adopted, and must have been married, and if a woman, must be a widow, or be lawfully divorced from her husband, without her fault.

§ 109. A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife.

§ 110. A legitimate child cannot be adopted without the consent of its parents, if living, nor an illegitimate child without the consent of its mother, if living, except that consent is not necessary from a father or mother deprived of civil rights, or adjudged guilty of adultery, or of cruelty, and for either cause divorced, or adjudged to be an habitual drunkard, or who has been judicially deprived of the custody of the child, on account of cruelty or neglect.

§ 111. The consent of a child, if over the age of twelve years, is necessary to its adoption.

The age of twelve is fixed upon, as being the period at which the marriage of a female child is allowed.

§ 112. The person adopting a child, and the child adopted, and the other persons whose consent is necessary, must appear before the county judge of the county where the person adopting resides, and the necessary consent must thereupon be signed, and an agreement be executed by the person adopting, to the effect that the child shall be adopted, and treated in all respects as his own lawful child should be treated.

§ 113. The judge must examine all persons appearing before him pursuant to the last section, each
§ 114. A child, when adopted, takes the name of the person adopting, and the two thenceforth sustain towards each other the legal relation of parent and child, and have all the rights, and are subject to all the duties, of that relation.

§ 115. The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards and of all responsibility for the child so adopted, and have no right over it.

§ 116. The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption.

This provision, like the rest, is new, but is so manifestly just, and the present state of the law is so unmerciful to innocent children, that it is presumed that no objection will be made to the change. The seducer can make reparation to the mother of his child, though she is more or less culpable, but can at present make absolutely none to the child, though perfectly innocent. By the law of France, and of almost every European nation, and in this country, by the law of Maine, Vermont, Massachusetts, Connecticut, Ohio, Illinois, Indiana, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky and Missouri, a child is legitimated by the marriage of its parents after its birth.

Privacy is an indispensable element of such an adoption. To compel the father to appear before a judge, or in any way to place the matter upon record, would brand the child with the very stigma from which a repentant father would desire to save it.
TITLE III

GUARDIAN AND WARD.

Under this head are placed not only the provisions of law relating to the guardianship of minors, but also those relating to the custody and care of persons of unsound mind. The "committee" of a lunatic is here termed a "guardian."

118. Ward, what.
119. Kinds of guardians.
120. General guardian, what.
121. Special guardian, what.
122. Appointment by parent.
123. No person guardian of estate without appointment.
124, 125. Appointment by court.
126. Jurisdiction.
127. Rules for awarding custody of minor.
128. Powers of guardian appointed by court.
129. Duties of guardian of the person.
130. Duties of guardian of estate.
131. Relation confidential.
132. Guardian under direction of court.
133. Death of a joint guardian.
134. Removal of guardian.
135. Guardian appointed by parent, how superseded.
136. Guardian appointed by court, how superseded.
137. Release by ward.
139. Insane persons.

§ 117. A guardian is a person appointed to take care of the person or property of another.

§ 118. The person over whom, or over whose property, a guardian is appointed, is called his ward.

§ 119. Guardians are either:
1. General; or,
2. Special.

§ 120. A general guardian is a guardian of the person, or of all the property of the ward within this state, or of both.
§ 121. Every other is a special guardian.

§ 122. A guardian of the person of a child born, or likely to be born, may be appointed, by will, or by deed, to take effect upon the death of the parent appointing:

1. If the child is legitimate, by the father, with the written consent of the mother; or by either parent, if the other is dead, or incapable of consent;

2. If the child is illegitimate, by the mother.

§ 123. No person, whether a parent or otherwise, has any power as guardian of property, except by appointment as hereinafter provided.

By the existing law (1 Rev. Stat. 718, § 5), if any infant has real property, the father or mother, or if he has none, the nearest and eldest relative, males being preferred to females of the same degree, is declared guardian of the child, and of the real property.

When a parent dies in possession of real property leaving an infant heir thereof, and his guardian by nature enters thereon, the entry is presumed to be as guardian, unless accompanied by acts or declarations inconsistent with such character (Byrne v. Van Hoezen, 5 Johns., 66; Jackson v. DeWalls, 7 id., 167; Putnam v. Ritchie, 6 Paige, 330; Beecher v. Crouse, 19 Wend., 306).

§ 124. A guardian of the person or property, or both, of a person residing in this state, who is a minor, or of unsound mind, may be appointed in all cases by the supreme court, when there is no such guardian, and by a surrogate in the cases provided in the Code of Civil Procedure.

§ 125. A guardian of the property within this state of a person not residing therein, who is a minor, or of unsound mind, may be appointed by the supreme court.

§ 126. In all cases, the court first making the appointment of a guardian has exclusive jurisdiction.
to appoint and control him, except in case of a removal pursuant to section 134.

§ 127. In awarding the custody of a minor, or in appointing a general guardian, the court or officer is to be guided by the following considerations:

1. By what appears to be for the best interest of the child, in respect to its temporal and its mental and moral welfare; and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question;

2. As between parents adversely claiming the custody or guardianship, neither parent is entitled to it as of right, but, other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor or business, then to the father;

3. Of two persons equally eligible in other respects, preference is to be given, as follows:

   (1.) To a relative;
   (2.) To one who was indicated by the wishes of a deceased parent;
   (3.) To one who already stands in the position of a trustee of a fund to be applied to the child's support.

§ 128. A guardian appointed by a court has power over the person and property of the ward, unless otherwise ordered.

§ 129. A guardian of the person is charged with the custody of the ward, and must look to his support, health and education. He may fix the residence

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2 Morehouse v. Cooke, Hopk., 226.
3 Underhill v. Dennis, 9 Paiga, 262; Re Pierce, 12 How. Pr., 532. But such wishes are not conclusively binding (Foster v. Mott, supra; Cozine v. Horn, 1 Bradf., 143).
4 Bennett v. Byrne, 2 Barb. Ch., 216.
of the ward at any place within the state, but not elsewhere, without permission of the court.

Ex parte Bartlett, 4 Bradf., 221; Clarke v. Montgomery, 23 Barb., 464.

§ 130. A guardian of the property must keep safely the property of his ward. He must not suffer any sale, waste or destruction of the real property, but must maintain the inheritance, its buildings and appurtenances, out of the moneys of the estate, and deliver the same to the ward at the close of his guardianship, in as good condition as he received them, inevitable decay and injury only excepted.


§ 131. The relation of guardian and ward is confidential, and is subject to the provisions of the Title on TRUST.

§ 132. In the management and disposition of the person or property committed to him, a guardian may be regulated and controlled by the court.

This section is new. It is intended to qualify the common law rules which empower him to dispose of personality in his discretion, and of the realty during the term of his guardianship.

§ 133. On the death of one of two or more joint guardians, the power continues to the survivor, until a further appointment is made by the court.

People v. Byron, 3 Johns. Cas., 53.

§ 134. A guardian may be removed by the supreme court for any of the following causes:

1. For abuse of his trust;
2. For continued failure to perform its duties;
3. For incapacity to perform its duties;
4. For gross immorality;
5. For having an interest adverse to the faithful performance of his duties;
6. For removal from the state;
7. In the case of a guardian of the property, for insolvency; or,
8. When it is no longer proper that the ward should be under guardianship.

§ 135. The power of a guardian appointed by a parent is superseded:
1. By his removal, as provided by section 134;
2. In the case of a female ward, by her marriage; or,
3. By the ward's attaining majority.

* By the existing law, this rule extends only to the case in which the ward is a female (Brick's estate, 16 Abb. Pr., 13; People v. Kearney, 31 Barb., 430).

At present, the powers of a female guardian cease with her marriage (Corrigan v. Kiernan, 1 Bradf., 208); but the provisions of the Code in relation to husband and wife remove the reason of the rule.

§ 136. The power of a guardian appointed by a court is superseded only:
1. By the order of the court; or,
2. If the appointment was made solely because of the ward's minority, by his attaining majority.

* It has been held that a guardian of the children of a convict, appointed during his civil death, is superseded by his pardon (Matter of Deming, 10 Johns., 232, 483), and that a guardian improvidently appointed by the court, is superseded by the production of an appointment by the father (People v. Kearney, 31 Barb., 430), but it seems proper that the guardian should be superseded only by order of the court.

* See 2 R. S., 161, § 10.

§ 137. After a ward has come to his majority, he may settle accounts with his guardian, and give him a release, which is valid if obtained fairly and without undue influence.


§ 138. A guardian appointed by a court is not entitled to his discharge until one year after the ward's majority.


§ 139. A person of unsound mind may be placed in an asylum for such persons, upon the order of the county judge of the county in which he resides, as follows:

1. The judge must be satisfied, by the oath of two reputable physicians, that such person is of unsound mind, and unfit to be at large;

2. Before granting the order, the judge must examine the person himself, or if that is impracticable, cause him to be examined by an impartial person;

3. After the order is granted, the person alleged to be of unsound mind, his or her husband or wife, or relative to the third degree, may demand an investigation before a jury, which must be conducted in all respects as under an inquisition of lunacy.

This section, which is new, is designed to remedy the present loose and dangerous state of the law which allows a commitment for lunacy without judicial intervention.

TITLE IV.

MASTER AND SERVANT.

SECTION 140. Who may bind themselves as apprentices.
141. Who to consent to such binding.
142. Parent or guardian, when liable for breach of indenture.
143. Pauper children may be bound to service.
144. Special provision as to Indian children.
145. Age of infants to be inserted in indentures.
146. Pecuniary consideration to be inserted.
147. Special agreement to be inserted in certain cases.
148. Certain indentures, where to be filed.
149, 150. Indentures by foreigners, being minors.
151. How assigned.
152. Indentures, when invalid.
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153. County superintendents and overseers to be guardians of servants.

154. Penalty on apprentices absenting themselves from service.

155. No servant or apprentice bound by any restriction as to time and place where he shall work when free.

156, 157. When the executor or administrator of a deceased master may assign a contract of service.

158. Assignment by court.

§ 140. Male minors, and unmarried females under the age of eighteen years, with the consent of the persons or officers hereinafter mentioned, may bind themselves, by a writing called an indenture, as fully as if they were of age, to serve as clerks, apprentices or servants in a particular calling, until majority (except in the case of females, who cannot bind themselves further than until the age of eighteen), or for any shorter time.

2 R. S., 154, § 1.

§ 141. Consent to an indenture of apprenticeship must be given by a certificate at the end thereof, or indorsed thereon, signed:

1. By the father and mother of the apprentice;

2. If the father lacks capacity to consent, or has abandoned or neglected to provide for the family, or is dead, and no testamentary guardian or executor has been appointed by him, with power under the will to bring up the child to a calling, and a certificate of such fact is indorsed on the indenture by a justice of the peace of the town, then by the mother;

3. If the father is dead, and such guardian or executor has been appointed by him, then by such guardian or executor;

4. If the mother is dead, or lacks capacity to consent, then by the father;

5. If there is no parent of capacity to consent, and no such executor, then by the guardian; or,

6. If there is no such parent, executor or guardian, then by the officers of the poor of the town or county,
or by any two justices of the peace of the town, or by the county judge.


§ 142. A parent, executor or guardian, consenting to an indenture, is not liable for a breach thereof by the apprentice, unless the indenture or consent expresses an intention to bind him therefor.


§ 143. Any child who is chargeable, or whose parents are chargeable, to a county, town, or city poor house, or who is in such poor house, may be bound to service until attaining twenty-one years, or if a female, until attaining eighteen years, by the officers of the poor of such county, town or city, as effectually as by the child himself with the parents' consent; but such binding, by the officers of a town or city, must be with the consent, in writing, of two justices of the peace of the town, or of the mayor, recorder and aldermen of the city, or any two of them.

2 R. S., 155, § 6.

§ 144. No child of an Indian woman can be bound, under this Title, except in the presence, and with the consent of a justice of the peace; and his certificate of consent must be filed with the clerk of the town where the indenture is executed.

2 R. S., 155, § 7.

§ 145. In every indenture of apprenticeship the age of the apprentice must be stated, and such statement is presumptive evidence thereof; and before an officer executes an indenture, or consents thereto, he must inform himself of the age of the apprentice.

2 R. S., 155, § 8. The statement of the age in the indenture may be contradicted by proof (Drew v. Peckwell, 1 E. D. Smith, 408; Banks v. Metcalfe, 1 Wheel. Cr. Cas., 381; Matter of Brennan, 1 Sandf., 711).
§ 146. If there is any pecuniary consideration for an indenture of apprenticeship on either part, it must be stated therein.

2 R. S., 155, § 9.

§ 147. The indenture of an apprentice, executed by officers of the poor, must bind the master to cause him to be taught reading, writing, and the general rules of arithmetic, and to give him a new bible at the expiration of his term of service.

2 R. S., 155, § 10; slightly modified.

§ 148. Every officer executing an indenture of apprenticeship must file a counterpart thereof with the clerk of the county, town or city of which he is an officer.

2 R. S., 155, § 11.

§ 149. An immigrant minor may bind himself to service, until he attains majority, or for a shorter term, in such manner as may be prescribed by the law of the country in which the contract is made. If the indenture is made for the purpose of enabling him to pay his passage to this country, it may be for the term of one year, although such term extends beyond his majority; but in no case for a longer term.

§ 150. Every indenture under section 149 must be acknowledged by the minor on a private examination before a mayor, recorder, or alderman of a city, or a justice of the peace, and a certificate of the acknowledgment must be indorsed upon the indenture.

2 R. S., 156, §§ 12, 13.

§ 151. The master, under an indenture specified in section 149, may assign it, by writing indorsed thereon, and with the approval, also indorsed, of a magistrate mentioned in section 150.

2 R. S., 166, § 14. The requirement of two witnesses to this assignment has been omitted. The commissioners regard such provisions as founded upon a state of society and of the law, which no longer exists.
§ 152. No indenture or contract for the service of an apprentice is binding upon him, unless made as hereinbefore prescribed.

2 R. S., 158, § 26.

§ 153. The county superintendents of the poor, and the overseers of the poor of cities and towns, must see that every apprentice or other servant in their respective counties, cities or towns, is properly treated, and that the terms of the contract are fulfilled in his favor; and it is their duty to redress any grievance of such persons in the manner prescribed by law.

2 R. S., 158, § 27.

§ 154. If an apprentice, for whose instruction the master receives no pecuniary compensation, willfully absents himself from service without leave, he may be compelled to serve double the time of such absence, unless he makes satisfaction for the injury; but such additional term of service cannot extend more than three years beyond the original term.

2 R. S., 158, § 28.

§ 155. No person may accept from an apprentice or servant, an agreement, oath or promise not to exercise his vocation in any particular place; nor may any person exact from an apprentice or servant, any consideration for exercising his vocation in any place after his term of service has expired.

§ 156. Any consideration exacted contrary to the last section, may be recovered back with interest, and every person accepting such agreement or exacting such consideration, is liable to the apprentice or servant in a penalty of one hundred dollars.


§ 157. The executors or administrators of the master of any apprentice bound by officers of the poor, may assign the indenture, with the written consent
of the apprentice, acknowledged before a justice of the peace.

2 R.S., 160, § 41.

§ 158. If an apprentice refuses consent to an assignment under the last section, the court of sessions may authorize such assignment without his consent, upon application after fourteen days' notice to the apprentice, or to his parents or guardian, if he has any in the county.

2 R.S., 160, § 42.
DIVISION SECOND.

PROPERTY.

PART I. Property in General.
II. Real, or Immovable Property.
III. Personal, or Movable Property.
IV. Acquisition of Property.

The following memorandum will show where the provisions of the Revised Statutes relating to property are inserted in this Division.

Sections 1, 3, and 4 of article I of Part II of the Revised Statutes, have been, in substance, embodied in the Constitution, and are therefore omitted here. Section 2 is embodied in the title on Succession. Sections 5–7 are superseded by Title IV of Part III of Division I.

The provisions of article II of the same statute, entitled "Of the persons capable of holding and conveying land," are thus disposed of; — section 8 is extended to the case of all persons, and the provisions of the subsequent sections, and other statutes, extending the right of aliens, are omitted. This is in accordance with the recommendation of the governor, in his message of January, 1862.

The capacity of Indians is fixed by section 26 of Part I of Division I, on Persons, and reference to them is omitted in this part of the Code. Section 9 (like other saving clauses elsewhere) is omitted as being sufficiently provided for by the general clause of the provision at the end of the Code, saving vested rights; and section 10 is omitted as provided for in Part I on Persons.
Article I of title II of the same part of the Revised Statutes, entitled "Of the Creation and Division of Estates," is embodied partly in Title II of Part I of this division, and partly in Title II of Part II.

Article II of that title, entitled "Of Uses and Trusts," is embodied in Title IV of Part II.

Article III, entitled "Of Powers," is embodied in Title V of the same.

Article IV, "Of Alienation by Deed," is embodied in the Title on Transfers.

Title III (p. 740) "Of Dower," is omitted, it being proposed to abolish Dower and Curtesy.

The provisions of Title IV (p. 744) are inserted in title III of part II, except sections 1, 2 and 3, which are in the chapter on The Hiring of Real Property, and sections 4–6, and 26, which are to be inserted in the Code of Civil Procedure.

The provisions of title V (p. 748) are disposed as follows: Section 1 is inserted in the chapter on Transfers, and on Wills.

Section 2 is stated in the Division relating to Obligations, as a general principle of interpretation.

Section 3, with important modifications, is embodied in the Title on Succession.

Sections 4 and 5 are inserted in the Title on Mortgage.

Section 6 is embodied in the Code of Civil Procedure, as reported complete, p. 750.

Sections 7–9, are embodied in title III of part II.

Chapter II (p. 751), of Descent, is superseded by the chapter on Succession.

Chapter III (p. 756) is embodied in the article on Recording Transfers.
PART I.

PROPERTY IN GENERAL.

TITLE I. Nature of Property.
II. Ownership.
III. General Definitions.

TITLE I.

NATURE OF PROPERTY.

SECTION 159. Property, what.
159. In what property may exist.
160. Wild animals.
161. Real and personal.
162. Real property.
163. Land.
164. Fixtures.
165. Appurtenances.
166. Personal property.

§ 159. The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing, of which there may be ownership, is called property.

§ 160. There may be ownership of all inanimate things which are capable of appropriation, or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill, as the composition of an author, the good will of a business, trade-marks and signs, and of rights created or granted by statute.

§ 161. Animals wild by nature are the subjects of ownership while living, only when on the land of the
person claiming them, or when tamed, or taken and held in possession, or disabled and immediately pursued.

§ 162. Property is either:
1. Real or immovable; or,
2. Personal or movable;

§ 163. Real or immovable property consists of:
1. Land;
2. That which is affixed to land; and,
3. That which is incidental or appurtenant to land.

§ 164. Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.

§ 165. A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of nails, bolts or screws.

§ 166. A thing is deemed to be incidental or appurtenant to land, when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air or heat from or across the land of another.

§ 167. Every kind of property that is not real is personal.
TITLE II.

OWNERSHIP.

CHAPTER I. Owners.

II. Modifications of ownership.
III. Rights of owners.
IV. Termination of ownership.

CHAPTER I.

OWNERS.

SECTION 168. Owner.

169. Property of the state.

170. Who may own property.

§ 168. All property has an owner, whether that owner is the state, and the property public, or the owner an individual, and the property private. The state may also hold property as a private proprietor.

§ 169. The state is the owner of all land, below high water mark, bordering upon tide water; of all land below the water of a lake or stream which constitutes an exterior boundary of the state; of all property lawfully appropriated by it to its own use; of all property dedicated to the state, and of all property of which there is no other owner.

The ultimate right of the state to all other property is declared by chapter II of title II of part III of the Political Code (§§ 249, 250).

§ 170. Any person, whether citizen or alien, may take and hold property, real or personal. Who may own property.

CHAPTER II.

MODIFICATIONS OF OWNERSHIP.

ARTICLE I. Interests in property.

II. Conditions of ownership.
III. Restraints upon alienation.
IV. Accumulations.

ARTICLE I.

INTERESTS IN PROPERTY.

SECTION 171. Ownership, absolute or qualified.
172. When absolute.
173. When qualified.
174. Several ownership, what.
175. Ownership of several persons.
176. Joint interest, what.
177. Partnership interest, what.
178. Interest in common, what.
179. What interests are in common.
180. Interests as to time.
181. Present interest, what.
182. Future interest, what.
183. Perpetual interest, what.
184. Limited interest, what.
186. Vested interests.
187. Contingent interests.
188. Two or more future interests.
189. Certain future interests not to be void.
190. Posthumous children.
191, 192. Qualities of expectant estates.
193, 194. Interests in real property.
195. What future interests are recognized.

§ 171. The ownership of property is either:
1. Absolute; or,
2. Qualified.

§ 172. The ownership of property is absolute, when a single person has the absolute dominion over it,
and may use it or dispose of it according to his
pleasure, subject only to general laws.

Thus the use of gunpowder is restricted by general laws,
but its ownership may nevertheless be justly called
absolute.

§ 173. The ownership of property is qualified:

1. When it is shared with one or more persons;
2. When the time of enjoyment is deferred or
limited; or,
3. When the use is restricted.

§ 174. The ownership of property by a single per-
son is designated as a sole or several ownership.

§ 175. The ownership of property by several per-
sions is either:

1. Of joint interests;
2. Of partnership interests; or,
3. Of interests in common.

§ 176. A joint interest is one owned by several
persons in equal shares, by a title created by a single
will or transfer which confers a right of survivorship.

This provision is intended to confine the right of sur-
vivorship to cases in which its creation was clearly in-
tended.

§ 177. A partnership interest is one owned by
several persons, in partnership, for partnership pur-
poses.

Collumb v. Read, 24 N. Y., 509; Buchan v. Sumner, 2
Barb. Ch., 165; extending the doctrine of Phillips v.
Phillips, 1 Myl. & K., 649; Broom v. Broom, 3 id., 443.

§ 178. An interest in common is one owned by
several persons, not in joint ownership or partnership.

These last five sections are substituted for 1 R. S., 726,
§ 43.

§ 179. Every interest created in favor of several
persons in their own right, including husband and
wife, is an interest in common, unless acquired by

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them in partnership, for partnership purposes, or unless declared in its creation, expressly or by necessary implication, to be a joint interest, with a right of survivorship.

This is contrary to the present law (Wright v. Saddler, 20 N.Y., 320, 323; Torrey v. Torrey, 14 id., 410), but seems necessary to make the rule consistent with the provisions of the Code relative to married women.

1 R.S., 727, § 44.

§ 180. In respect to the time of enjoyment, an interest in property is either:

1. Present or future; and,

2. Perpetual or limited.


§ 181. A present interest entitles the owner to the immediate possession of the property.

1 R.S., 723, § 8.

§ 182. A future interest entitles the owner to the possession of the property only at a future period.

This definition corresponds to that of "expectant estates" in 1 R.S., 723, § 9. A future interest is there distinguished from a reversion. This distinction is not, however, logical. A reversion is as truly a future estate as a remainder.

§ 183. A perpetual interest has a duration equal to that of the property.

§ 184. A limited interest has a duration less than that of the property.
§ 185. A future interest is either:
1. Vested; or,
2. Contingent.

From 1 R. S., 723, § 13, as to real property. The same language is used in regard to personal property (Phelps' ex'r v. Pond, 23 N. Y., 69).

§ 186. A future interest is vested, when there is a person in being, who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest.

1 R. S., 723, § 13.
1 The words "defeasible or indefeasible" are inserted to answer the objection that a future interest might be vested, and also contingent, within the meaning of these definitions of the Revised Statutes (Coster v. Lorillard, 14 Wend., 302); e.g., aremainder to descendants in being subject to open and let in after-born descendants. Such remainders have always been held to be vested (Powars v. Bergen, 6 N. Y., 360; Root v. Stuyvesant, 18 Wend., 268; Dubois v. Ray, 7 Bow., 287; Williamson v. Field, 2 Sandf. Ch., 533).

§ 187. A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect, remains uncertain.

1 R. S., 723, § 13.

§ 188. Two or more future interests may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.

1 R. S., 724, § 25; Loddington v. Kime, 1 Ld. Raym., 203; 2 Smith's Fearn, 43.

§ 189. A future interest is not void merely because of the improbability of the contingency on which it is limited to take effect.

1 R. S., 724, § 26.

§ 190. When a future interest is limited to successors, heirs, issue or children, posthumous children are
entitled to take, in the same manner as if living at the death of their parent.


§ 191. Future interests pass by succession,¹ will,² and transfer,³ in the same manner as present interests.

1 R. S., 725, § 35.
1 Wood v. Keyes, 8 Paige, 355, 368; Wendell v. Crandall, 1 N. Y., 491.
³ Lawrence v. Bayard, 7 Paige, 70, 78; Grout v. Townsend, 2 Hill, 554, 557.

More possibility.

§ 192. A mere possibility, such as the expectancy of an heir-apparent, is not to be deemed an interest of any kind.


Interests in real property.

§ 193. In respect to real or immovable property, the interests mentioned in this chapter are denominated estates, and are specially named and classified in Part II of this Division.

It has been deemed unadvisable to apply the technical names of estates in real property to interests in personal property, although precedents for such a course are not wanting.

§ 194. The names and classification of interests in real property have only such application to interests in personal property as is in this Division of the Code expressly provided.

§ 195. No future interest in property is recognized by the law, except such as is defined in this Division of the Code.

Substantially the same as 1 R. S., 726, § 42.


OF THE STATE OF NEW YORK.

ARTICLE II.

CONDITIONS OF OWNERSHIP.

SECTION 196. Fixing the time of enjoyment.
197. Conditions.
198. Certain conditions precedent, void.
199. Conditions restraining marriage, void.
200. Conditions restraining alienation, void.

§ 196. The time when the enjoyment of property is to begin or end may be determined by computation, or be made to depend on events. In the latter case, the enjoyment is said to be upon condition.

§ 197. Conditions are precedent or subsequent. The former fix the beginning, the latter the ending of the right.

§ 198. If a condition precedent requires the performance of an act wrong of itself, the instrument containing it is so far void, and the right cannot exist. If it requires the performance of an act not wrong of itself, but otherwise unlawful, the instrument takes effect, and the condition is void.

§ 199. Conditions imposing restraints upon marriage, except upon the marriage of a minor, or of the widow of the person by whom the condition is imposed, are void; but this does not affect limitations where the intent was, not to forbid marriage, but only to give the use until marriage.

§ 200. Conditions restraining alienation, when repugnant to the interest created, are void.

De Poyer v. Michael, 6 N. Y., 496.
ARTICLE III.

RESTRAINTS UPON ALIENATION.

SECTION 201. How long it may be suspended.
202. Future interests void, which suspend power of alienation.
203. Restriction on qualification of enjoyment.

§ 201. The absolute power of alienation cannot be suspended by any limitation or condition whatever,1 for a longer period than during the continuance of not more than two2 lives3 in being at the creation of the limitation or condition,4 except in the single case mentioned in section 229.

1 R. S., 723, § 15; id., 773, § 1.
1 This includes a trust of real property (Coster v. Lorillard, 14 Wend., 265, 319; Hawley v. James, 16 id., 121, 173, 174, 208; Kane v. Gott, 24 id., 641, 662, 667).
2 Amory v. Lord, 9 N. Y., 410; Phelps' ex'r v. Pond, 23 id., 79.
3 Hone v. Van Schaick, 20 Wend., 564, 566; Boynton v. Hoyt, 1 Den., 83, 68; Beekman v. Bonnor, 23 N. Y., 298, 316.
4 The words "limitation or condition" are substituted for "estate," so as to include powers (See Hawley v. James, 16 Wend., 125, 178, 208; Coster v. Lorillard, 14 id., 324, 325; Hone v. Van Schaick, 20 id., 566, 567, 569).

§ 202. Every future interest is void in its creation which, by any possibility,1 may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.

1 R. S., 723, § 14; 1 R. S., 773, §§ 1, 2.
1 The words "by any possibility may" are now, but in accordance with Hawley v. James, 16 Wend., 120, 126, 171, 178, 227; Everitt v. Everitt, 29 Barb., 112; Jennings v. Jennings, 7 N. Y., 547, 549; Amory v. Lord, 9 id., 416; Thompson v. Carmichael's Exec'r, 1 Sandf. Ch., 398; Arnold v. Gilbert, 3 id., 568.
§ 203. Restrictions upon the power to affix qualifications to the right of enjoyment are contained in sections 14 and 15 of article I of the Constitution of the state.

ARTICLE IV.

ACCUMULATIONS.

SECTION 204. Dispositions of income.

205. Accumulations, when void.

206. Accumulation of income.

207. Other directions, when void in part.

208. Application of income to support, &c., of minor.

§ 204. Dispositions of the income of property to accrue and to be received at any time subsequent to the execution of the instrument creating such disposition, are governed by the rules prescribed in this Title in relation to future interests.

1 R. S., 726, § 36.

§ 205. All directions for the accumulation of the income of property, except such as are allowed by this Title, are void.¹

¹ Titus v. Weeks, 37 Barb., 136, 146.

§ 206. An accumulation of the income of property, for the benefit of one or more persons, may be directed by any will or transfer in writing, sufficient to pass the property out of which the fund is to arise, as follows:

1. If such accumulation is directed to commence on the creation of the interest out of which the income is to arise, it must be made for the benefit of one or more minors¹ then in being,² and terminate at the expiration of their minority; or,

2. If such accumulation is directed to commence at any time subsequent to the creation of the interest
out of which the income is to arise, it must commence within the time in this title permitted for the vesting of future interests, and during the minority of the beneficiaries, and terminate at the expiration of such minority.  

1 R. S., 726, § 37.

2 Hoyt v. Hoyt, 1 Dea., 53, 59; Hawley v. James, 16 Wend., 117.


4 Mason v. Jones, 3 Barb., 250, 263.

§ 207. If, in either of the cases mentioned in the last section, the direction for an accumulation is for a longer term than during the minority of the beneficiaries, the direction only, whether separable or not from other provisions of the instrument, is void as respects the time beyond such minority.

1 R. S., 726, § 38. The change from "only" to "instrument" is new, but sustained by Williams v. Williams, 8 N. Y., 425; Kilpatrick v. Johnson, 15 N. Y., 322; See, however, King v. Bandle, 15 Barb., 139, 145.

§ 208. When a minor, for whose benefit an accumulation has been directed, is destitute of other sufficient means of support and education, the supreme court, upon application, may direct a suitable sum to be applied thereto, out of the fund.

1 R. S., 726, § 39; 773, § 5.

CHAPTER III.

RIGHTS OF OWNERS.

SECTION 209. Increase of property.

210. In certain cases who entitled to income of property.

§ 209. The owner of a thing owns also all its products and accessions.

§ 210. When in consequence of a valid limitation of a future interest, there is a suspension of the power of alienation or of the ownership, during
the continuation of which the income is undisposed of, and no valid direction for its accumulation is given, such income belongs to the persons presumptively entitled to the next eventual interest.

1 R. S., 726, § 40. Held to apply to personal property (Gilman v. Reddington, 24 N. Y., 19; Kilpatrick v. Johnson, 15 id., 322; but see Phelps' ex'r v. Pond, 23 N. Y., 83).

CHAPTER IV.

TERMINATION OF OWNERSHIP.

Section 211, 212. Future interests, when defeated.

213, 214. Future interests, when not defeated.

§ 211. A future interest, depending on the contingency of the death of any person without successors, heirs, issue, or children, is defeated by the birth of a posthumous child of such person, capable of taking by succession.

1 R. S., 725, § 31.

§ 212. A future interest may be defeated in any manner, or by any act or means, which the party creating such interest provided for or authorized in the creation thereof; nor is a future interest, thus liable to be defeated, to be on that ground adjudged void in its creation.

1 R. S., 725, § 32.

§ 213. No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest, nor by any destruction of such precedent interest by forfeiture, surrender, merger or otherwise, except as provided by the next section, or where a forfeiture is imposed by statute as a penalty for the violation thereof.

1 R. S., 725, § 32.

§ 214. No future interest, valid in its creation, is defeated by the determination of the precedent in-
interest before the happening of the contingency on which the future interest is limited to take effect; but should such contingency afterwards happen, the future interest takes effect in the same manner and to the same extent as if the precedent interest had continued to the same period.

1 R. S., 725, § 34; modified by substituting the words "future interest" for "remainder."

TITLE III.

GENERAL DEFINITIONS.

216. Time of creation, what.

§ 215. The income of property, as the term is used in this Part of the Code, includes the rents and profits of real property, the interest of money, dividends upon stock, and other produce of personal property.

§ 216. The delivery of the grant, where a limitation, condition, or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition, or interest, within the meaning of this Part of the Code.

Modified from 1 R. S., 726, § 41; see Lang v. Kopke, 5 Sandys, 369, 370.
PART II.

REAL OR IMMOVABLE PROPERTY.

TITLE I. General Provisions.
II. Estates in Real Property.
III. Rights and Obligations of Owners.
IV. Uses and Trusts.
V. Powers.

TITLE I

GENERAL PROVISIONS.

§ 217. Real property within this state is governed by the law of this state.

TITLE II.

ESTATES IN REAL PROPERTY.

CHAPTER I. Estates in General.
II. Termination of Estates.
III. Servitudes.

CHAPTER I

ESTATES IN GENERAL.

SECTION 218. Enumeration of estates.
219. What estate a fee simple.
220. Estates null abolished; their nature declared.
221. Certain remainders valid.
THE CIVIL CODE

SECTION 222. Freeholds; chattels real; chattel interests.
223. Estates for life of a third person, when a freehold, &c.
224. Future estates, what.
225. Reversions.
226. Remainders.
227. Limitations of chattels real.
228. Suspension by trust.
229. Contingent remainder in fee.
230. Remainders, future and contingent estates, how created.
231. Limitation of successive estates for life.
232, 233. Remainder upon estates for life of third person.
234. Contingent remainder on a term of years.
235. Remainder of estates for life.
236. Remainder upon a contingency.
237. Heirs of a tenant for life, when to take as purchasers.
238. Construction of certain remainders.
239. Effect of power of appointment.

§ 218. Estates in real property, in respect to the duration of their enjoyment, are either:
1. Estates of inheritance, or perpetual estates;
2. Estates for life;
3. Estates for years; or,
4. Estates at will.

§ 219. Every estate of inheritance, notwithstanding the abolition of tenures, continues to be called a fee simple, or fee; and every such estate, when not defeasible or conditional, is called a fee simple absolute, or an absolute fee.

§ 220. Estates tail are abolished; and every estate which would be adjudged a fee tail, according to the law of this state, as it existed previous to the twelfth day of July, one thousand seven hundred and eighty-two, is a fee simple; and if no valid remainder is limited thereon, is a fee simple absolute.
§ 221. Where a remainder in fee is limited upon any estate, which would by the law mentioned in the last section be adjudged a fee tail, such remainder is valid as a contingent limitation upon a fee, and vests in possession, on the death of the first taker, without issue living at the time of his death.


§ 222. Estates of inheritance and for life, are called estates of freehold; estates for years are chattels real; and estates at will are chattel interests, but are not liable as such to sale on execution.

1 R. S., 722, § 5.


§ 223. An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold only during the life of the grantee or devisee. After his death it is a chattel real.


§ 224. A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time, or otherwise, of a precedent estate, created at the same time.

1 R. S. 723, § 10.

1 Nicoll v. N. Y. & Erie R. R., 12 N. Y., 121, 139. "The definition in this section is so framed as to comprehend every species of expectant estates created by the act of the party, remainders strictly so called, future uses and executory devises." (Rev. Notes, 5 Edmonds' Stat., App., 305).

"Introduced to embrace estates in futuro, as they are technically called." Ib.

"The words 'by lapse of time or otherwise' are necessary to provide for contingent limitations operating to abridge or defeat the prior estate." Ib.
§ 225. A reversion is the residue of an estate left, by operation of law, in the grantor, or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

1 R. S., 723, § 12. The words "by operation of law" are new, and "successors" substituted for "heirs."

§ 226. When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.

1 R. S., 723, § 11. Modified by inserting the words "other than a reversion."

§ 227. The provisions of Title II of Part I of this Division, relative to future estates, apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

1 R. S., 724, § 23.

§ 228. The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation, within the meaning of section 201.

This section, though not in the Revised Statutes, is simply declaratory of the existing law (Hawley v. James, 16 Wend., 163; Belmont v. O'Brien, 12 N. Y., 402; Williams v. Williams, 8 id., 531.)

§ 229. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate
of such persons may be determined, before they attain majority.

1 R. S., 723, § 16.

Temple v. Hawley, 1 Sandf. Ch., 153.

§ 230. Subject to the rules of this Title, and of Part I of this Division, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this Title.


§ 231. Successive estates for life cannot be limited, except to persons in being at the creation thereof; and where a remainder is limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto are void, and upon the death of those persons the remainder, if valid in its creation, takes effect in the same manner as if no other life estates had been created.

1 R. S., 723, § 17.

The words "if valid in its creation" are new. See Amory v. Lord, 9 N. Y., 419; Vail v. Vail, 7 Barb., 241.

§ 232. No remainder can be created upon an estate for the life of any other person than the grantee or devisee of such estate, unless such remainder is in fee; nor can a remainder be created upon such an estate in a term for years, unless it is for the whole residue of such term.

1 R. S., 734, § 18.

§ 233. When a remainder is created upon an estate for the life of any other person than the grantee or
devisee thereof, and more than two persons are named as the persons during whose lives the life estate shall continue, the remainder, if valid in its creation, takes effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced.

The words "if valid in its creation" are new. Otherwise, the section is the same as 1 R. S., 724, § 19.

§ 234. A contingent remainder cannot be created on a term of years, unless the nature of the contingency on which it is limited is such, that the remainder must vest in interest during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof.

1 R. S., 724, § 20.
1 Butler v. Butler, 3 Barb. Ch., 304.

§ 235. No estate for life can be limited as a remainder on a term of years, except to a person in being at the creation of such estate.


§ 236. 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 is to be deemed a conditional limitation.

1 R. S., 725, § 27; Tyson v. Blake, 22 N. Y., 563.

§ 237. When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life.

1 R. S., 725, § 28, modified so as to avoid the use of the technical phrase "take as purchasers."

§ 238. When a remainder, on an estate for life or for years, is not limited on a contingency defeating
or avoiding such precedent estate, it is to be deemed intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years.

1 R. S., 725, § 29.

§ 239. A general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed.

Root v. Stuyvesant, 18 Wend., 268, per Nelson, Ch. J.; 2 Smith’s Pharn, 193. This section is new.

CHAPTER II.

TERMINATION OF ESTATES.

SECTION 240. Tenancy at will may be terminated by notice.

241. Form and service of notice.

242. Effect of notice.

243. Re-entry, when and how to be made.

244. Notice not necessary before action.

§ 240. A tenancy or other estate at will, however created, may be terminated by the landlord’s giving notice to the tenant, in the manner prescribed by the next section, to remove from the premises within a period specified in the notice, of not less than one month.

1 R. S., 745, § 7.

§ 241. The notice prescribed by the last section must be in writing, and must be served by delivering the same to the tenant, or to some person of discretion residing on the premises; or if neither can, with reasonable diligence, be found, the notice may be served by affixing it on a conspicuous part of the premises, where it may be conveniently read.

1 R. S., 745, § 8.

§ 242. After the notice prescribed by sections 240 and 241 has been served in the manner therein directed, and the period specified by such notice has
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expired, but not before,\(^1\) the landlord may re-enter, or proceed according to law to recover possession.\(^2\)

\(^1\) Livingston v. Tanner, 14 N. Y., 67.
\(^2\) Substantially from 1 R. S., 745, § 9.

§ 243. Whenever the right of re-entry is given to a grantor or lessor in any grant or lease, or otherwise, such re-entry may be made at any time after the right has accrued, upon fifteen days' previous written notice of intention to re-enter, served in the mode prescribed by section 241.

* Laws of 1846, ch. 274, § 3; same stat. 3 R. S., 5 ed., 36, § 12; modified as to mode of service, and extended to all cases in which a right of re-entry is given for the non-performance of any of the terms of the agreement.

§ 244. An action for the possession of real property leased or granted, with a right of re-entry, may be maintained at any time after the right to re-enter has accrued, without the notice prescribed in section 243.

CHAPTER III.

SERVITUDES.

**SECTION 245.** Servitudes attached to land.

246. Servitudes not attached to land.

247. Designation of estates.

248. By whom grantable.

249. By whom held.

250. Extent of servitudes.

251. Apportioning easements.

252. Rights of owner of future estate.

253. Actions by owner and occupant of dominant tenement.

254. Actions by owner of servient tenement.

255. How extinguished.

§ 245. The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements:\(^1\)

1. The right of pasture;
2. The right of fishing;
3. The right of taking game;
4. The right of way;\(^5\)
5. The right of taking water, wood, minerals and other things;

6. The right of transacting business upon land;

7. The right of conducting lawful sports upon land;

8. The right of receiving air, light or heat from or over, or discharging the same upon or over, land;

9. The right of receiving water from or discharging the same upon land;

10. The right of flooding land;

11. The right of having water flow without diminution or disturbance of any kind;

12. The right of using a wall as a party wall;

13. The right of receiving more than natural support from adjacent land or things affixed thereto;

14. The right of having the whole of a division fence maintained by a co-terminous owner;

15. The right of having public conveyances stopped, or of stopping the same, on land;

16. The right of a seat in church;

17. The right of burial.

These rights are generally called easements (Wolfe v. Frost, 4 Sandif. Ch., 72), although a distinction is drawn, for some purposes, between a mere easement, and a right to take the produce of the land (Wickham v. Hawker, 7 M. & W., 63; Race v. Ward, 4 El. & Bl., 702).


Race v. Ward, 4 El. & Bl., 702; Manning v. Wadsale, 5 Ad. & El., 758; Weekly v. Wildman, 1 Id. Raym., 407.

Tyson v. Smith, 9 Ad. & El., 406; 6 id., 745.

Abbott v. Weekly, 1 Levinz, 176.


§ 246. The following land burdens, or servitudes upon land, may be granted, and held, though not attached to land:

1. The right of fishing and taking game;
2. The right of a seat in church;
3. The right of burial;
4. The right of taking rents and tolls;
5. The right of way.

§ 247. The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement.

Wolfe v. Frost, 4 Sandf. Ch., 72.

§ 248. A servitude can be created only by one who has a vested estate in the servient tenement.


§ 249. A servitude thereon cannot be held by the owner of the servient tenement.

§ 250. The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.

1 Dixon v. Glow, 24 Wend., 188.

2 Corning v. Gould, 16 Wend., 531.

§ 251. In case of partition of the dominant tenement, the burden must be apportioned, according to the division of the dominant tenement, but not in such a way as to increase the burden upon the servient tenement.

The latter clause is added to meet the objection that common of estovers cannot be apportioned because so doing would multiply the burden (See Livingston v. Ketcham, 1 Barb., 592).

§ 252. The owner of a future estate in a dominant tenement may use easements attached thereto, for the purpose of viewing waste, demanding rent, or removing an obstruction to the enjoyment of such easements, although such tenement is occupied by a tenant.

Proud v. Hollis, 1 Barn. & Cr., 8.

§ 253. The owner of any estate in a dominant tenement, or the occupant of such tenement, may maintain an action for the enforcement of an easement attached thereto.


§ 254. The owner in fee of a servient tenement, may maintain an action for the possession of the land, against any one unlawfully possessed thereof, though a servitude exists thereon in favor of the public.

§ 255. A servitude is extinguished:

1. By the vesting of the right to the servitude and the right to the servient tenement in the same person;¹

2. By the destruction of the servient tenement;²

3. By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise;³ or,

4. When the servitude was acquired by enjoyment,⁴ by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment.⁵

¹ Huttemeier v. Albro, 18 N. Y., 48; 2 Bowo., 546; James v. Plant, 4 Ad. & El., 749.
² Voorhooe v. Presbyterian Church, 17 Barb., 109; Regina v. Bamber, 5 Q. B., 279; Regina v. Chorley, 12 id., 515.
³ Corning v. Gould, 16 Wend., 539; 3 Kent, 449; see Urain v. Fox, 16 Barb., 184.
⁴ A servitude created by deed is not extinguished by mere non-user for any period (Smys Ly v. Hastings, 22 N. Y., 217; 24 Barb., 44; Jewett v. Jewett, 16 id., 157).
⁵ Robie v. Sedgwick, 35 Barb., 329.
TITLE III.

RIGHTS AND OBLIGATIONS OF OWNERS.

CHAPTER I. Rights of owners.
II. Obligations of owners.

CHAPTER I.

RIGHTS OF OWNERS.

ARTICLE I. Incidents of ownership.
II. Boundaries.

ARTICLE I.

INCIDENTS OF OWNERSHIP.

SECTION 256. Water.
257. Rights of tenant for life.
258, 259. Rights of tenant for years, &c.
260. Rights of grantees of rents and reversion.
261. Rights of lessees and their assignees, &c.
262. Application of last two sections.
263. Remedy on lessee for life.
264. Rent dependent on life.
265. Remedy of reversioners, &c.

§ 256. The owner of land owns water standing water thereon, or flowing over1 or under2 its surface, but not forming a definite stream.3 Water running in a definite stream, formed by nature4 over5 or under6 the surface, may be used7 by him as long as it remains there; but he may not prevent the natural8 flow of the stream, or of the natural spring9 from which it commences its definite course, nor pursue, nor pollute10 the same.

1 Broadbent v. Ramsbotham, 11 Exch., 602; better reported, 25 L. J. [Exch.], 122; Rawstron v. Taylor, 11 Exch., 369, 382.
§ 257. The owner of a life estate may use the land in the same manner as the owner of a fee simple, except that he must do no act to affect the injury of the inheritance.


§ 258. A tenant for years or at will, unless he is a wrongdoer by holding over, may occupy the buildings, take the annual products of the soil, work mines and quarries open at the commencement of his tenancy, and cultivate and harvest the crops growing at the end of his tenancy.

1 Freer v. Stotenbur, 36 Barb., 641.

§ 259. A tenant for years or at will has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired, or by the last section.

§ 260. A person to whom any real property is transferred or devised, upon which rent has been reserved, or to whom any such rent is transferred, is
entitled to the same remedies for recovery of rent, for non-performance of any of the terms of the lease, or for any waste or cause of forfeiture, as his grantor or devisor might have had.  

§ 261. Whatever remedies the lessee of any real property may have against his immediate lessor, for the breach of any agreement in the lease, he may have against the assigns of the lessor, and the assigns of the lessee may have against the lessor and his assigns, except upon covenants against incumbrances or relating to the title or possession of the premises.

§ 262. The provisions of the last two sections apply to all grants reserving rent, except grants in fee executed before the ninth day of April, 1805, or after the fourteenth day of April, 1860, the rents reserved by which have been transferred since the latter date.

§ 263. Rent due upon a lease for life may be recovered in the same manner as upon a lease for years.

§ 264. Rent dependent on the life of a person may be recovered after, as well as before, his death.
§ 265. A person having an estate in fee, in remainder or reversion, may maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life or years, and although, after its commission, his estate is transferred, and he has no interest in the property at the commencement of the action.

The words "in fee" are new. No one but the owner in fee could have a right to maintain the action.

1 R. S., 750, § 8; see Van Deusen v. Young, 29 Barb., 9, 15. The rest of the section is new, though in accordance with existing law.


ARTICLE II.

BOUNDARIES.

Section 266. Rights of owner.

267. Boundaries by water.

268. Boundaries by ways.

269. Lateral and subjacent support.

270. Trees whose trunks are wholly on land of one.

271. Line trees.

§ 266. The owner of land in fee has the right to the surface, and to everything permanently situated beneath or above it.

§ 267. When land borders upon tide-water, or upon water which constitutes an exterior boundary of the state, the owner of the upland takes to high-water mark; when it borders upon a navigable lake where there is no tide, the owner takes to the edge of the lake at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.


2 See Kingman v. Sparrow, 12 Barb., 206; Canal Appraisers v. People, 17 Wend., 570.


§ 268. An owner of land, bounded by a road or street, is presumed to own to the centre of the way, but the contrary may be shown.

- Mott v. Mayor of N. Y., 2 Hill, 358, 363; Bissell v. N. Y. Central R. R., 23 N. Y., 81; Wagner v. Troy Union R. R., 25 N. Y., 529. In the city of New York the fee in many of the streets is in the corporation, as trustees for the public; still, it is held that the above rule applies even to streets in that city.

§ 269. Each coterminous owner is entitled to the lateral and subjacent support which his land by nature receives from the land of the other.


2 Rowbotham v. Wilson, 8 El. & Bl., 123; 9 House of Lords Cas., 348; Bonomi v. Backhouse, Et., B. & E., 622; 1 Jurist (N. S.), 809, aff'd, 9 H. L. Cas. 563.

§ 270. Trees whose trunks stand wholly upon the land of one owner, belong exclusively to him, although their roots grow into the land of another.

See Dubois v. Beaver, 25 N. Y., 123, 126.

§ 271. Trees whose trunks stand partly on the land of two or more coterminous owners, belong to them in common.


CHAPTER II.

OBLIGATIONS OF OWNERS.

§ 272. The owner of a life estate must keep the buildings and fences in repair from ordinary waste, and must pay the taxes and other annual charges.
and a just proportion of extraordinary assessments benefiting the whole inheritance.  

1 Sarles v. Sarles, 3 Sandf. Ch., 601, 607.
4 Stilwell v. Doughty, 2 Bradf., 311.

§ 273. Coterminal owners are mutually bound equally to maintain:

1. The boundaries and monuments between them;

2. The fences between them; unless one of them chooses to let his land lie open as a public common, in which case, if he afterwards incloses it, he must refund to the other a just proportion of the value, at that time, of any division fence made by the latter.

They owe this duty only to each other, and not to the public generally (Ryan v. Rochester & Syracuse R. R., 9 How. Pr., 453).

1 R. S., 353, §§ 30, 31, as amended: Laws 1860, ch. 267. The mode of determining controversies as to fences is prescribed by the Political Code.

TITLE IV.

USES AND TRUSTS.

The provisions of this title are from 1 R. S., 727; modified only as to the form of expression, except where otherwise noted. Sections 66, 69, 70, 71 and 72 are inserted in the title on Trusts in the Third Division of this Code. Section 67 is transferred to the title on Succession.

Section 274. What uses and trusts may exist.

275. Executed uses existing.
276. Right to possession of land creates legal ownership.
277. Certain trusts unaffected.
278. Trustees of estate for use of another take no interest.
279. Proceeding sections qualified.
280. Trust must be in writing.
281. Transfer to one for money paid by another.
282. Rights of creditors.
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SECTION 283. Section 281 qualified.

284. Purchasers protected.

285. For what purposes express trusts may be created.

286. Certain devises in trust to be deemed powers.

287. Profits of land liable to creditors in certain cases.

288. Other express trusts to be powers in trust.

289. Creation of certain powers not prohibited.

290. And land, &c., to descend to persons entitled.

291. Trustees of express trusts to have whole estate.

292. Author of trust may devise, &c.

293. Title of grantor of trust property.

294. Interests remaining in grantor of express trust.

295. 296. Powers over trust of party interested.

297. Effect of omitting trust in conveyance.

298. Certain sales, &c., by trustees, void.

299. When estate of trustee to cease.

§ 274. Uses and trusts, in relation to real property, are those only which are specified in this Title.

§ 275. Every estate which is now held as a use, executed under any former statute of this state, is confirmed as a legal estate.

§ 276. Every person who, by virtue of any transfer or devise, is entitled to the actual possession of real property, and the receipt of the rents and profits thereof, is to be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest.

§ 277. The last section does not divest the estate of any trustees in a trust existing on the first day of January, one thousand eight hundred and thirty, where the title of such trustee is not merely nominal, but is connected with some power of actual dis-
position or management in relation to the real property which is the subject of the trust.

1 R. S., 727, § 48.

Frazier v. Western, 1 Barb. Ch., 238, 239.

§ 278. Every disposition of real property, whether by transfer or will, must be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to any other, to the use of or in trust for such person; and if made to any person, to the use of or in trust for another, no estate or interest vests in the trustee; but he must execute a release of the property to the beneficiary on demand, the latter paying the expense thereof.

1 R. S., 728, § 49.

Hotchkiss v. Etting, 36 Barb., 44.

* Ring v. McCoun, 10 N. Y., 268; Rawson v. Lampman, 5 N. Y., 456, 462; Wright v. Douglass, 7 N. Y., 564.

* This provision is new, and contrary to the existing law (Ring v. McCoun, 10 N. Y., 268); but seems desirable to avoid difficulties in titles (see South Baptist Church v. Yates, Hoffin., 142).

§ 279. The preceding sections of this Title do not extend to trusts arising or resulting by implication of law, nor prevent or affect the creation of such express trusts as are hereinafter authorized and defined.

1 R. S., 728, § 50.

§ 280. No trust in relation to real property is valid, unless created or declared:

1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing;
2. By the instrument under which the trustee claims the estate affected; or,
3. By operation of law.

Enlarged from 2 R. S., 134, § 6.

§ 281. Where a transfer of real property is made to one person, and the consideration therefor is paid by or for another, no use or trust results in favor of the person by or for whom such payment is made;
but the title vests in the grantee, subject only to the provisions of the next two sections.\footnote{1}

\footnote{1 The words "or for" are intended to supersede the doctrine of Sieman v. Austin, 33 Barb., 17; a decision which leaves much room for the frauds which this section was meant to avoid.}

\footnote{2 1 R. S., 728, § 51; Davis v. Graves, 29 Barb., 480.}

§ 282. Every such transfer as is described in the last section is presumed\footnote{1} to be fraudulent as against the creditors, at that time,\footnote{2} of the person paying the consideration; and where a fraudulent intent is not disproved, a trust results in favor of such creditors,\footnote{3} to the extent necessary to satisfy their just demands.

\footnote{1 R. S., 728, § 52.}
\footnote{Wood v. Robinson, 22 N. Y., 584, 586.}
\footnote{Beawser v. Power, 10 Paige, 568, 570.}
\footnote{Garfield v. Hatmaker, 16 N. Y., 475; Wood v. Robinson, 22 N. Y., 584; McCartney v. Bostwick, 31 Barb., 390.}

§ 283. Section 281 does not apply:

1. To cases where the grantee took the grant as an absolute\footnote{1} transfer in his own name, without the consent\footnote{2} or knowledge of the person paying the consideration; nor,

2. To cases where the grantee, in violation of a trust, purchased the real property so transferred, with property belonging to another person.\footnote{3}

\footnote{1 R. S., 728, § 53.}
\footnote{Loynesbury v. Purdy, 18 N. Y., 517.}
\footnote{il., 518, 519.}
\footnote{Reid v. Fitch, 11 Barb., 399.}

§ 284. No implied or resulting trust can prejudice the rights of a purchaser or incumbrancer of real property, for value\footnote{1} and without notice\footnote{2} of the trust.

\footnote{1 R. S., 728, § 54.}
\footnote{Wood v. Robinson, 22 N. Y., 564, 567.}
\footnote{Sieman v. Austin, 33 Barb., 14.}

§ 285. Express trusts may be created for any of the following purposes:

1. To sell\footnote{1} real property for the benefit of creditors;
2. To sell, mortgage or lease real property, for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon;

3. To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family during the life of such person, or for any shorter term, subject to the rules of Title II of this Part, or,

4. To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by the same Title.

1 R. S., 728, § 55.


The words "annuitants or other" are new, but supported by Lang v. Ropke, 5 Sandf., 371; Hawley v. James, 16 Wend., 61, 117.

The words "pay them to, or" are new, but supported by Leggett v. Perkins, 2 N. Y., 297, 306, 309; Leggett v. Hunter, 19 N. Y., 464; Noyes v. Blakeman, 6 N. Y., 581.

The words "whether ascertained at the time of the trust or not" are new, but conform to Gilman v. Reddington, 24 N. Y., 13, 14.

The words "for himself or for his family" are new, but are sustained by Rogers v. Tilley, 20 Barb., 639, 641.

Though a trust for the minority of the beneficiary is valid (Lang v. Ropke, 5 Sandf., 389), it is so upon the ground that it terminates at his death, even while yet a minor (id.; Hawley v. James, 16 Wend., 61; 5 Paige, 463).


Gilman v. Reddington, 24 N. Y., 12; 1 Hill, 492.

Coster v. Lorillard, 14 Wend., 318; Hawley v. James, 16 id., 174, 265.

§ 286. A devise of real property to executors or other trustees, to be sold or mortgaged, where the trustees are not also empowered to receive the rents
§ 287. Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such person, in the same manner as personal property which cannot be reached by execution.

1 R. S., 729, § 57.
1 Sillick v. Mason, 3 Barb. Ch., 79; Clute v. Bool, 3 Paige, 83.

§ 288. Where an express trust in relation to real property is created for any purpose not enumerated in the preceding sections, such trust vests no estate in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, is valid as a power in trust, subject to the provisions in relation to such powers, contained in Title V of this Part.

1 R. S., 729, § 58.
1 This expression is substituted for "no estate shall vest in," conformably to the decision in Darling v. Rogers, 22 Wend., 494.
2 Hotchkiss v. Eliing, 36 Barb., 45.

§ 289. Nothing in this Title prevents the creation of a power in trust, for any of the purposes for which an express trust may be created.

This section is new. The contrary was assumed by Bronson, J., in Hawley v. James, 16 Wend., 174, 175, followed in Arnold v. Gilbert, 3 Sandf. Ch., 563; the
§ 290. In every case where a trust is valid as a power in trust, the real property to which the trust relates, remains in, or passes by succession to, the persons otherwise entitled, subject to the execution of the trust as a power in trust.

1 R. S., 729, § 59. The words "in trust" are now.

§ 291. Except as hereinafter otherwise provided, every express trust in real property, valid as such, in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.

1 R. S., 729, § 60.

"Hereinafter" is substituted for "herein." It was said in Darling v. Rogers, 22 Wend., 492, 493, and Hawley v. James, 10 Wend., 148, that this exception referred to § 282. But the express trusts mentioned in that section are not express trusts valid as such, but valid as powers in trust. The amendment enacts the construction adopted in Briggs v. Davis, 21 N. Y., 576, without referring to the cases above cited.

§ 292. Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust.


§ 293. The grantee or devisee of real property subject to a trust acquires a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them.

1 R. S. 729, § 61.
§ 294. Where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust, or his successors.

1 R. S., 729, § 62.

1 Substituted for "remains in or reverts to," so as to conform to the definition of a reversion, § 225. The whole section, indeed, seems to be superfluous, but it is thought best not to omit it.

§ 295. The beneficiary of a trust for the receipt of the rents and profits of real property cannot transfer, or in any manner dispose of, his interest in such trust.

1 R. S., 730, § 63; Belmont v. O'Brien, 12 N. Y., 402.

§ 296. The beneficiary of a trust for the payment of an annuity out of the rents and profits of real property, or of a sum in gross, can dispose of his interest in such trust.

1 R. S., 730, § 63.

1 Modified so as to adopt the construction given to this section of the Revised Statutes in Hawley v. James, 16 Wend., 61, 275 (decree, section 4), and followed in Lang v. Ropke, 5 Sandf., 371; Griffon v. Ford, 1 Bone., 143. To the contrary, see McSorley v. Wilson, 4 Sandf. Ch., 624; Clute v. Bool, 8 Paige, 86.

§ 297. Where an express trust is created in relation to real property, but is not contained or declared in the grant to the trustee, such grant must be deemed absolute, in favor of the subsequent creditors of the trustees, not having notice of the trust, and in favor of purchasers from such trustees, without notice, and for a valuable consideration.

1 R. S., 730, § 64. Davis v. Graves, 29 Barb., 480.

§ 298. Where a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustees, in contravention of the trust, is absolutely void.

1 R. S., 730, § 65. Belmont v. O'Brien, 12 N. Y., 394, 405; Briggs v. Davis, 20 N. Y., 21; 21 N. Y., 577. This rule applies to purchasers in good faith, as well as to any others.
§ 299. When the purpose for which an express trust was created ceases, the estate of the trustee also ceases.

I R. S., 730, § 67.

TITLE V.

POWERS.

The provisions of this title are from I R. S., 734; omitting § 127, which is embodied in the title on Succession, and § 126, which is inserted in the chapter on Interpretation of Wills.

SECTION 300. What powers exist.  
301. Application of this title.  
302. Definition of a power.  
303. Terms "author of a power" and "holder of a power" defined.  
304. Division of powers.  
305. Definition of general powers.  
306. Definition of special powers.  
308. Powers in trust.  
309. General powers, when in trust.  
310. Special powers, when in trust.  
311. Who may create power.  
312. To whom power may be given.  
313. How created.  
314. Reservation of powers in conveyances.  
315. When power irrevocable.  
316. When power a lien.  
318. Beneficial powers, &c., transferred by insolvent assignments.  
319. Who to execute powers.  
320, 321. Married women.  
322. How executed.  
323. Execution by survivors.  
324. Execution of power to dispose by devise.  
325. Execution of power to dispose by grant.  
326, 327. Directions by author, when disregarded.  
328. Nominal conditions.  
329. When directions of author to be observed.  
330, 331. Consent of third person to execution of power.  
332. Omission to recite power.
333. Instruments deemed conveyances.
334. Certain dispositions not void.
335. Computation of term of suspension.
336. What estate may be given.
337. Married women, their authority.
338. Defective execution.
339. Fraud.
340. General and beneficial powers to married women.
341. Estate of owner for life, &c., when changed into a fee.
342, 343. Certain powers create a fee.
344. Effect of power to devise inheritance in certain cases.
345. Power to dispose of fee.
346. Power to revoke.
347. Special and beneficial powers, who may take.
348. Construction of leasing powers.
349. Power to make leases by owner for life.
350. Release of such power.
351. Mortgages by party having power to lease, &c.
352. Effect thereof.
353. Special and beneficial powers liable to creditors.
354. Future beneficial powers.
355. Trust powers imperative.
356. Effect of right of selection.
357, 358. Construction of certain powers.
359, 360. When court to execute power.
361. Execution of trust power when compelled by creditors, &c.
362. Defective execution.
363. Application of certain sections.

§ 300. Powers, in relation to real property, are those only which are specified in this Title.

1 R. S., 732, § 13. The phraseology of this section has been altered, in the same manner, and for the same reasons, as in the case of sections 195 and 274.

§ 301. The provisions of this Title do not extend to a simple power of attorney to convey real property in the name of the owner and for his benefit.

1 R. S., 738, § 134.

§ 302. A power, as the term is used in this Title, is an authority to do some act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner grants.
ing or reserving such power might himself perform for any purpose. 3

1 R. S., 732, § 74.
1 The words "or revocation" are now, but declaratory of existing law.
2 Selden v. Vermilya, 3 N. Y., 536.
3 The words "for any purpose" are new, but do not alter the law (see §§ 288, 289; Downing v. Marshall, 23 N. Y., 377-380; Belmont v. O'Brien, 12 N. Y., 404).

§ 303. The author of a power, as the term is used in this Title, is the person by whom a power is created, whether by grant or devise; and the holder of a power 1 is the person in whom a power is vested, whether by grant, devise or reservation.
1 R. S., 738, § 135.
1 Barber v. Cary, 11 N. Y., 401, 403.

§ 304. Powers are general or special, and beneficial or in trust.
1 R. S., 732, § 76.

§ 305. A power is general, when it authorizes the alienation or incumbrance of a fee in the property embraced therein, by grant, will or charge, or any of them, 1 in favor of any person whatever.
1b., § 77.
1 See Tallmadge v. Sill, 21 Barb., 51, 52, 53.

§ 306. A power is special:
1. When a person or class of persons is designated, to whom the disposition of property under the power is to be made; 1 or,
2. When it authorizes the alienation or incumbrance, by means of a grant, will, or charge, of only an estate less than a fee.
1b., § 78.
1 Wright v. Tallmadge, 15 N. Y., 313, 314.

§ 307. A power is beneficial, when no person other 1 than its holder has, by the terms of its creation, any interest in its execution.
1b., § 79.
OF THE STATE OF NEW YORK.

§ 308. A power is in trust, when any person or class of persons, other than its holder, has, by the terms of its creation, an interest in its execution.

This section is new; but merely states the general principle upon which the two following sections are founded (see Coster v. Lorillard, 14 Wend., 329, 362).

§ 309. A general power is in trust, when any person or class of persons, other than its holder, is designated as entitled to the proceeds of the disposition or charge authorized by the power, or to any portion of the proceeds or other benefits to result from its execution.

1 R. S., 734, § 94.

§ 310. A special power is in trust:

1. When the disposition or charge which it authorizes is limited to be made to any person or class of persons,¹ other² than the holder of the power; or,

2. When any person or class of persons, other² than the holder, is designated as entitled to any benefit from the disposition or charge authorized by the power.

Jb., § 95.

¹ Wright v. Tallmadge, 15 N. Y., 314.
² Coster v. Lorillard, 14 Wend., 325, 329, 361, 362.

§ 311. No person is capable of creating a power, who is not at the same time capable of granting some estate in the property to which the power relates.

1 R. S., 732, § 15; Dempsey v. Tylee, 3 Duer, 97.

§ 312. A power may be vested in any person.

1 R. S., 735, § 109; omitting all the restrictions of the statute, in accordance with § 170.

§ 313. A power may be created only:

1. By a suitable clause, contained in a grant of some estate in the real property to which the power relates, or in an agreement to execute such a grant; or,
2. By a devise contained in a will.  

§ 314. 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 of this Title, in the same manner as if granted to another.

Ib., § 106.

§ 315. Every power, beneficial or in trust, is irrevocable, unless an authority to revoke it is given or reserved in the instrument creating the power.

Ib., § 108; Wright v. Delafield, 23 Barb., 511.

§ 316. A power is a lien upon the real property which it embraces, from the time the instrument in which it is contained takes effect; except that against creditors, purchasers and incumbrancers, in good faith and without notice, from any person having an estate in such real property, the power is a lien only from the time the instrument in which it is contained is duly recorded.

Ib., § 107.

§ 317. Where a power to sell real property is given to a mortgagee or other incumbrancer, in an instrument intended to secure the payment of money, the power is to be deemed a part of the security, and vests in and may be executed by any person, who, by assignment or otherwise, becomes entitled to the money so secured to be paid.

1 R. S., 737, § 133.

§ 318. Every beneficial power, and the interest of every person entitled to compel the execution of a trust power, passes to the assignees, pursuant to
statute, of the estate of a non-resident, absconding, insolvent or imprisoned debtor, or of a person of unsound mind, in whom such a power or interest is vested.

1 R. S., 735, § 104

§ 319. A power cannot be executed by any person not capable of disposing of real property.

1 R. S., § 109, omitting the reference to the next section, as being no exception, under the present state of the law.

§ 320. A married woman may execute a power during her marriage, without the concurrence of her husband, unless otherwise prescribed by the terms of the power.

1 R. S., § 110.

By this section "the disability of coverture is completely taken away, and a married woman may execute during coverture any power which may be lawfully conferred upon any person" (Denin, J., Wright v. Tallmadge, 16 N. Y., 313; S. F., Leavitt v. Pell, 27 Barb., 322, 332).

Section 117 is in part to the same effect.

§ 321. No power can be executed by a married woman before she attains her majority; nor without being acknowledged by her in the manner prescribed by the chapter on Recording Transfers.  

1 R. S., § 111.

2 R. S., § 117. See page 152.

§ 322. A power can be executed only by a written instrument which would be sufficient to pass the estate or interest intended to pass under the power, if the person executing the power was the actual owner.

1 R. S., 735, § 113.

§ 323. Where a power is vested in several persons, all must unite in its execution; but in case any one or more of them is dead, the power may be executed by the survivor or survivors, unless otherwise prescribed by the terms of the power.

1 R. S., § 112. The exception is new, though probably in accordance with existing law.
§ 324. Where a power to dispose of real property is confined to a disposition by devise or will, the instrument of execution must be a will duly executed according to the provisions of the Title on Wills.

1 R. S., 736, § 115.

§ 325. Where a power is confined to a disposition by grant, it cannot be executed by will, even though the disposition is not intended to take effect until after the death of the person executing the power.

Ib., § 116.

§ 326. Where the author of a power has directed or authorized it to be executed by an instrument which would not be sufficient in law to pass the estate, the power is not void, but its execution is to be governed by the rules before prescribed in this Title.

Ib., § 118.

§ 327. Where the author of a power has directed any formalities to be observed in its execution, in addition to those which would be sufficient to pass the estate, the observance of such additional formalities is not necessary to a valid execution of the power.

Ib., § 119.

§ 328. Where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the execution of the power.

Ib., § 120.

§ 329. With the exceptions contained in the preceding sections, the intentions of the author of a power as to the mode, time and conditions of its execution must be observed, subject to the power of
the supreme court to supply a defective execution in the cases provided in sections 338 and 362.


§ 330. When the consent of a third person to the execution of a power is requisite, such consent must be expressed in the instrument by which the power is executed, or be certified in writing thereon. In the first case the instrument of execution, in the second, the certificate, must be subscribed by the party whose consent is required; and to entitle the instrument to be recorded, such signature must be duly proved or acknowledged, according to the chapter on Recording Transfers.

§ 331. Where the consent of several persons to the execution of a power is requisite, all must consent thereto; but, in case any one or more of them is dead, the consent of the survivors is sufficient, unless otherwise prescribed by the terms of the power.

This section is new. Compare § 323.

§ 332. Every instrument executed by the holder of a power, conveying an estate or creating a charge which such holder would have no right to convey or create except by virtue of his power, is to be deemed a valid execution of the power, even though not recited or referred to therein.

1 R. S., 787. § 124.
§ 333. Every instrument except a will, in execution of a power, even though the power is one of revocation only, is to be deemed a conveyance within the meaning of the chapter on Recording Transfers.

1 R. S., 736, § 114.

§ 334. A disposition or charge, by virtue of a power, more extensive than was authorized thereby, is not therefore void; but every estate or interest so created, so far as it is embraced by the terms of the power, is valid.

1 R. S., 737, § 123. The words "or charge" are now.

§ 335. The period during which the absolute right of alienation may be suspended by an instrument in execution of a power, must be computed, not from the date of the instrument, but from the time of the creation of the power.

Ib., § 128.

§ 336. No estate or interest can be given or limited to any person, by an instrument in execution of a power, which could not have been given or limited at the time of the creation of the power.

1 R. S., 737, § 129, modified by substituting the words "which could not," &c., for the words "which such person would not have been capable of taking under the instrument by which the power was granted," so as to remove the difficulty of construction suggested in Dempsey v. Tylee, 3 Duer, 73, 98, 101, 102. Compare Hoey v. Kenny, 25 Barb., 396.

§ 337. When a married woman, entitled to an estate in fee, is authorized by a power to dispose of such estate during her marriage, she may, by virtue of such power, create any estate which she might create if unmarried.

1 R. S., 737, § 130.

§ 338. Purchasers for a valuable consideration, claiming under a defective execution of a power, are entitled to the same relief as similar purchasers.
claiming under a defective conveyance from an actual owner.


§ 339. Instruments in execution of a power are affected by fraud in the same manner as like instruments executed by owners or trustees.

Ib., § 125.

§ 340. A general and beneficial power is valid, which gives to a married woman power to dispose, during her marriage, and without the concurrence of her husband, of a present or future estate in real property conveyed or devised to her in fee.

1 R. S., 732, § 80, changed in phraseology, so as to render it consistent with the present law concerning the rights of married women. A married woman may now dispose of property as if she were unmarried, and for all women married since 1848, this provision is unnecessary. But there may be powers heretofore created, the validity of which it is proper to recognize.

The words "a present or future estate in" are added, in conformity to the construction of WALWORTH, Ch., in Jackson v. Edwards, 7 Paige, 386, 401.

§ 341. Where an absolute power of disposition, not accompanied by any trust, is given to the owner of a particular estate for life or years, such estate is changed into a fee, absolute in favor of creditors, purchasers, and incumbrancers, but subject to any future estates limited thereon, in case the power should not be executed, or the property should not be sold1 for the satisfaction of debts.

Ib., § 81.

1 Jackson v. Edwards, 22 Wend., 609.

§ 342. Where an absolute power of disposition, not accompanied by any trust, is given to any person to whom no particular estate is limited, such person also takes a fee, subject to any future estate that may be limited thereon, but absolute in favor of creditors, purchasers, and incumbrancers.

Ib., § 82.
§ 343. In all cases where an absolute power of disposition is given, not accompanied by any trust, and no remainder is limited on the estate of the holder of the power, he is entitled to an absolute fee.

1 R. S., 733, § 83.

§ 344. Where a general and beneficial power to devise the inheritance is given to the owner of an estate for life or for years, he is deemed to possess an absolute power of disposition, within the meaning of the last three sections.

1 R. S., 733, § 84. See Tallmadge v. Sill, 21 Barb., 52, 53.

§ 345. Every power of disposition is deemed absolute, by means of which the holder is enabled in his lifetime to dispose of the entire fee, in possession or in expectancy, for his own benefit.

Ib., § 85.

The words "in possession or in expectancy" are added, in conformity to the construction of Walworth, Ch., in Jackson v. Edwards, 7 Paige, 401.

§ 346. Where the grantor in any conveyance reserves to himself, for his own benefit, an absolute power of revocation, such grantor is still to be deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.

Ib., § 86.

§ 347. A special and beneficial power is valid, which is granted:

1. To a married woman, to dispose, during the marriage, of any estate less than a fee, belonging to her, in the property to which the power relates; or,

2. To the owner of a life estate in the property embraced in the power, to make leases for not more than twenty-one years, commencing in possession during his life.

Ib., § 87. See note to § 340.
§ 348. A special and beneficial power to make leases for more than twenty-one years given to the owner of a life estate, is void only as to the time beyond twenty-one years, and authorizes leases for that term or less.

This section is new.
The contrary was held in Root v. Stuyvesant, 18 Wend., 257, "by a divided vote against the opinion of all the judges" (Williams v. Williams, 8 N. Y., 539). It is "an anomalous case, to be rejected and shunned, not to be followed; as an authority it ought never to be quoted" (Duren, J., Lang v. Ropke, 5 Sandf., 372), "an adjudication between the amicable parties then before the court, and not a precedent which can affect the rights of third persons " (Brons, J., How v. Van Schaick, 20 Wend., 569; and see Darling v. Rogers, 22 Wend., 496).

§ 349. The power of the owner of a life estate to make leases is not transferable as a separate interest, but is annexed to his estate, and will pass, unless specially excepted, by any grant of such estate. If specially excepted in any such grant, it is extinguished.

1 R. S., 733, § 88.

§ 350. The power of the owner of a life estate to make leases may be released by him to any person entitled to a future estate in the property, and is thereupon extinguished.

Ib., § 89.

§ 351. A mortgage, executed by the owner of a life estate having a power to make leases, or by a married woman, by virtue of any beneficial power, does not extinguish or suspend the power; but the power is bound by the mortgage in the same manner as the real property embraced therein.

Ib., § 90.

§ 352. The effects on the power, of a lien by mortgage such as is mentioned in the last section, are:
1. That the mortgagee is entitled to an execution of the power, so far as the satisfaction of his lien may require it; and,

2. That any subsequent estate created by the owner, in execution of the power, becomes subject to the mortgage in the same manner as if in terms embraced therein.

§ 353. Every special and beneficial power is liable to the claims of creditors, in the same manner as other interests that cannot be reached by execution, and the execution of the power may be adjudged for the benefit of the creditors entitled.

Ib., § 93.

§ 354. No beneficial power, general or special, not already specified and defined in this Title, can hereafter be created.

Ib., § 92.

It has been thought that the omission of this section would not affect the authority to create such powers (Nelson, Ch. J., Root v. Stuyvesant, 18 Wend., 271; Cowen, J., ib., 292). But the Revisers say: "We have deemed it very important to limit the authority of owners in the creation of beneficial powers. We have not been able to discover that any practical good can result from their permission, except in the cases that we have specified" (5 Edmonds' Stat. at Large, Rev. Note, 323). And see Jackson v. Edwards, 7 Page, 400.

§ 355. Every trust power, unless its execution is made expressly to depend on the will of the trustee, is imperative, and imposes a duty on the trustee, the performance of which may be compelled for the benefit of the parties interested.

1 R. S., 734, § 96.
1 Arnold v. Gilbert, 5 Barb., 195, 198.

§ 356. A trust power does not cease to be imperative, where the trustee has the right to select any, and
exclude others, of the persons designated as the
beneficiaries of the trust.

Ib., § 97.

§ 357. Where a disposition under a power is directed
to be made to, among, or between several persons,
without any specification of the share or sum to be
allotted to each, all the persons designated are enti-
tled in equal proportion.

Ib., § 98.

§ 358. Where the terms of a power import that the
estate or fund is to be distributed among several per-
sons designated, in such manner or proportions as
the trustee of the power may think proper, the trust-
see may allot the whole to any one or more of such
persons in exclusion of the others.

Ib., § 99.

§ 359. If the trustee of a power, with the right of
selection, dies leaving the power unexecuted, its exe-
cution must be adjudged for the benefit, equally, of
all the persons designated as objects of the trust.

Ib., § 100.

§ 360. Where a power in trust is created by will, and
the testator has omitted to designate, expressly
or by necessary implication, by whom the power is
to be executed, its execution devolves on the supreme
court.

Ib., § 101.
The words "expressly or by necessary implication" are
added, upon the authority of Meekings v. Cromwell, 5
N. Y., 139.

§ 361. The execution, in whole or in part, of any
trust power, may be adjudged for the benefit of the
creditors or assignees of any person entitled, as one
of the beneficiaries of the trust, to compel its execu-
tion, when his interest is transferable.

1 R. S., 726, § 103.
§ 362. Where the execution of a power in trust is defective, in whole or in part, under the provisions of this Title, its proper execution may be adjudged in favor of the persons designated as the objects of the trust.

1 R. S., 737, § 131.

§ 363. The provisions of the Title on Trust, saving the rights of other persons from prejudice by the misconduct of trustees, and authorizing the court to remove and appoint trustees; the provisions of the Title on Succession, devolving express trusts upon the court,\(^1\) on the death of the trustee; and the provisions of section 299, in the Title on Uses and Trusts,\(^2\) apply equally to powers in trust, and the trustees of such powers.

1 R. S., 734, § 102.
\(^1\) Hoey v. Kanny, 26 Barb., 396.
PART III.
PERSONAL OR MOBILE PROPERTY.

TITLE I. Personal Property in General.
II. Particular Kinds of Personal Property.

TITLE I.
PERSONAL PROPERTY IN GENERAL.

Section 364. By what law governed.
365. Future interests in perishable property, how protected.

§ 364. If there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile.

§ 365. Where one has the present and another the future interest in a thing personal, and the thing is perishable, the latter may require it to be sold, and the proceeds invested, for the benefit of both parties, according to their respective interests; except in case of a thing specially appropriated to a particular use.

This provision is new.
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TITLE II.

PARTICULAR KINDS OF PERSONAL PROPERTY.

CHAPTER I. Things in action.
   II. Shipping.
   III. Corporations.
   IV. Products of the mind.
   V. Other kinds of personal property.

CHAPTER I.

THINGS IN ACTION.

SECTION 366. Things in action defined.

367. Transfer and survivorship.

§ 366. A thing in action is a right to recover something by a judicial proceeding.

§ 367. A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office.

This section is proposed to establish one rule for the assignability and the survivorship of things in action. Though the cases on this subject are conflicting, this view is generally received (See McKee v. Judd, 12 N. Y., 622; Meech v. Stoner, 19 id., 26).
CHAPTER II.

SHIPPING.

ARTICLE I. General provisions.
II. Rules of navigation.

ARTICLE I.

GENERAL PROVISIONS.

SECTION 368. Definition of a ship.
369. Appurtenances and equipments.
370. Foreign and domestic navigation.
371. Foreign and domestic ships distinguished.
372. Several owners.
373. Owner for voyage.
374. Registry, &c.

§ 368. A ship is any structure fitted for navigation. Every kind of ship is included in the term "shipping."

§ 369. All things, belonging to the owners, which are on board a ship, and are connected with its proper use, for the objects of the voyage and adventure in which the ship is engaged, are deemed its appurtenances.

See the cases on this subject in 1 Pars. Mar. L., 71.

§ 370. Ships are engaged either in foreign or domestic navigation, or in the fisheries. Ships are engaged in foreign navigation, when passing to or from a foreign country; and in domestic navigation, when passing from place to place within the United States.

§ 371. A ship in a port of the state to which it belongs is called a domestic ship; in another port it is called a foreign ship.

§ 372. If a ship belongs to several persons, not partners, and they differ as to its use or repair, the
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controversy may be determined by any court of competent jurisdiction.

This provision, which is new, is intended to establish a rule for all cases of difference, whether a majority occur in one opinion or not (See 2 Fam. Mar. Law, 555).

§ 373. If the owner of a ship commits its possession and navigation to another, that other, and not the owner, is responsible for its repairs and supplies.

§ 374. The registry, enrollment, and license of ships, are regulated by acts of Congress.

3 Kent, 133; Henketh v. Stevens, 7 Barb., 498.

ARTICLE II.

RULES OF NAVIGATION.*

SECTION 375. Collisions.

1. Rules as to ships meeting each other.
2. The rule for sailing vessels.
3, 4. Rules for steamers in narrow channels.
5. Rules for steam vessels on different courses.
6. Meeting of steamers.

376. Collision from breach of rules.
377. Breaches of such rules to imply willful default.
378. Loss, how apportioned.

§ 375. In the case of ships meeting, the following rules must be observed in addition to those prescribed by that part of the POLITICAL CODE, which relates to Navigation:

1. Whenever any ship, whether a steamer or sailing ship, proceeding in one direction, meets another ship, whether a steamer or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve the risk of a collision, the helms of both ships must be put to port so as to pass on the port

* The subjects of Pilotage and Wrecks are regulated by the POLITICAL CODE.
side of each other; and this rule applies to all steamers and all sailing ships, whether on the port or starboard tack, and whether close-hauled or not, except where the circumstances of the case are such as to render a departure from the rule necessary in order to avoid immediate danger, and subject also to a due regard to the dangers of navigation, and, as regards sailing ships on the starboard tack close-hauled, to the keeping such ships under command.¹

2. In the case of sailing vessels, those having the wind fair must give way to those on a wind. When both are going by the wind, the vessel on the starboard tack must keep her wind, and the one on the larboard tack bear up strongly, passing each other on the larboard hand. When both vessels have the wind large or abeam, and meet, they must pass each other in the same way on the larboard hand, to effect which two last mentioned objects the helm must be put to port. Steam vessels must be regarded as vessels navigating with a fair wind, and should give way to sailing vessels on a wind of either tack.²

3. A steamer navigating a narrow channel must, whenever it is safe and practicable, keep to that side of the fair way or mid-channel which lies on the starboard side of the steamer.³

4. A steamer when passing another steamer in such channel, must always leave the other upon the larboard side.⁴

5. When steamers must inevitably or necessarily cross so near that, by continuing their respective courses, there would be a risk of collision, each vessel must put her helm to port, so as always to pass on the larboard side of each other.⁵

6. The rules of this section do not apply to any case for which a different rule is provided by the regulations for the government of pilots of steamers approaching each other within sound of the steam whistle, or by the regulations concerning lights upon
steamers, prescribed under authority of the acts of Congress, approved August 30, 1852, and April 29, 1864.∗

∗ This rule is from the English Mercantile Shipping Act of 1854. 17 and 18 Vic., c. 104.

∗ This rule is from the Rules of Navigation of Trinity House, 1840.

17 and 18 Vic., c. 104.

Rules of Trinity House.

Rules of Trinity House.

The regulations prescribed by the Board of Inspectors, under authority of the act of 1852, are as follows:

All pilots of steamers navigating seas, gulfs, lakes, bays, or rivers (except rivers emptying into the Gulf of Mexico, and their tributaries), when meeting or approaching each other, whether by day or by night, and as soon as within sight and tally within sound of the steam whistle, shall observe and comply with the following

REGULATIONS:

Rule 1. When steamers meet "head and head," it shall be the duty of each to pass to the right or larboard side of the other. And either pilot, upon determining to pursue this course, shall give, as a signal of his intention, one short and distinct blast of his steam whistle, which the other shall answer promptly by a similar blast of the whistle. But if the course of each steamer is so far on the starboard of the other as not to be considered by the rules as meeting "head and head," or if the vessels are approaching in such a manner, that passing to the right (as above directed) is deemed unsafe, or contrary to rule, by the pilot of either vessel, the pilot so deciding shall immediately give two short and distinct blasts of his steam whistle, which the other pilot shall answer promptly by two similar blasts of his whistle, and they shall pass to the left or on the starboard side of each other. Note.—In the night, steamers will be considered meeting "head and head," so long as both the colored lights of each are in view of the other. In the day, a similar position will also be considered "head and head."

Rule 2. When steamers are approaching each other in an oblique direction (as shown in diagram of fifth situation), they will pass to the right, as if meeting "head and head," and the signal, by whistle, shall be given and answered promptly, as in that case specified.

Rule 3. If, when steamers are approaching each other, the pilot of either vessel fails to understand the course or intention of the other, whether from the signals being given and answered erroneously, or from other cause, the pilot, so in doubt, shall immediately signify the same by giving several short and rapid blasts of the steam whistle, and if the other vessel shall have approached within a mile of each other, both shall be immediately slowed to a speed barely sufficient for steerage way, until the proper signals are given, answered and understood, or until the vessels shall have passed each other.

Rule 4. When steamers are running in a fog, or thick weather, it shall be the duty of the pilot to cause a long blast of the steam whistle to be sounded at intervals not exceeding two minutes. And no steamer shall, in any case, be justified in coming into collision with another vessel if it be so doing to avoid it.

Rule 5. Whenever a steamer is nearing a short bend or curve in the channel, where, from the height of the banks or other cause, a steamer approaching from the opposite direction cannot be seen for a distance of half a mile, the pilot of such steamer, when he shall have arrived within half a mile of such curve or bend, shall give a signal by one long blast of the steam whistle, which signal shall be answered by a similar blast given by the pilot of any approaching steamer that may be within hearing. Should such signal be so answered by a steamer upon the further side of such bend, then the usual signals for meeting and passing shall immediately be given and answered. But if the first alarm signal of such pilot be not answered, he is to consider the channel clear, and govern himself accordingly.

Rule 6. The signals by blowing of the steam whistle shall be given and answered by pilots in compliance with these rules, not only when meeting "head and head," or hastily so, but at all times, when passing or meeting, at a distance within half a mile of each other, and whether passing to the starboard or larboard.

N. B.—The foregoing rules are to be complied with in all cases, except when steamers are navigating in a crowded channel or in the vicinity of wharves,—under these circumstances steamers must be run and managed with great caution, sounding the whistle as may be necessary to guard against collision or other accidents.

STEAMERS’ LIGHTS, TO PREVENT COLLISION AT NIGHT.

Rule 7. When under weigh. All steamers rigged for carrying sail must carry a bright white light at the foremost head, and all other steamers must carry a bright white light on the stern or near the bow, and another on a mast near the stern, or on the flag-staff at the stern, the last named being at an elevation of at least twenty feet above all other lights upon the steamer. All steamers must carry a green light upon the starboard side, and a red light on the port side.
§ 376. If it appears that a collision was occasioned by failure to observe any rule of the foregoing section, the owner of the ship by which such rule is infringed cannot recover compensation for damages sustained by the ship in such collision, unless it appears that the circumstances of the case made a departure from the rule necessary.

Norn.—Steamers, although rigged for carrying sail, instead of the foremost head light, may adopt the forward and stern lights provided for steamers not rigged for carrying sail, provided such lights are so arranged and placed on the vessel as to secure the contemplated objects.

When at anchor. A bright, white light at least twenty feet above the surface of the water. The lantern so constructed and placed as to show a good light all around the horizon.

First. The masthead light of steamers rigged for carrying sail to be visible at a distance of at least five miles in a clear dark night, and the lantern to be so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the ship.

Second. The stern and stern lights of steamers not rigged for carrying sail to be visible at a distance of at least five miles in a clear dark night, and the respective lanterns to be so constructed that the stern light shall show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the ship, and that the stern light shall show a uniform light all around the horizon.

Third. The colored side lights to be visible at a distance of at least two miles in a clear dark night, and the lanterns to be so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, namely, from right ahead to two points abaft the beam on their respective sides.

Fourth. The side lights are to be fitted with inboard screens of at least six feet in length (clear of the lanterns), to prevent them from being seen across the bow. The screens are to be placed in a fore and aft line with the inner edge of the side lights, and in contact therewith.

Norn. — The object of carrying the bright white light at the foremost head of steamers rigged for carrying sail is merely to intimate to other vessels the approach or presence of such steamer.

Norn. — The object of the colored lights required to be carried on all steamers, is to indicate to other vessels the course or direction such steamer may be steering.

Norn. — The object of requiring steamers not rigged for carrying sail to carry a white side light in connection with a white light on the stern or near the bow, is to provide (when the vessel’s rig will admit of it) a method of determining, by a central range of lights, more correctly the course that such vessel is running.

The regulations of the act of April 29, 1864, which apply to all “mercantile marine,” are as follows:

REGULATIONS FOR PREVENTING COLLISIONS ON WATER.

PRELIMINARY.

ARTICLE 1. What to be considered sailing-ships and what ships under steam. In the following rules every steamship which is under sail, and not under steam, is to be considered as a sailing-ship; and every steamship which is under steam, whether under sail or not, is to be considered a ship under steam.

RULES CONCERNING LIGHTS.

LIGHTS.

Art. 2. The lights mentioned in the following articles, and no others, shall be carried in all weathers between sunset and sunrise.

LIGHTS FOR STEAMSHIPS.

Art. 3. All steam vessels whose manner shall carry—(a.) At the foremost head, a bright white light, so fixed as to show an uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, six from right ahead to two points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles. (b.) On the starboard side, a green light, so constructed as to throw an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from
§ 377. Damage to person or property arising from the failure of a ship to observe any rule of section 375, must be deemed to have been occasioned by the willful default of the person in charge of the deck of such ship at the time, unless it appears that the circumstances of the case made a departure from the rule necessary.

right ahead to two points shaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles. (c.) On the port side, a red light, so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points shaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles. (d.) The said green and red side lights shall be fitted with inward screens and three forward from the light, so as to prevent these lights from being seen across the bow.

LIGHTS FOR STEAM-BOATS.

Art. 4. Steamships, when towing other ships, shall carry two bright white masthead lights vertically, in addition to their side lights, so as to distinguish them from other steamships. Both of these masthead lights shall be of the same construction and character as the masthead lights which other steamships are required to carry.

LIGHTS FOR SAILING-BOATS.

Art. 5. Sailing-vessels under way or being towed, shall carry the same lights as steamships under way, with the exception of the white masthead lights, which they shall never carry.

EXCEPTIONAL LIGHTS FOR SMALL SAILING-VESSELS.

Art. 6. Whenever, as in the case of small vessels during bad weather, the green and red lights cannot be fixed, these lights shall be kept on deck, on their respective sides of the vessel, ready for instant exhibition, and shall, on the approach of or to other vessels, be exhibited on their respective sides in sufficient time to prevent collision, in such manner as to make them most visible, and so that the green light shall not be seen on the port side, nor the red light on the starboard side.

To make the use of these portable lights more certain and easy, they shall each be painted outside with the color of the light they respectively contain, and shall be provided with suitable screens.

LIGHTS FOR SHIPS AT ANCHOR.

Art. 7. Ships, whether steamships or sailing-ships, when at anchor in roads and fairways, shall, between sunset and sunrise, exhibit where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of eight inches in diameter, and so constructed as to show a clear, uniform and unbroken light, visible all around the horizon, and at a distance of at least one mile.

LIGHTS FOR PILOT-VESSELS.

Art. 8. Sailing pilot-vessels shall not carry the lights required for other sailing-vessels, but shall carry a white light at the masthead, visible all around the horizon, and shall also exhibit a flare up light every fifteen minutes.

LIGHTS FOR FISHING-BOATS AND BOATS.

Art. 9. Open fishing-boats and other open boats shall not be required to carry side lights required for other vessels, but shall, if they do not carry such lights, carry a lantern having a green slide on the port side and a red slide on the other side, and on the approach of or to other vessels, such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side. Fishing-vessels and open boats when at anchor, or attached to their nets and stationery, shall exhibit a bright white light. Fishing-vessels and open boats shall, however, not be prevented from using a flare-up in addition, if considered expedient.

RULES GOVERNING FOG SIGNALS.

FOG SIGNALS.

Art. 10. Whenever there is a fog, whether by day or night, the fog-signals described below shall be carried and used, and shall be sounded at least every five minutes, viz.:

(a.) Steamships under way shall use a steam whistle placed before the funnel, not less than eight feet from the deck.

(b.) Sailing-ships under way shall use a fog-horn.

(c.) Steamships and sailing-ships when not under way shall use a bell.
§ 378. Losses caused by collision are to be borne as follows:

1. If either party was exclusively in fault he must bear his own loss, and compensate the other for any loss he has sustained;

2. If neither was in fault, the loss must be borne by him on whom it falls;

3. If both were in fault the loss is to be equally divided, unless it appears that there was a great disparity in fault, in which case the loss must be equitably apportioned; or,

STEERING AND SAILING RULES.

TWO SAILING-SHIPS MEETING.

Art. 11. If two sailing-ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass on the port side of the other.

TWO SAILING-SHIPS CROSSING.

Art. 12. When two sailing-ships are crossing so as to involve risk of collision, then, if they have the wind on different sides, the ship with wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is close hauled, and the other ship free, in which case the latter ship shall keep out of the way. But if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward, shall keep out of the way of the ship which is to leeward.

TWO SHIPS UNDER STEAM MEETING.

Art. 13. If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port so that each may pass on the port side of the other.

TWO SHIPS UNDER STEAM CROSSING.

Art. 14. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side, shall keep out of the way of the other.

SAILING SHIP AND SHIP UNDER STEAM.

Art. 15. If two ships, one of which is a sailing-ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing-ship.

SHIPS UNDER STEAM TO SLACKEN SPEED.

Art. 16. Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steamship shall, when in a fog, go at a moderate speed.

VESSELS OVERTAKING OTHER VESSELS.

Art. 17. Every vessel overtaking any other vessel, shall keep out of way of the said last mentioned vessel.

CONSTRUCTION OF ARTICLES 12, 14, 15 AND 17.

Art. 18. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course subject to the qualifications contained in the following article:

PROVIDE TO SAVE SPECIAL CASES.

Art. 19. In obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger.

NO SHIP UNDER ANY CIRCUMSTANCES TO NEGLECT PROPER PRECAUTIONS.

Art. 20. Nothing in these rules shall excuse any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. Approved, April 20, 1856.
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4. If it cannot be ascertained where the fault lies, the loss must be equally divided.  

1 The Scioto, Davie's, 359; The Woodrop-Sims, 2 Dods., 83; The Sappho, 9 Jur., 560; Reeves v. The Constitution, Gilpin, 579.
2 The Woodrop-Sims, supra; Stainback v. Rae, 14 How. [U.S.], 532; The Itinerant, 2 W. Rob., 236.
3 This is the rule in admiralty courts (Cushing v. The Fraser, 21 How. [U.S.], 184; Rogers v. The St. Charles, 19 Id., 108; The Catharine v. Dickinson, 17 Id., 177; Vaux v. Sheeter, 8 Moore P. C., 75). It is otherwise at common law (Dowell v. Gen. St. N. Co. 5 El. & Bl., 195; Gen. St. N. Co. v. Mann, 14 C.B., 127; see Barnes v. Cole, 21 Wend., 188).
4 The Scioto, Davie's, 359; The Catharine of Dover, 2 Hagg. Adm., 145; Lucas v. The Swann, 6 Mc'Lean, 282; The Nautilus, Ware, 529.

CHAPTER III.

CORPORATIONS.

ARTICLE I. The creation of corporations.

II. Corporate stock.

III. Corporate powers.

IV. Dissolution of corporations.

ARTICLE I.

THE CREATION OF CORPORATIONS.

Section 379. Corporations defined.

380. How created.

381. Reservation of power to repeal.

382. Dealers with a corporation cannot question its corporate existence.

383. Name.

384. Distinction of corporations.

385. Public corporations defined.

386. Private corporations.

387. Charters.

388, 389. Acceptance of charter.

390. Number of corporators.

391. Purposes for which corporations may be formed.

392. Charter to be prepared.

393. Charter of road company.
§ 379. A corporation is a creature of the law, having certain powers and duties of a natural person. Being created by the law it may continue for any length of time which the law prescribes.

§ 380. A corporation can only be created by authority of a statute. But the statute may be special for a particular corporation, or general for a number of corporations.

§ 381. Every grant of corporate power is subject to alteration, suspension or repeal, in the discretion of the legislature.

1 R. S., 600, § 7.

§ 382. One who assumes an obligation to an ostensible corporation, as such, cannot resist the obligation on the ground that there was in fact no such corporation, until that fact has been adjudged in a direct proceeding for the purpose.

§ 383. Every corporation must have a corporate name, which it has no power to change unless expressly authorized by law; but the name is to be deemed so far matter of description, that a mistake in the name, in any instrument, may be disregarded, if a sufficient description remains by which to ascertain the corporation intended.

Ang. & Ames on C., 93, 94.

§ 384. Corporations are either:
1. Public; or,
2. Private.

§ 385. A public corporation is one that has for its object the government of a portion of the state. Such
corporations are regulated by the Political Code, and by local statutes.

§ 386. Private corporations are of three kinds:
1. Corporations for religion;
2. Corporations for benevolence;
3. Corporations for profit.

§ 387. The instrument by which a corporation is constituted is called its charter, whether that be a statute, as in case of a special charter, or the document prescribed by a general statute, for the constitution of the corporation.

§ 388. In order to constitute a private corporation, there must not only be a statutory grant of corporate authority, but an acceptance of that grant by a majority of the corporators, or their agents. The acceptance cannot be conditional or qualified.

§ 389. Except when otherwise expressly provided, the acceptance of a grant of corporate authority may be proved like any other fact.

§ 390. Private corporations may be formed by the voluntary association of three or more persons, for the purposes and in the manner mentioned in the following sections of this article.

This section, which is new, is intended to provide a uniform rule as to the number of persons who may form a corporation. Under the existing statutes there are great differences in this respect.

§ 391. The purposes for which the private corporations mentioned in the last section may be formed are:
1. The support of public worship;
2. The support of any benevolent, charitable, educational or missionary undertaking;
3. The support of any literary or scientific undertaking; the maintenance of a library; or the promotion of painting, music or other fine arts;

4. The encouragement of agriculture and horticulture;

5. The maintenance of public parks, and of facilities for skating and other innocent sports;

6. The maintenance of a club for social enjoyment;

7. The maintenance of a public or private cemetery;

8. The prevention and punishment of theft or willful injuries to property, and insurance against such risks;

9. The insurance of human life, and dealing in annuities;

10. The insurance of human beings against sickness or personal injury;

11. The insurance of the lives of domestic animals;

12. The insurance of property against marine risks;

13. The insurance of property against loss or injury by fire, or by any risk of inland transportation;

14. The transaction of a banking business;

15. The construction and maintenance of a railway and of a telegraph line in connection therewith;

16. The construction and maintenance of any other species of roads, and of bridges in connection therewith;

17. The construction and maintenance of a bridge;

18. The construction and maintenance of a telegraph line;

19. The establishment and maintenance of a line of stages;

20. The establishment and maintenance of a ferry;
21. The building and navigation of ships, and carriage of persons and property thereon;

22. The supply of water to the public;

23. The manufacture and supply of gas, or the supply of light or heat to the public by any other means;

24. The transaction of any manufacturing, mining, mechanical or chemical business;

25. The transaction of a printing and publishing business;

26. The establishment and maintenance of an hotel;

27. The erection of buildings, and the accumulation and loan of funds for the purchase of real property, or,

28. The improvement of the breed of domestic animals, by importation, sale or otherwise.

2 Laws 1848, ch. 319; Laws 1857, ch. 392; Laws 1861, ch. 239.
3 Id.
4 Laws 1853, ch. 305.
5 Laws 1860, ch. 242; extended to musical societies.
6 Laws 1855, ch. 425.
7 Laws 1861, ch. 149.
8 New. See special charters, Laws 1860, ch. 49, 473, 474; Laws 1861, ch. 48, 304; Laws 1862, ch. 342; Laws 1864, ch. 31, 184, 244, 294, 382, 489.
9 Laws 1847, ch. 133; Laws 1854, ch. 112.
10 Laws 1854, ch. 112.
11 Laws 1859, ch. 168.
12 Laws 1853, ch. 403.
13 Id.
14 New. A special charter was, however, granted for this purpose in 1863.
15 Laws 1853, ch. 463.
16 Laws 1848, ch. 308; Laws 1853, ch. 463.
17 Laws 1853, ch. 466.
18 Laws 1839, ch. 260; Laws 1847, ch. 160.
19 Laws 1850, ch. 140.
20 Laws 1848, ch. 265.
22 Laws 1846, ch. 259.
23 Id.
24 Laws 1843, ch. 265.
§ 392. A charter must be prepared, setting forth:

1. The name of the corporation;
2. The purpose for which it is formed;
3. The place or places where its business is to be transacted;
4. The term for which it is to exist;
5. The number of its directors or trustees, and the names and residences of those who are appointed for the first year; and,
6. The amount of its capital stock, if any; and the number of shares into which it is divided.

§ 393. The charter of a road company must also state:

1. The kind of road intended to be constructed;
2. The places from and to which the road is intended to be run;
3. The counties through which it is intended to be run; and,
4. The estimated length of the road.

§ 394. The charter of an intended corporation must be subscribed by three or more persons, two of whom at least must be citizens of this state, and must be
§ 395. The charter of a corporation designed to carry on the business of banking or insurance must be presented to the superintendent of the banking or insurance department, as the case may be, who must indorse his approval thereon, but may, as a condition thereof, require the name of the corporation to be changed, if it is, in his judgment, likely to mislead the public.

This provision is at present applicable only to insurance companies (Laws 1853, ch. 466).

§ 396. A petition must be presented with the charter of an intended corporation, to the county court of the county in which its principal place of business is to be situated, asking that the charter be examined, approved and filed, and an order of incorporation granted.

This, and the next three sections, are new.

§ 397. A petition for incorporation must declare the truth of the statements of the charter, and must be subscribed by all the persons who subscribed the charter, and verified by their oaths.

§ 398. Upon the presentation of a petition for incorporation, the court must inquire into the facts; and if satisfied that the matters stated in the petition are true, and that the proceedings have been had in conformity with the law, an order must be made by the court declaring that the charter is approved, and that upon the filing of the order, charter and petition, the subscribers of the charter shall be a corporation, for the purposes, and upon the terms therein stated.

§ 399. Upon the filing of the order, charter and petition, mentioned in the last section, with the clerk of the county in which the order was made, and of a duplicate thereof with the secretary of state, the subscribers of the charter are a corporation for the purposes and upon the terms therein stated.
§ 400. Except when otherwise provided, a person becomes a corporator in a private corporation, upon the issue of stock to him and his acceptance thereof.

ARTICLE II.

CORPORATE STOCK.

SECTION 401. Subscriptions for stock.
402. Remedies for non-payment of subscription.
403. Issue of stock.
404. Transfers of stock.
405. Over-issuance of stock.
406. Purchase of stock by the corporation.
407. Dividend.

§ 401. A subscription to the stock of a corporation about to be formed, is to be held for the benefit of the corporation, when it is formed, and may be enforced by it.

Hamilton & Dansville Plankroad Co. v. Rice, 7 Barb., 157; Schenectady & Saratoga Plankroad Co. v. Thatcher, 11 N. Y., 103; Lake Ontario, &c., R. R. Co. v. Mason, 16 N. Y., 451; Rensselaer & Washington Plankroad Co. v. Barton, Id., 457, note; but see Poughkeepsie & Salt Point Plankroad Co. v. Griffin, 24 N. Y., 150.

§ 402. When a corporation is authorized by its charter, or by the terms of subscription, to forfeit stock for non-payment, it may either forfeit the stock, or recover the amount of the subscription, but cannot do both.¹

¹ Harlem Canal Co. v. Seixas, 2 Hall, 504; The Same v. Spear, 2d, 510; Palmer v. Lawrence, 3 Sandf., 161; Union Turnpike Co. v. Jenkins, 1 Cr., 381; Goshen Turnpike Co. v. Hurtin, 9 Johns., 217; Dutchess Cotton Manufactory v. Davis, 14 Id., 238.

§ 403. Stock is issued by placing it in the name of the stockholder upon the books of the corporation, unless the issue of a certificate is required by the charter or by-laws, in which case the stock is issued by the execution and delivery of the certificate.²


¹ Thorp v. Woodhull, 1 Sandf. Ch., 411.
§ 404. A certificate of stock may be transferred like any other personal property; and a transfer on the books of the corporation is not necessary, between the parties to the transfer; but a certificate is not a negotiable instrument, and a transfer does not confer greater rights against the corporation than the former holder of the stock possessed.


§ 405. A corporation whose capital is limited by its charter, either in amount or in number of shares, cannot issue valid certificates in excess of the limit thus prescribed.


§ 406. Unless otherwise provided, a corporation may purchase, hold and transfer shares of its own stock.


§ 407. A dividend belongs to the person in whose name the stock stands upon the books of the corporation on the day when it becomes payable.

ARTICLE III.

CORPORATE POWERS.

Section 408. General powers.

409. 410. By-laws and other powers.

411. Mode of acting.

412. Meetings and agencies.

413. Meetings of public corporations.

414. Mode of exercising power.

415. General restriction.
§ 408. Every corporation, by virtue of its existence as such, has the following powers, unless otherwise specially provided:

1. To have succession by its corporate name, for the period limited by its charter; and when no period is limited, perpetually; subject to the power of the legislature as hereinbefore declared;

2. To maintain and defend judicial proceedings;

3. To make and use a common seal, and alter the same at pleasure;

4. To hold, purchase and transfer such real and personal property as the purposes of the corporation require, not exceeding the amount limited by its charter;

5. To appoint and remove subordinate officers and agents, as the business of the corporation requires, and to allow them a suitable compensation;

6. To make by-laws, not inconsistent with the law of the land, for the management of its property, the regulation of its affairs, and the transfer of its stock;

7. To admit and remove members; and,

8. To enter into any obligation essential to the transaction of its ordinary affairs.

The first six subdivisions are in substance the same as 1 R. S., 599, § 1.

Fawcett v. Charles, 13 Wend., 473.


§ 409. The by-laws of a corporation are the regulations subordinate to the charter, prescribed for the government of its officers. They must be made by the corporators in general meeting, unless the charter prescribes another body or a different mode.

This and the four sections following are now.

§ 410. The powers and duties of corporations, the time, place and manner of exercising the corporate powers, the means by which persons may become members or lose membership, the kind and number of officers, and the manner of their appointment or removal, are prescribed by this Code, or by the statutes relating to the corporations respectively, or the by-laws made in pursuance of law.

§ 411. A corporation may act:
1. By writing, under the corporate seal;
2. By writing, signed by an authorized agent;
3. By resolution of the corporators, directors, or other managing body; or,
4. By an authorized agent.

§ 412. Unless otherwise expressly authorized by its charter, the meetings of the corporators, directors or other managing body of a corporation, must be held within the jurisdiction of the state by whose authority the corporation was created. It may, however, also have agencies elsewhere.

§ 413. The meetings of a public corporation, or of its officers, must be held within the limits of its own jurisdiction.
§ 414. Where the law expressly confers power upon a corporation to do an act in a certain mode, its power is confined to the mode prescribed. McSpedon v. Mayor of N. Y., 7 Bowr., 601; McCullough v. Moss, 5 Denio, 567; Farmers' Loan and Trust Company v. Carroll, 5 Barb., 613; Brady v. Mayor, &c., of New York, 2 Bowr., 173.

§ 415. Besides the powers and duties specified in this chapter, and such others as are expressly conferred by statute, or may be necessary to the exercise of the powers so conferred, a corporation has no other power. 1 R. S., 600, § 3.

§ 416. No corporation, unless it is expressly incorporated for banking purposes, possesses the power of discounting bills, notes or other evidences of debt, of receiving deposits, of buying gold and silver bullion or foreign coins, of buying and selling bills of exchange, or of issuing bills, notes or other evidences of debt, upon loan or for circulation as money. 1 R. S., 600, § 4.

§ 417. When the whole capital of a corporation is not paid in, and the capital paid is insufficient to satisfy the claims of its creditors, each stockholder is bound to pay, on each share held by him, the sum necessary to complete the amount of such share as fixed by the charter, or such proportion of that sum as is required to satisfy the debts of the corporation. 1 R. S., 600, § 5.

§ 418. When the corporate powers of a corporation are directed by its charter to be exercised by any particular body, or number of persons, a majority of such body, or persons, if not otherwise provided by the charter, is a sufficient number to form a board for the transaction of business. Such board must be convened in the mode prescribed by the charter or by-laws, or by notice to all the members thereof.
within the state; and every decision of a majority
of the persons thus duly assembled as a board, is as
valid as if made by all.
1 R. S., 600, § 6.

§ 419. A foreign corporation can perform no act in
this state, which is forbidden by the laws or is con-
trary to the policy of the state.

§ 420. Every act of a foreign corporation done in
this state is subject to its laws, and the corporation
itself may be sued in the manner prescribed by the
CODE OF CIVIL PROCEDURE.

§ 421. Any corporation, being a college or other
literary institution of this state, may take and hold
property, both real and personal, subject to such con-
ditions and visitations as may be prescribed by the
donor, and agreed to by the corporation, in trust for
any of the following purposes:

1. To establish and maintain an observatory;
2. To found and maintain professorships and
   scholarships;
3. To provide and keep in repair a place for the
   burial of the dead; or,
4. For any other specific purpose comprehended
   in the general objects authorized by its charter.

Laws of 1840, ch. 318.

§ 422. The corporation of any city or village of
this state may take and hold property, both real and
personal, subject to such conditions as may be pre-
scribed by the donor, and agreed to by the corpora-
tion, in trust for any purpose of education, or for the
diffusion of knowledge, or for the relief of distress,
or for fire-engine houses, reservoirs, or public docks, or
for parks, gardens, or other grounds for health and
recreation, or for ornament or military exercise and
parade, within or near such incorporated city or vil-
lage.

Ib., with some additions.
§ 423. The school commissioners of any town, and the trustees of any school district, may take and hold property, both real and personal, in trust for the benefit of the schools of the town or district, and for such purposes are to be deemed corporations.

§ 424. A corporation is dissolved:

1. By the expiration of the time limited by its charter; or,

2. By a judgment of dissolution, in the manner provided by the Code of Civil Procedure.

The reference is to the Code of Civil Procedure, as reported complete.

§ 425. If any corporation hereafter created is not organized, and engaged in the transaction of business, within one year from the date of its incorporation, its dissolution may be adjudged; unless a different time within which its business must be commenced, is fixed by law.¹

¹ 1 R. S., 600, § 7, omitting the words "by the legislature," after "created;" and modified by making the delay cause for a judgment of dissolution only.

This qualification, which, by Laws of 1846, ch. 155, was applied to railroad corporations, is here made applicable to all kinds.

§ 426. Upon the dissolution of any corporation, unless other persons are appointed by the legislature, or by some court of competent authority, its directors, trustees or managers, at the time of its dissolution, become the trustees of the creditors and stockholders.
of the corporation dissolved, and have power to settle its affairs, collect and pay debts, and divide among the stockholders the property that remains after the payment of debts and necessary expenses; and for this purpose may maintain or defend any judicial proceeding.

1 R. S., 600, § 9.

§ 427. The trustees mentioned in the last section are jointly and severally responsible to the creditors and stockholders of the corporation, to the extent of its property in their hands.

1 R. S., 601, § 10.

§ 428. A corporation once dissolved can be revived only by the same power by which it could be created.

CHAPTER IV.

PRODUCTS OF THE MIND.

SECTION 429. How far the subject of ownership.

430. Joint authorship.

431. Transfer.

432. Effect of publication.

433. Subsequent inventor, author, &c.

434. Private writings.

§ 429. The author of any product of the mind, whether it is an invention, or a composition in letters or art, or a design, with or without delineation, or other graphical representation, has an exclusive ownership therein, and in the representation or expression thereof, which continues so long as the product, and the representations or expressions thereof made by him, remain in his possession.

§ 430. Unless otherwise agreed, a product of the mind, in the production of which several persons are jointly concerned, is owned by them as follows:

1. If the product is single, in equal proportions; or,
2. If it is not single, in proportion to the contribution of each.

§ 431. The owner of any product of the mind, or of any representation or expression thereof, may transfer his property in the same.

§ 432. If the owner of a product of the mind intentionally makes it public, a copy or reproduction may be made public by any person, without responsibility to the owner, so far as the law of this state is concerned.

The protection afforded by act of Congress is a matter of federal legislation, with which the state cannot interfere.

§ 433. If the owner of a product of the mind does not make it public, any other person subsequently and originally producing the same thing, has the same right therein as the prior author, which is exclusive to the same extent, against all persons except the prior author, or those claiming under him.

§ 434. Letters, and other private communications in writing, belong to the person to whom they are addressed and delivered; but they cannot be published against the will of the writer, except by authority of law.

See Woolsey v. Judd, 4 Duer, 382, and cases there cited; Eyre v. Higbee, 22 How. Pr., 198.

CHAPTER V.

OTHER KINDS OF PERSONAL PROPERTY.

SECTION 435. Trade-marks and signs.

436, 437. Good-will of business.

438. Title deeds.

§ 435. One who produces or deals in a particular thing, or conducts a particular business, may appropriate to his exclusive use, as a trade-mark, any form,
symbol or name, which has not been so appropriated by another, to designate the origin or ownership thereof; but he cannot exclusively appropriate any designation or part of a designation, which relates only to the name, quality or description of the thing or business. 3

1 Taylor v. Carpenter, 2 Sandf. Ch., 603.
2 Howard v. Henriques, 3 Sandf., 725.
3 Amoskeag Manufacturing Co. v. Spear, 2 Sandf., 599;
   Fetridge v. Wolls, 6 Abb. Pr., 144.

§ 435. The good-will of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired.


§ 437. The good-will of a business is property, transferable like any other.

Title deeds. § 438. Instruments essential to the title of real property, and which are not kept in a public office as a record pursuant to law, belong to the person in whom, for the time being, such title may be vested, and pass with the title.
PART IV.

ACQUISITION OF PROPERTY.

TITLE I. Modes in which property may be acquired.
   I. Occupancy.
   II. Accession.
   III. Transfer.
   IV. Will.
   V. Succession.

TITLE II.

OCCUPANCY.

§ 439. Property is acquired by
1. Occupancy;
2. Accession;
3. Transfer;
4. Will; or,
5. Succession.

§ 440. Occupancy for any period confers a title sufficient against all except the state and those who
have title by prescription, accession, transfer, will or succession.


§ 441. Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property, confers a title thereto, denominated a title by prescription, which is sufficient against all.

TITLE III.

ACCESSION.

CHAPTER I. To real property.

II. To personal property.

CHAPTER I.

ACCESSION TO REAL PROPERTY.

SECTION 442. Fixtures.

443. Alluvion.

444. Sudden removal of bank.

445. Islands, in navigable streams.

446. In unnavigable streams.

447. Islands formed by division of stream.

448. Abandoned bed of stream.

§ 442. When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed belongs to the owner of the land, unless he chooses to require the former to remove it.

Alluvion.

§ 443. Where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by
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accumulation of material, or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

1 Halsey v. McCormick, 18 N. Y., 147; Emans v. Turnbull, 2 Johns., 313. If the formation is sudden, it belongs to the state (II).
2 Emans v. Turnbull, 2 Johns., 313.
3 Code Napoleon, Art. 556, 567.

§ 444. If a river or stream, navigable or not navigable, carries away, by sudden violence, a considerable and distinguishable part of a bank, and bears it to the opposite bank, or to another part of the same bank, the owner of the part carried away may reclaim it, within a year after the owner of the land to which it has been united takes possession thereof.

This and the four sections following are similar to those of the Code Napoleon, Art. 559-563.

§ 445. Islands, and accumulations of land, formed in the beds of streams which are navigable, belong to the state, if there is no title or prescription to the contrary.

§ 446. An island, or an accumulation of land, formed in a stream which is not navigable, belongs to the owner of the shore on that side where the island or accumulation is formed, or, if not formed on one side only, to the owners of the shore on the two sides, divided by an imaginary line drawn through the middle of the river.

§ 447. If a stream, navigable or not navigable, forming itself a new arm, divides itself and surrounds land belonging to the owner of the shore, and thereby forms an island, the island belongs to such owner.

§ 448. If a stream, navigable or not navigable, forms a new course, abandoning its ancient bed, the
owners of the land newly occupied take, by way of indemnity, the ancient bed abandoned, each in proportion to the land of which he has been deprived.

CHAPTER II.

ACCESSION TO PERSONAL PROPERTY.

The provisions of this chapter, except § 455, are similar to those of the Code Napoleon and the Code of Louisiana.

SectIon 449. Accession by uniting several things.

§ 450. Principal part, what.
§ 452. Unitng materials and workmanship.
§ 453. Inseparable materials.
§ 454. Materials of several owners.
§ 455. Willful trespassers.
§ 456. Owner may elect between the thing and its value.
§ 457. Wrongdoer liable in damages.

§ 449. When things belonging to different owners have been united so as to form a single thing, and cannot be separated without injury, the whole belongs to the owner of the thing which forms the principal part, who must, however, reimburse the value of the residue to the other owner, or surrender the whole to him.

§ 450. That part is to be deemed the principal, to which the other has been united only for the use, ornament or completion of the former, unless the latter is the more valuable, and has been united without the knowledge of its owner, who may, in the latter case, require it to be separated and returned to him, although some injury should result to the thing to which it has been united.

§ 451. If neither part can be considered the principal, within the rule prescribed by the last section, the more valuable, or, if the values are nearly equal, the more considerable in bulk, is to be deemed the principal part.
§ 452. If one makes a thing from materials belonging to another, the latter may claim the thing on reimbursing the value of the workmanship, unless the value of the workmanship exceeds the value of the materials, in which case the thing belongs to the maker, on reimbursing the value of the materials.

§ 453. Where one has made use of materials which in part belong to him and in part to another, in order to form a thing of a new description, without having destroyed any of the materials, but in such a way that they cannot be separated without inconvenience, the thing formed is common to both proprietors; in proportion, as respects the one, of the materials belonging to him, and as respects the other, of the materials belonging to him and the price of his workmanship.

§ 454. When a thing has been formed by the admixture of several materials of different owners, and neither can be considered the principal substance, an owner, without whose consent the admixture was made, may require a separation, if the materials can be separated without inconvenience. If they cannot be thus separated, the owners acquire the thing in common, in proportion to the quantity, quality, and value of their materials; but if the materials of one were far superior to those of the others, both in quantity and value, he may claim the thing on reimbursing to the others the value of their materials.

§ 455. The foregoing sections of this article are not applicable to cases in which one willfully uses the materials of another without his consent; but, in such cases, the product belongs to the owner of the material, if its identity can be traced.

Silsbury v. McCoon, 3 N. Y., 379.

§ 456. In all cases where one, whose material has been used without his knowledge, in order to form a product of a different description, can

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claim an interest in such product, he has an option to
demand either restitution of his material, in kind, in
the same quantity, weight, measure, and quality,
or the value thereof; or where he is entitled to the
product, the value thereof in place of the product.

§ 457. One who wrongfully employs materials be-
longing to another, is liable to him in damages, as
well as under the foregoing provisions of this chapter.

TITLE IV.

TRANSFER.

CHAPTER I. Transfer in general.
II. Transfer of real property.
III. Transfer of personal property.
IV. Recording transfers.
V. Unlawful transfers.

The obligations of the parties to a transfer for considera-
tion, or to a contract of hiring, are regulated by the
titles on Sales, on Exchange, and on Hiring. Trans-
fers in trust for the benefit of creditors are regulated
by the Part on Debtor and Creditor.

CHAPTER I.

TRANSFER IN GENERAL.

ARTICLE I. Definition of transfer.
II. What may be transferred.
III. Mode of transfer.
IV. Interpretation of grants.
V. Effect of transfer.

ARTICLE I.

DEFINITION OF TRANSFER.

SECTION 458. Transfer, what.
459. Transfer a contract.
§ 458. Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another.

§ 459. A voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general; except that a consideration is not necessary to its validity.\(^1\)


\(^2\) This clause was proposed for enactment, in regard to grants of real property, by the Revisers in 1828 (see 3 R. S. [2d ed.], 593), but was not enacted. It is, however, undoubted law, both as to real and personal property (Buun v. Winthrop, 1 Johns. Ch., 329; Irons v. Smallpiece, 2 E. & Ald., 551, 554; Jackson v. Garnsey, 16 Johns., 189).

ARTICLE II.

WHAT MAY BE TRANSFERRED.

SECTION 460. What may be transferred.

461. Possibility.

462. Right of entry.

§ 460. Property of any kind may be transferred, except as otherwise provided by this article.

See Conderman v. Smith, 41 Barb., 404; Lintuer v. Snyder, 15 id., 621.

§ 461. A mere possibility, not coupled with an interest, cannot be transferred.


§ 462. A mere right of re-entry, or of repossession for breach of a condition subsequent, cannot be transferred to any one except the owner of the property affected thereby.

ARTICLE III.

MODE OF TRANSFER.

Section 463. When oral.
464. Grant, what.
465. Delivery necessary.
466. Date.
467. Delivery to grantee is necessarily absolute.
468. Delivery in escrow.
469. Surrendering or canceling grant.
470. Constructive delivery.
471. When voluntary settlement takes effect.

When oral. § 463. A transfer may be made without writing, in every case in which a writing is not expressly required by statute.

4 N. Y., 497; 1 Exch., 591.

Grant, what. § 464. A transfer in writing is called a grant.

Delivery necessary. § 465. A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor.

1 R. S., 138, § 138. A delivery after the grantor’s death is of no effect (Roosevelt v. Corow, 6 Barb., 190; Jackson v. Leek, 12 Wend., 107).

Date. § 466. A grant duly executed is presumed to have been delivered at its date.

Harris v. Norton, 16 Barb., 264.

Delivery to grantee is necessarily absolute. § 467. A grant cannot be delivered to the grantee conditionally. Delivery to him or to his agent as such is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery was made.

1 Braman v. Bingham, 26 N. Y., 433; Worrall v. Munn, 5 N. Y., 229.

Where one person is the agent of both parties, delivery to him is not necessarily absolute (Huff v. Cincinnati, &c., R. R., 13 Ohio St., 235).

Delivery in escrow. § 468. A grant may be deposited by the grantor with a third person, to be delivered on perform-
ance of a condition, and, on delivery by the depositary, it will take effect.

Clark v. Gifford, 10 Wend., 310.

§ 469. Redelivering a grant of real property to the grantor, or canceling it, does not operate to retransfer the title.

Jackson v. Anderson, 6 Wend., 474; Jackson v. Chase, 2 Johns., 84; Baynor v. Wilson, 6 Hill, 469; Nicholson v. Halsey, 1 Johns. Ch., 417.

§ 470. Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases:

1. Where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or,

2. Where it is delivered to a stranger for the benefit of assent is shown or may be presumed.

1 Scragham v. Wood, 15 Wend., 545; see Roosevelt v. Carow, 6 Barb., 190.

2 Church v. Gilman, 15 Wend., 656.

§ 471. A grant made as a mere gratuity takes effect upon its execution, even though the grantor retains its possession, unless a contrary intention appears.

Souverbye v. Arden, 1 Johns. Ch., 246; Bann v. Winthrop, 1 id., 329; see Roosevelt v. Carow, 6 Barb., 190.

ARTICLE IV.

INTERPRETATION OF GRANTS.

Section 472. Grants, how interpreted.

473. Limitations, how controlled.

474. Recitals, when resorted to.

475. Interpretation against grantor.

476. Irreconcilable provisions.

477. Meaning of "heirs" and "issues" in certain remainders.

478. Words of inheritance, unnecessary.
§ 472. Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided by this article.

§ 473. A clear and distinct limitation in a grant is not controlled by other words less clear and distinct.


§ 474. If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction.


§ 475. A grant is to be interpreted in favor of the grantee,¹ except that a reservation in any grant,² and every grant by a public officer or body, as such, to a private party,³ is to be interpreted in favor of the grantor.

² Bowes v. Ravensworth, 15 C. B., 512.
³ See note 4 to section 819.

§ 476. If several parts of a grant are absolutely irreconcilable, the former part prevails.


§ 477. Where a future interest is limited by a grant to take effect on the death of any person without heirs,¹ or heirs of his body, or without issue,² or in equivalent words; such words must be taken to mean successors or issue living at the death of the person named as ancestor.³

² Tyson v. Blake, 22 N. Y., 558.
³ 1 R. S., 724, § 22.

§ 478. Words of inheritance or succession are not requisite to transfer a fee in real property.

1 R. S., 748, § 1.
ARTICLE V.

EFFECT OF TRANSFER.

SECTION 479. What title passes.
480. What interests affected.
481. Incidents.
482. Grant may inure to benefit of stranger.

§ 479. A transfer vests in the transferee all the actual title to the thing transferred which the transferrer then has, unless a different intention is expressed or is necessarily implied,¹ and no more,² except in the cases specified in sections 480, 499, 1745 and 1773.

¹This provision is already enacted with respect to real property (1 R. S., 748, § 1; see Nicoll v. N. Y. & Erie R. R. Co., 12 N. Y., 121, 129), and is undoubted law as to personal property.

§ 480. A transfer cannot affect any interest of the transferrer which he does not own when it is made; but, if it is made with a covenant, neither the transferrer nor any person claiming under him can be permitted to take in contravention of the covenant.


§ 481. The transfer of a thing transfers also all its incidents³ unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself.⁴

²Battle v. Coit, 26 N. Y., 404; Kellogg v. Smith, 26 N.
³Y., 18; see Nostrand v. Durland, 21 Barb., 478.
§ 482. A present interest, and the benefit of a condition or covenant respecting property, may be taken by any natural person under a grant, although not named a party thereto.

This provision is contrary to the common law (Craig v. Wells, 11 N.Y., 315; Hornbeck v. Westbrook, 9 Johns., 73). But a similar provision has been enacted in England (8 & 9 Vic., c. 106, § 5).

CHAPTER II.
TRANSFER OF REAL PROPERTY.

ARTICLE I. Mode of transfer.
II. Effect of transfer.

ARTICLE I.

MODE OF TRANSFER.

SECTION 483. Requisites to convey certain estates.

484. Grants in fee or of freeholds, how executed; when to take effect.

485. Form of grant.

486. Grant by married woman must be acknowledged.

487. Livery of seisin.

§ 483. An estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent, thereunto authorized by writing.

2 R.S., 134, § 6.

§ 484. A grant of an estate in real property, other than an estate for years or at will, must be sealed by the grantor or his agent; and if not duly acknowledged, previous to its delivery, according to the provisions of chapter IV of this Title, its subscription and seal must be attested by at least
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one witness; or if not so attested, it has no effect as against a subsequent purchaser or incumbrancer, or those claiming under him, until so acknowledged.

1 R. S., 738, § 137. The word "subsequent" is inserted on the authority of Wood v. Chapin, 13 N. Y., 509, 524. A grant is not absolutely void for want of attestation (Ib.). The words "subscription and seal" are substituted for "execution and delivery."

A grant of an estate in land in fee (Jackson v. Wendell, 12 Johns., 73), or for life (People v. Gillis, 24 Wend., 201), and a grant of an estate in an incorporeal hereditament in fee (Wickham v. Hawker, 7 M. & W., 76; Brown v. Woodworth, 5 Barb., 555), for life (see Hewlins v. Shippam, 5 B. & C., 221; Wood v. Leadbitter, 13 M. & W., 838), for years (Somerset v. Fogwell, 5 B. & C., 875; Wallis v. Harrison, 2 M. & W., 533; Mayfield v. Robinson, 7 Q. B., 487; Thomas v. Fredericks, 10 id., 775; Bird v. Higginson, 2 Ad. & El., 696; but see to the contrary, Warren v. Leland, 2 Barb., 618), at will (see Wood v. Leadbitter, 13 M. & W., 838), or of uncertain duration (Roffey v. Henderson, 17 Q. B., 574), must at common law be under seal. The only exception was the grant of an original chattel of a thing properly lying in grant (see Hewlins v. Shippam, 5 Barb. & Or., 230; Somerset v. Fogwell, id., 882).

§ 485. A grant of an estate in real property may be made, in substance, as follows:

"This grant, made the .. day of ........, in the year ........, between A. B., of ........, of the first part, and C. D., of ........, of the second part, witnesseth:

"That the party of the first part hereby grants to the party of the second part, in consideration of .... dollars, now received, all the real property situated in ........, and bounded .........

"Witness the hand and seal of the party of the first part.

"A. B. [Seal.]"

In England, the following form is prescribed by 8 & 9 Vic., c. 119:

"This indenture, made, &c., in pursuance of an act to facilitate the conveyance of real property, between A. B. and C. D.: witnesseth: that in consideration of ........, now paid by the said C. D. to the said A. B. (the receipt whereof is hereby by him acknow-10
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ledged), he, the said A. B., doth grant unto the said C. D., his heirs and assigns forever, all that . . .

In witness whereof, the said parties hereto have hereunto set their hands and seals."

Chancellor Kent (4 Com., 481), recommends the following:

"I, A. B., in consideration of one dollar to me paid by C. D., grant to him the lot of land [describing it.]

Witness my hand and seal," &c.

A form briefer still was held sufficient in Kentucky (Chiles v. Conley, 2 Dana, 23).

§ 486. No estate in the real property of a married woman passes by any grant purporting to be executed or acknowledged by her within this state, unless the grant is acknowledged by her in the manner prescribed by section 521.

1 R. S., 758, § 10. Modified by making the requirement apply to grants executed, and acknowledgments taken within the state, instead of to acknowledgments wherever taken, of a married woman residing in the state. The fact of residence is often difficult to ascertain, and the validity of the acknowledgment should not be made to turn upon it.

§ 487. The mode formerly in use, of conveying lands by feoffment, with livery of seizin, is abolished.

1 R. S., 738, § 136.

ARTICLE II.

EFFECT OF TRANSFER.

SECTION 488. What easements pass with property.

489. No implied covenants in grants.

490. How far conclusive on purchasers.

491. Grants by owners for life or for years.

492. Title to highway.

493. Attornment by tenant unnecessary.

494. Lineal and collateral warranties.

§ 488. A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred, in the same manner and to the same extent, as such property was obviously
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and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

1 Eno v. Del Vecchio, 4 Duor, 53; United States v. Appleton, 1 Sumn., 492; see Huttemeier v. Albro, 18 N. Y., 48.


Although the question does not seem to have been decided, there can be little doubt that the grantee is entitled to the benefit of these quasi easements whether existing at the time a grant is bargained for, or at the time when it is actually delivered.

§ 489. No covenant is implied in any grant of an estate in real property, whether it contains special covenants or not, except as provided by the Title on Hiring.

1 R. S., 738, § 140. A demise of an estate for years in an incorporeal hereditament (Mayor of N. Y. v. Mabie, 13 N. Y., 151), or in land (Tone v. Brace, 11 Paige, 566), has been held not to be "a conveyance of real estate;" but a transfer of an existing lease (see Tone v. Brace, 11 Paige, 569), or an original lease in fee (Carter v. Burr, 39 Barb., 69, 65) is such a conveyance. The words "grant of an estate in real property," are inserted in place of the words above quoted, in order to avoid these distinctions.

§ 490. Every grant of an estate in real property is conclusive against the grantor and every one subsequently claiming under him, except a purchaser or incumbrancer who, in good faith, and for a valuable consideration, acquires a superior title or lien by an instrument that is first duly recorded.

1 R. S., 739, §§ 143, 144.

§ 491. A grant, made by the owner of an estate for life or years, purporting to transfer a greater estate than he could lawfully transfer, does not work a forfeiture of his estate, but passes to the grantee all the estate which the grantor could lawfully transfer.

1 R. S., 139, § 145.
§ 492. A transfer of land, bounded by a highway, passes the title of the person whose estate is transferred to the soil of the highway in front thereof.


§ 493. When real property is occupied by a tenant, a grant of any estate therein, by his landlord, is valid without an attornment of the tenant to the grantee; but the payment of rent to such grantor, by his tenant, before notice of the grant, is binding upon the grantee; and the tenant is not liable to the grantee for any breach of the condition of the lease, until he has had notice of the grant.

1 R. S., 739, § 146.

§ 494. Lineal and collateral warranties, with all their incidents, and all the incidents of feudal tenures, not expressly retained by this Code, are abolished. The liability of those who acquire the real property of a decedent, by will or succession, is regulated by the Code of Civil Procedure.

1 R. S., 739, § 141. See Appendix D. in the original draft of this Code.

CHAPTER III.

TRANSFERS OF PERSONAL PROPERTY.

ARTICLE I. Mode of Transfer.

II. What operates as a transfer.
III. Gifts.

ARTICLE I.

MODE OF TRANSFER.

SECTION 495. When must be in writing.
496. Transfer by sale, &c.

§ 495. An interest in a ship,¹ or in an existing trust,² can be transferred only by operation of law, or by a
written instrument, subscribed by the person making
the transfer, or by his agent.

1 This provision is intended to settle a doubtful question.
The uniform language of the authorities is that a bill
of sale is the customary and proper mode of transfer.
Agreements for sale are regulated by the Title on Sale.

§ 497. The mode of transferring other personal
property by sale, is regulated by the Title on that
subject in the Third Division of this Code.

ARTICLE II.
WHAT OPERATES AS A TRANSFER.

SECTION 497. Transfer of title under sale.
498. Transfer of title under executory agreement for sale.
499. When buyer acquires better title than seller has.

§ 497. The title to personal property, sold or
exchanged, passes to the buyer whenever the parties
agree upon a present transfer, and the thing itself
is identified, whether it is separated from other
things or not. 1

1 This is essential (McCandlish v. Newman, 22 Penn. St.,
460).

2 Kimberly v. Patchin, 19 N. Y., 330; see contra, Aldridge
v. Johnson, 7 E. & B., 885. Delivery is not essential

§ 498. Title is transferred by an executory agree-
ment for the sale or exchange of personal property,
only when the buyer has accepted the thing, or when
the seller has completed it, prepared it for delivery,
and offered it to the buyer, with intent to transfer the
title thereto, in the manner prescribed by the chapter
upon OFFER OF PERFORMANCE.

Andrews v. Durant, 11 N. Y., 35; Tompkins v. Dudley,
25 N. Y., 272; Johnson v. Hunt, 11 Wend., 138; see
Rohde v. Thwaites, 6 B. & C., 388; Wood v. Bell, 5
E. & B., 772; Reid v. Fairbanks, 13 C. B., 692.

§ 499. Where the possession of personal property,
together with a power to dispose thereof, is trans-
ferred by its owner to another person, an executed
sale by the latter, while in possession, to a buyer in
good faith and in the ordinary course of business, for
value, transfers to such buyer the title of the former
owner, though he may be entitled to rescind, and
does rescind the transfer made by him.

Passet v. Smith, 23 N. Y., 252; Brower v. Peabody, 13
id., 121; Smith v. Lykes, 6 id., 41; Beavers v. Lane, 6
Duer, 236; Salus v. Everett, 20 Wend., 261.

ARTICLE III.

GIFTS.

Section 500. Gifts defined.

501. Gift, how made.

502. Gift not revocable.

503. Gift in view of death, what.

504. When gift presumed to be in view of death.

505. Revocation of gift in view of death.

506. Effect of will upon gift.

507. When treated as legacy.

§ 500. A gift is a transfer of personal property,
made voluntarily and without consideration.

§ 501. A verbal gift is not valid, unless the means
of obtaining possession and control of the thing are
given, nor, if it is capable of delivery, unless there is
an actual or symbolical delivery of the thing to the
donee.

This doctrine is too well settled in this state to be ques-
tioned (Woodruff v. Cook, 25 Barn., 505; Hunter v.
Hunter, 19 id., 631; Huntington v. Gilmore, 14 id.,
243; Noble v. Smith, 2 Johns., 51; Grangiac v. Arden,
10 id., 293; Cook v. Hasted, 12 id., 188); but the
cases from which the strictness of the rule has been
derived (Irons v. Smallpiece, 2 B. & Ald., 551, and
others) are not recognized as good authority in Eng-
lund in respect to gifts not in view of death (Winter v.
Winter, 4 Law Times [N. S.], 639; 101 Eng. C. L.,
297; Lucas v. Thornton, 1 C. B., 381; Ward v. And
land, 15 M. & W., 870; per Parke, B.).

§ 502. A gift, other than a gift in view of death,
cannot be revoked by the giver.
§ 503. A gift in view of death is one which is made in contemplation, fear, or peril of death, and with intent that it shall take effect only in case of the death of the giver.

It has not been thought necessary to declare what may be the subject of a gift in view of death, as in this state there is no difference in this respect between such a gift and any other transfer of personal property. (See Coutant v. Schuyler, 1 Paige, 316; Harris v. Clark, 3 N. Y., 93.)

§ 504. A gift made during the last illness of the giver, or under circumstances which would naturally impress him with an expectation of speedy death, is presumed to be a gift in view of death.

Merchant v. Merchant, 2 Bradf., 432.

§ 505. A gift in view of death may be revoked by the giver at any time,¹ and is revoked by his recovery from the illness, or escape from the peril, under the presence of which it was made,² or by the occurrence of any event which would operate as a revocation of a will made at the same time.³

¹ Merchant v. Merchant, 2 Bradf., 432.

§ 506. A gift in view of death is not affected by a previous will; nor by a subsequent will, unless it expresses an intention to revoke the gift.

§ 507. A gift in view of death must be treated as a legacy, so far as relates only to the creditors of the giver.
CHAPTER IV.

RECORDING TRANSFERS.

Substantially from 1 R. S., 755.

ARTICLE I. What may be recorded.

II. Mode of recording.

III. Proof and acknowledgment of instruments.

IV. Effect of recording or of the want thereof.

ARTICLE I.

WHAT MAY BERecordED.

§ 508. Any instrument or judgment, affecting the title to real property, may be recorded under this chapter.

The present statutes authorize deeds, powers of attorney, wills, letters patent of the state, judgments in partition &c., to be recorded.

§ 509. Before an instrument may be recorded, its execution must be acknowledged by the person executing it, or proved by a subscribing witness, and the acknowledgment or proof certified in the manner prescribed by article III of this chapter.

§ 510. An instrument, proved and certified pursuant to sections 524 and 525, may be recorded in the proper office, if the original is at the same time deposited therein to remain for public inspection, but not otherwise.

1 R. S., 761, § 32.

§ 511. Transfers of property in trust for the benefit of creditors, and transfers of or liens on property, by way of mortgage, are required to be recorded in
the cases specified in the Title on special relations of DEBTOR and CREDITOR, and the chapter on MORTGAGES, respectively.

ARTICLE II.

MODE OF RECORDING.

SECTION 512. In what office.
514. Duties of clerk, &c.
515. Transfers of vessels.

§ 512. Instruments recorded under this chapter, must be recorded with the register of deeds, or, if there is none, with the clerk, of the county in which the real property affected thereby is situated.

§ 513. Grants, absolute in terms, and not intended as mortgages, or as securities in the nature of mortgages, are to be recorded in one set of books, and mortgages and securities in another.

1 R. S., 756, § 7.

§ 514. The duties of clerks and registers of deeds, in respect to recording instruments, are prescribed by the POLITICAL CODE.

§ 515. The mode of recording transfers of ships, registered under the laws of the United States, is regulated by acts of Congress.

ARTICLE III.

PROOF AND ACKNOWLEDGMENT OF INSTRUMENTS.

SECTION 516, 517. By whom acknowledgments may be taken in this state.
518. By whom taken, without the state.
519. By whom taken, without the United States.
520. Requisites for acknowledgments.
521. Requisites for acknowledgments when made by married women.
522. Id.
523. Proof by subscribing witness.

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§ 516. The proof or acknowledgment of an instrument may be made at any place within this state, before a judge of the court of appeals,\(^1\) or of the supreme court.\(^2\)

\(^1\) New.
\(^2\) 1 R. S., 156, § 4.

§ 517. The proof or acknowledgment of an instrument may be made, in this state, within the city or county for which the officer was appointed,\(^1\) before:

1. A judge of a court of record;\(^3\)
2. A mayor or recorder of a city;\(^2\)
3. A justice of the peace;\(^3\)
4. A commissioner of deeds;\(^3\) or,
5. A notary public.\(^4\)

\(^1\) The statute (1 R. S., 156, § 4) seems to make this limitation only with respect to county judges, justices of the peace, and commissioners of deeds. But other statutes in effect limit the powers of all judges of local courts in the same manner.
\(^2\) 1 R. S., 156, § 4.
\(^3\) Laws of 1840, 187, ch. 238.
\(^4\) Laws of 1859, 869, ch. 360.

§ 518. The proof or acknowledgment of an instrument may be made without the state, but within the United States, and within the jurisdiction of the officer,\(^1\) before:

1. A judge of the supreme court, or of a district court, of the United States;\(^1\)
2. A judge of the supreme, superior or circuit court of any state or territory;\(^1\)
3. The mayor of any city;\(^2\)
4. Any other officer of the state or territory where the acknowledgment is made, authorized by its laws to take the proof or acknowledgment;\(^3\) or,
5. A commissioner appointed for the purpose by
the government of this state, pursuant to special
statutes of this state.4

1 R. S., 757, § 4.
2 Laws 1845, ch. 109.
3 Laws 1848, ch. 195.
4 Laws 1850, ch. 270.

§ 519. The proof or acknowledgment of an in-
strument may be made without the United States,
before:

1. A minister plenipotentiary, or minister extra-
ordinary, or chargé d'affaires, of the United States,
resident and accredited in the country where the
proof or acknowledgment is made;

2. A consul of the United States resident in that
country;

3. A judge of the highest court of any of the
British American provinces, acting in his own juris-
diction; or,

4. The mayor or chief magistrate of any city in
the British islands, acting in his own jurisdiction.

From 1 R. S., 759, § 6; Laws of 1829, 348, ch. 222;
Laws 1845, ch. 109.

§ 520. The acknowledgment of an instrument
cannot be taken, unless the officer taking it knows,
or has satisfactory evidence, that the person making
such acknowledgment is the individual who is de-
scribed in and who executed the instrument.

1 R. S., 758, § 9.

§ 521. The acknowledgment of a married woman
to an instrument, purporting to be executed by her,
cannot be taken within this state, unless she ac-
knowledges to the officer, on a private examination,
apt from her husband, that she executed such
instrument freely, and without any compulsion or fear
of her husband.

1 R. S., 758, § 10.
§ 522. A conveyance by a married woman has the same effect as if she were unmarried,¹ and may be acknowledged in the same manner, except as mentioned in the last section.²

¹ This provision is in accordance with the present law concerning married women.

² See 1 R. S., 758, § 11.

§ 523. The proof of the execution of an instrument must be made by a subscribing witness thereto, who must state his own place of residence, and that he knew the person who is described in and who executed the instrument; and such proof must not be taken, unless the officer is personally acquainted with such subscribing witness, or has satisfactory evidence that he is the subscribing witness to the instrument.

1 R. S., 753, § 12.

§ 524. When all the witnesses to an instrument which might be recorded are dead, it may be proved before any officer mentioned in sections 517, 518 or 519, other than commissioners of deeds, justices of the peace and notaries public.

1 R. S., 761, § 30.

§ 525. The proof of the execution of an instrument, in the case mentioned in the last section, must be made by satisfactory evidence of the death of all the witnesses thereto, and of the handwriting of such witnesses, or of one of them, and of the grantor; all which evidence must be set forth by the officer taking the same, in his certificate of the proof.

1 R. S., 761, § 31.

§ 526. An officer taking the acknowledgment or proof of any instrument must indorse upon the instrument a certificate thereof, signed by himself personally, setting forth all the matters required by law to be done or known by him, or proved before him, on the proceeding; together with the names of all the witnesses examined before him, their places of residence respectively, and the substance of their evidence.

1 R. S., 759, § 15.
§ 527. A certificate of proof or acknowledgment before any officer in this state other than a judge of a court of record, when used in any county other than that in which he resides, must be accompanied by a certificate, under the hand and seal of the clerk of the county in which the officer resides, setting forth that such officer, at the time of taking such proof or acknowledgment, was duly authorized to take the same, and that the clerk is acquainted with his handwriting and believes that the signature to the original certificate is genuine.

1 R. S., 759, § 18, slightly modified so as to conform to the present judicial system.

§ 528. When an instrument is proved or acknowledged before one of the officers mentioned in subdivision 4 of section 518, the certificate of such officer must be accompanied by 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 the proof or acknowledgment, duly authorized to take the same, and that such clerk, register, recorder or prothonotary, is acquainted with the handwriting of the officer, and believes his signature to be genuine.

Laws of 1848, ch. 105, as amended by Laws of 1853, ch. 61, § 2.

§ 529. When an instrument is proved or acknowledged before one of the commissioners mentioned in subdivision 5 of section 518, the certificate of such commissioner must be accompanied by the certificate of the secretary of state of this state, attesting the existence of the officer, and the genuineness of his signature; and such commissioner can only act within the city or county in which he resided at the time of his appointment.

1 R. S., 757, § 4, subd. 2; Laws of 1845, 89, ch. 109; Laws of 1850, 682, ch. 270, amended by Laws of 1857, 756, ch. 788.
ARTICLE IV.

EFFECT OF RECORDING, OR THE WANT THEREOF.

The provisions of sections 16 and 17, 26 and 27, and of part of sections 22, 33 and 39 of chapter 3 of Part II, of the Revised Statutes, have been omitted as part of the law of evidence, contained in the Code of Civil Procedure.

Section 530. Conveyances to be recorded.

531. Conveyance, what.

532. Letter recorded, how revoked.

533. Effect of recording and deposit.

534. Certain leases in counties named not affected.

§ 530. Every conveyance of real property, other than a lease for a term not exceeding three years, is void as against any subsequent purchaser or incumbrancer (including an assignee of a mortgage, lease, or other conditional estate) of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded.

1 R. S., 156, § 1.

§ 531. The term "conveyance," as used in the last section, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or incumbered, or by which the title to any real property may be affected; except wills, executory contracts for the sale or purchase of real property, and powers of attorney.

1 R. S., 762, §§ 39-38.

§ 532. No instrument containing a power to convey real property, which has been recorded, is to be deemed revoked by any act of the party by whom it was executed, unless the instrument containing such revocation is also recorded in the same office in which the instrument containing the power was recorded.

1 R. S., 763, §§ 39, 40.
§ 533. The recording and deposit of an instrument proved and certified according to the provisions of sections 510, 524 and 525 are constructive notice of the execution of such instrument to all purchasers and incumbrancers subsequent to the recording; but the proof, recording and deposit do not entitle the instrument or the record thereof, or the transcript of the record, to be read in evidence.

1 R. S., 761, § 33.

§ 534. The provisions of this chapter do not extend to leases for life, or for years, in the counties of Albany, Ulster, Sullivan, Herkimer, Dutchess, Columbia, Delaware and Schenectady.

1 R. S., 763, § 42.

CHAPTER V.

UNLAWFUL TRANSFERS.

Section 535. Certain instruments void against purchasers, &c.

536. Not void against purchaser having notice, unless fraud is mutual.

537, 538. Power to revoke when deemed executed.

539. Purchaser in good faith, not affected.

540. Conveyance of land adversely possessed.

541. Other provisions.

§ 535. Every instrument, other than a will, affecting an estate in real property, including every charge upon real property, or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof, or incumbrancers thereon, is void as against every purchaser or incumbrancer, for value, of the same property, rents or profits.

2 R. S., 134, § 1, made more definite by the introduction of the word "incumbrancer" instead of using the word "purchaser" only, and afterwards explaining that incumbrancers are purchasers, which would be inconsistent with the provisions of the Code relative to mortgages. See § 1923.
§ 536. No instrument is to be avoided under the last section, in favor of a subsequent purchaser or incumbrancer having notice thereof at the time his purchase was made or his lien acquired, unless the person in whose favor the instrument was made, was privy to the fraud intended.

2 R. S., 134, § 2, modified by omitting "actual or legal" before "notice," inasmuch as "notice" is elsewhere defined as meaning constructive as well as actual notice.

§ 537. Where a power to revoke or modify an instrument affecting the title to, or the enjoyment of, an estate in real property is reserved to the grantor, or given to any other person, a subsequent grantee or charge upon the estate, by the person having the power of revocation, in favor of a purchaser or incumbrancer for value, operates as a revocation of the original instrument, to the extent of the power, in favor of such purchaser or incumbrancer.

This provision is intended to embody the substance of sections 3 and 4 of 2 R. S., 134. It is thought that there is no necessity for the distinction made by those sections between a power reserved to the grantor, and a power created in favor of a third person.

The provision is also expressly extended to all instruments affecting real property, as was no doubt the intention of the statute, and probably is its effect.

§ 538. Where a person having a power of revocation, within the provisions of the last section, is not entitled to execute it until after the time at which he makes such a grant or charge as is described in that section, the power is deemed to be executed as soon as he is entitled to execute it.

Substantially the same as 2 R. S., 134, § 5.

§ 539. The rights of a purchaser or incumbrancer in good faith and for value are not to be impaired by any of the foregoing provisions of this chapter.

2 R. S., 137, § 5, modified by adding the words "or incumbrancer," and by a slight change of phraseology.
§ 540. Every grant of real property, other than one made by the state, or under a judicial sale, is void, if at the time of the delivery thereof, such real property is in the actual possession of a person claiming under a title adverse to that of the grantor.

1 Brady v. Begun, 36 Barb., 333; Candee v. Haywood, 34 id., 349; People v. Mayor, &c., of N. Y., 8 Abb. Pr., 724; Jackson v. Gumaer, 2 Cow., 552.

2 1 R. S., 139, § 141. This provision does not apply to mortgages, which are not recognized in this Code as grants in any sense.

§ 541. Other provisions concerning unlawful transfers are contained in Part II of the Fourth Division of this Code, concerning the special relations of DEBTOR and CREDITOR.

TITLE V.

WILL.

In this Title, taken, for the most part, from the existing law, are inserted many new provisions relating to nuncupative wills; mutual and conditional wills; partial and total revocation; revocation of wills executed in duplicate; effect of alteration or obliteration; wills procured by undue influence; republication by codicil; placing power to devise real property on the same footing as personal estate; the execution of wills in foreign countries; the law of domicil; the interpretation of wills; the payment and abatement of legacies.

CHAPTER I. Execution and revocation of wills.

II. Interpretation of wills.

III. General provisions relating to wills.

CHAPTER II.

EXECUTION AND REVOCATION OF WILLS.

Section 542. Who may make will.

543. Monomaniac incompetent.

544. Will procured by fraud, &c.

545. What may pass by will.
§ 542. 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 no others, may dispose of real and personal property, by a will duly executed, according to the provisions of this Code.

§ 543. A person having any insane delusion is incompetent to make a will.
§ 544. A will or part of a will procured to be made by duress, menace, fraud or undue influence, may be denied probate; and a revocation, procured by the same means, may be declared void.

This section is new.

§ 545. Every estate and interest in real or personal property, to which heirs, husband, widow or next of kin might succeed, may be disposed of by will.

From 2 R. S., 57, § 2.

§ 546. A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except that no corporation can take under a will, unless expressly authorized by its charter or by statute so to take.

2 R. S., 57, § 3.

§ 547. A nuncupative will of real or personal property, or both, is valid, when made in contemplation, fear or peril of death:

1. By a soldier, while in actual military service, whether he is an officer or private, or a surgeon, or a servant of the army; or,

2. By a sailor (whether he is an officer or surgeon, a marine or mariner, or a servant of the vessel), after he finally goes on board the vessel for the voyage, and before he comes on shore, in port, after the voyage is over.

Modified from 2 R. S., 60, § 22. By this section the nuncupative will may pass real as well as personal property; but it can be made only in contemplation, fear or peril of death (See Prince v. Hazleton, 20 Johns., 592). A nuncupative will may be made by a ship's cook or other servant (Earp. Thompson, 4 Bradf., 184), and while the ship is at anchor, as well as on the open sea (Hubbard v. Hubbard, 8 N. Y., 196).

§ 548. A conjoint or mutual will is valid, but it may be revoked by any of the testators, in like manner with any other will.

Ex parte Day, 1 Bradf., 476.
§ 549. A will, the validity of which is made by its own terms conditional, may be denied probate, according to the event, with reference to the condition.

This section is new.

§ 550. Every will, other than a nuncupative will authorized by section 547, must be executed and attested as follows:

1. It must be subscribed at the end thereof, by the testator himself, or by some person in his presence and by his direction;

2. The subscription must be made in the presence of each of the attesting witnesses, or be acknowledged by the testator to each of them, to have been made by him or by his authority;

3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and,

4. There must be two attesting witnesses, each of whom must sign his name as a witness at the end of the will, at the testator’s request.

From 2 R. S., 63, § 40.

§ 551. A nuncupative will is not required to be in writing, nor to be declared or attested with any formalities.

Hubbard v. Hubbard, 8 N. Y., 196.

§ 552. A witness to a written will must write, with his name, his place of residence; and a person who subscribes the testator’s name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will.

From 2 R. S., 64, § 41.

§ 553. The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil.

§ 554. A will of real or personal property, or both, or a revocation thereof, made out of this state by a
person not having his domicil in this state, is as valid, when executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, as if it were made in this state, and according to the provisions of this chapter.

§ 535. No will or revocation is valid unless executed either according to the provisions of this chapter, or according to the law of the place in which it was made, or in which the testator was at the time domiciled.

The last two sections are modified from 2 R. S., 67, § 68, 69.

§ 556. Whenever a will, or a revocation thereof, is duly executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, the same is regulated, as to the validity of its execution, by the law of such place, notwithstanding that the testator subsequently changed his domicil to a place, by the law of which such will would be void.

This section is new. Compare Moultrie v. Hunt, 23 N. Y., 394, and Parsons v. Lyman, 20 N. Y., 103.

§ 557. Every surrogate, county clerk or register of deeds must deposit, in his office, any will delivered to him for that purpose, and give a written receipt to the depositor; and must inclose such will in a sealed wrapper, so that it cannot be read, and indorse thereon the name of the testator, his residence, and the date of the deposit; and such wrapper must not be opened until its delivery under the provisions of the next section.

2 R. S., 405, § 68.

§ 558. A will deposited under the provisions of the last section must be delivered only:

1. To the testator in person;
2. Upon his written order, duly proved by the oath of a subscribing witness;

3. After his death, to the person, if any, named in the indorsement on the wrapper of the will; or,

4. If there is no such indorsement, and if the will was not deposited with the surrogate having jurisdiction of its probate, then to the surrogate who has jurisdiction.

2 R. S., 405, § 69.

§ 559. The surrogate with whom a will is deposited, or to whom it is delivered, must, after the death of the testator, publicly open and examine the will and file it in his office, there to remain until duly proved, or deliver it to the surrogate having jurisdiction of its probate.

2 R. S., 405, § 70.

§ 560. A lost or destroyed will of real or personal property, or both, may be established in the cases provided in the Code of Civil Procedure.

The reference is to section 12 of Appendix D, in the original draft of this Code.

§ 561. Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered, otherwise than:

1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or,

2. By being burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction.

2 R. S. 64, § 42.

§ 562. When a will is canceled or destroyed by any other person than the testator, the direction of
the testator, and the fact of such injury or destruction, must be proved by two witnesses.

§ 563. A revocation by obliteration on the face of the will may be partial or total, and is complete if the material part is so obliterated as to show an intention to revoke; but where, in order to effect a new disposition, the testator attempts to revoke a provision of the will, by altering or obliterating it on the face thereof, such revocation is not valid unless the new disposition is legally effected.

McPherson v. Clark, 3 Bradf., 92.

§ 564. The revocation of a will, executed in duplicate, may be made by revoking one of the duplicates.

§ 565. A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will.


§ 566. If, after making a will, the testator duly makes and executes a subsequent will, the destruction, canceling or revocation of the latter does not revive the former, unless it appears by the terms of such revocation that it was his intention to revive the prior will, or unless after such destruction, canceling or revocation, he duly republishes the prior will.

2 R.S., 65, § 53.

§ 567. If, after having made a will, the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is to be deemed revoked,
unless provision has been made for such issue by some settlement, or unless such issue are 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 can be received.

2 R. S., 64, § 43.

§ 568. A will executed by an unmarried woman is revoked by her subsequent marriage.

2 R. S., 64, § 44.

§ 569. An agreement made by a testator, for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise, against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession.

2 R. S., 64, § 45.

§ 570. A charge or incumbrance upon any real or personal property, for the purpose of securing the payment of money, or the performance of any other obligation, is not a revocation of a will relating to the same property, previously executed; but the dispositions made by the will take effect subject thereto.

2 R. S., 64, § 46.

§ 571. A conveyance, settlement, or other act of a testator, by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession.

2 R. S., 65, § 47.

§ 572. If the instrument, by which an alteration is made in the testator's interest in a thing previously disposed of by his will, expresses his intent that it shall be a revocation, or if it contains provisions
wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency, by reason of which they do not take effect.

2 R. S., 65, §§ 47, 48.

§ 573. The revocation of a will revokes all its codicils.

§ 574. Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property, that he would have succeeded to if the testator had died intestate.

2 R. S., 65, § 49.

§ 575. Whenever any real or personal property is disposed of by will to a descendant or a brother or sister of the testator, and such legatee or devisee dies during the lifetime of the testator, leaving a successor who survives the testator, such disposition does not lapse, but the thing so disposed of vests in the surviving successors of the legatee or devisee, as if such legatee or devisee had survived the testator and had died intestate.

2 R. S., 66, § 52; substituting "successors" for "descendants."

§ 576. If a person is an attesting witness to the execution of a will wherein any beneficial devise, legacy, interest or power of appointment of any real or personal property, is made to such witness, and the will cannot be proved without his testimony, the devise, legacy, interest or power is void so far only as concerns such witness, or any one claiming under him, and the witness is competent to prove the execution of the will.

Modified from 2 R. S., 65, § 50; omitting the disqualification of husband or wife of witness.

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§ 577. An attesting witness to a will, without whose testimony it cannot be proved, and who would have been entitled to a share of the testator's estate in case the will had not been established, succeeds to the same portion of the testator's estate that he would have succeeded to if the testator had died intestate, not exceeding the value of the devise or bequest to him in the will.

2 R. S., 65, § 51.

§ 578. A creditor, whose debt is by a will charged upon property, is not thereby disqualified as a witness to prove the execution of the will:

2 R. S., 67, § 6. These three sections are retained because they seem to correspond to the exceptions made by the present Code of Procedure to the admission of parties in interest as witnesses.

CHAPTER II.

INTERPRETATION OF WILLS, AND EFFECT OF VARIOUS PROVISIONS.

SECTION 579. Testator's intention to be carried out.

580. Intention to be ascertained from the will.


582. Several instruments are to be taken together.

583, 584, 585. Harmonizing various parts.

586. Words taken in ordinary sense.

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599. Devise or bequest to a class.

600. When conversion takes effect.

601. When child born after testator's death takes under will.

602. Mistakes and omissions.

603. When devises and bequests vest.

604. When cannot be divested.
§ 579. A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible.\(^1\)

\(^1\) 1 R. S., 748, § 2; Brown v. Lyon, 5 N. Y., 420; see Chyöstie v. Phype, 19 id., 343.

§ 580. In case of uncertainty, arising upon the face of a will, as to the application of any of its provisions, the testator’s intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made; exclusive of his oral declarations.


§ 581. In interpreting a will, subject to the law of this state, the rules prescribed by the following sections of this chapter are to be observed, unless an intention to the contrary clearly appears.

§ 582. Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument.


§ 583. All the parts of a will are to be construed in relation to each other,\(^1\) and so as if possible to form one consistent whole,\(^2\) but where several parts\(^2\) are absolutely\(^4\) irreconcilable, the latter\(^4\) must prevail.

\(^1\) Arcularius v. Geiseinhainer, 3 Bradf., 64; affirmed 25 Barb., 403; Egerton v. Conklin, 25 Wend., 224, 238;

\(^2\) 420; see Chyöstie v. Phype, 19 id., 343.

\(^4\) Arcularius v. Geiseinhainer, 3 Bradf., 64; affirmed 25 Barb., 403; Egerton v. Conklin, 25 Wend., 224, 238;
§ 584. A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its contents in another part of the will.

1 Cole v. Wade, 16 Ves., 46; see Thompson v. Whitlock, 5 Jur. [N. S.], 991.
2 Thornhill v. Hall, 2 Cl. & F., 22; Barclay v. Maskelyne, H. R. V. Johns., 126. This rule applies equally to prior (Greenwood v. Sutcliff, 14 C. R., 226) and to subsequent words (Arcularius v. Geisenhainer, 3 Bradf., 76; affirmed 25 Barb., 403; Kiven v. Oldfield, 4 De Gaz & J., 30; Borroll v. Haigh, 2 Jur., 229).
4 Hillerston v. Lowe, 2 Hare, 355, 372; Mortimer v. Hartley, 3 De Gaz & Sm., 332.

§ 585. Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will.


§ 586. The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained.

1 Hone v. Van Schaick, 3 N. Y., 538; Cromer v. Pinckney, 3 Barb. Ch., 466; Bullock v. Downes, 9 H. of L. Cas., 24.
§ 587. The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative.


§ 588. Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy.


§ 589. Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention.

1 Moore v. Lyons, 25 Wend., 154, 155; Campbell v. Rawn don, 18 N. Y., 417; Brown v. Lyon, 6 N. Y., 419; Jackson v. Luquere, 5 Cow., 228; Jenius v. Hughes, 8 II. of L. Cas., 571; Doe v. Perratt, 6 Man. & Gr., 325, 342, 350.


3 Corrigan v. Kiernan, 1 Bradf., 203; Sherwood v. Sher wood, 3 id., 230; De Kay v. Irving, 5 Dem., 646; Parks v. Parks, 9 Paige, 107.

§ 590. Technical words are not necessary to give effect to any species of disposition by a will.

Jackson v. Luquere, 5 Cow., 228; Parks v. Parks, 9 Paige, 117.

§ 591. The term "heirs," or other words of inheritance, are not requisite to devise a fee, and a devise of real property passes all the estate of the testator, unless otherwise limited.

1 R. S., 148, § 1; to similar effect, 1 Vict., c. 26, § 26, 28.

§ 592. Real or personal property embraced in a power to devise, passes by a will purporting to devise all the real or personal property of the testator.

11 R. S., 737, § 126.
§ 593. A devise or bequest of all the testator’s real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death.

1 2 R. S., 57, § 5.
2 McNaughton v. McNaughton, 41 Barb., 50.

Residuary clause.

§ 594. A devise of the residue of the testator’s estate, property, or real property, passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will.

It has been doubted (Van Cortlandt v. Kip, 1 Hill, 596; 7 id., 352; see Prescott v. Prescott, 7 McE., 141, 146) whether this is the effect of a residuary devise, except where the beneficial taker under the prior devise is the same person as the residuary devisee (see Tucker v. Tucker, 5 N. Y., 421), where the prior devise has been revoked by the testator (Kip v. Van Cortlandt, 7 Hill, 346), or where the prior devise is only a charge upon, and not an exception from the residuary devise (Cook v. Stationers’ Co., 3 Myl. & K., 262).

§ 595. A bequest of the residue of the testator’s estate, property or personal property, passes all the personal property which he was entitled to bequeath at the time of his death, not otherwise effectually bequeathed by his will.

§ 596. A testamentary disposition to “heirs,” “relations,” “nearest relations,” “representatives,” “legal representatives” or “personal representatives,” or “family,” “issue,” “descendants,” “nearest” or “next of kin” of any person, without other words of qualification, and when the terms are used as words of donation and not of limitation, vests the property*
in those who would be entitled to succeed to the property of such person, according to sections 642 and 643 of this Code.

§ 597. The terms mentioned in the last section are used as words of donation, and not of limitation, when the property is given to the person so designated, directly, and not as a qualification of an estate given to the ancestor of such person.

§ 598. Words in a will referring to death\(^1\) or survivorship,\(^2\) simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.


\(^2\) Young v. Robertson, 4 Macq., 319, 330; Young v. Davies, 9 Jur. (N. S.), 399. The contrary was held as to real property in Moore v. Lyons, 25 Wend., 119, on the supposed English rule; but that rule does not exist (Taffee v. Cowper, 10 H. of L. Cas., 77; 22 Beav., 271).

It makes no difference that there is a postponement without any preceding life interest (Hodgson v. Micklethwaite, 2 Drewry, 294). This rule is not now law when the life tenant dies before the testator (Spurrell v. Spurrell, 11 Hare, 154).

§ 599. A testamentary disposition to a class includes every person answering the description at the testator's death;\(^1\) but when the possession is postponed to a future period, it includes also all persons coming within the description, before the time to which possession is postponed.\(^2\)

\(^1\) Tucker v. Bishop, 16 N. Y., 402; Campbell v. Rawdon, 18 N. Y., 415. Persons who die before the testator are not included (Stires v. Van Rensselaer, 2 Bradf., 172; Campbell v. Rawdon, 18 N. Y., 414, 415).


§ 600. When a will directs the conversion of real property into money, such property and all its pro-
ceeds must be deemed personal property, from the time of the testator's death.3

Forsyth v. Rathbone, 34 Barb., 405; Fowler v. Depau, 26 Barb., 239; Harris v. Clark, 7 N. Y., 260; Phelps v. Pond, 23 N. Y., 76.


Kane v. Gott, 24 Wend., 669.

§ 601. A child conceived before, but not born until after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class.

Rawlins v. Rawlins, 2 Cox, 425; Trower v. Butts, 1 Sim. & Sta., 181; Jenkins v. Freyer, 4 Paige, 53.

§ 602. When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intention cannot be received.7

1 Fleming v. Fleming, 8 Jr. (N. S.), 1042.
5 Stanley v. Stanley, 2 Johns. & Heme., 513; see Blundell v. Gladstone, 1 Phillips, 279.
6 See Blundell v. Gladstone, 1 Phil., 282.
7 Doe v. Hiscock, 5 Mees. & W., 563. To the contrary, Ex parte Hornby, 2 Bradf., 420. Otherwise if the words are equally descriptive of several persons (Doe v. Allen, 12 Ad. & El., 451; Fleming v. Fleming, 8 Jr. [N. S.], 1042) or subjects of ownership (See Douglass v. Fellows, 1 Kay, 114, 120).

§ 603. Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death.

1 Post v. Hover, 30 Barb., 312, 319.
2 Dupre v. Thompson, 8 Barb., 537.
§ 604. A testamentary disposition, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose.


§ 605. If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place.


§ 606. The death of a devisee\(^1\) or legatee\(^2\) of a limited interest, before the testator's death, does not defeat the interests of persons in remainder, who survive the testator.

\(^1\) Downing v. Marshall, 23 N. Y., 370; 23 How. Pr., 7;
Campbell v. Rawdon, 18 N. Y., 431.

§ 607. A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated.

§ 608. A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect.

§ 609. Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is fulfilled; except where such fulfillment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to the testator, or arose from an unavoidable event subsequent to the execution of the will.

§ 610. A condition precedent in a will is to be deemed performed when the testator's intention has been substantially, though not literally, complied with.
§ 611. A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event.

§ 612. A devise or legacy given to more than one person vests in them as owners in common.

1. *R. S.,* 727, § 44.
2. To the contrary, see Putnam v. Putnam, 4 *Bradf.,* 308.

§ 613. Advancements or gifts are not to be taken as ademptions of general legacies, unless such intention is expressed by the testator in writing.

This provision is new.

CHAPTER III.

GENERAL PROVISIONS.


1. Specific.
2. Demonstrative.
3. Annuities.
4. Residuary.
5. General.

615. Order of sale in case of an intestate.
616. Order of sale in case of a testator.
617, 618. Legacies, how charged with debts.
619. Abatement.
620. Specific devises and legacies.
621. Heir's conveyance good, unless will is proved within four years.
622. Possession of legatees.
623. Bequest of interest.
624. Satisfaction.
625. Legacies, when due.
626. Interest.
627. Construction of these rules.
628. Executor according to the tenor.
629. Power to appoint is invalid.
630. Executor not to act till qualified.
631. Executor of an executor.
632. Provisions as to revocations.
633. Execution and construction of prior wills not affected.
634. “Wills” includes codicils.
635. The law of what place applies.
636. Liability of beneficiaries for testator's obligations.
§ 614. Legacies are distinguished and designated, according to their nature, as follows:

1. A legacy of a particular thing, specified, and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator;

2. A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid; if such fund or property fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy;

3. An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets, as in case of a general legacy;

4. A residuary legacy embraces only that which remains after all the bequests of the will are discharged;

5. All other legacies are general legacies.

§ 615. When a decedent dies intestate, the property, except such as is otherwise disposed of under section 640 of this Code, and such as is exempt under the Code of Civil Procedure, is to be resorted to, in the following order, in payment of debts:

1. Personal property;
2. Real property other than estates of freehold;
3. Estates of freehold.

The reference is to section 83 of Appendix D, in the original draft of this Code.

§ 616. The property of a testator, with the exception specified in the last section, is to be resorted to, in the following order, for the payment of debts and legacies:

1. Personal property, excepting such as is expressly exempted in the will;
2. Real property expressly devised to pay debts or legacies, where the personal property is exempted in
the will, or where the personal property which is not exempted is insufficient;

3. Real property which is not effectually devised;

4. Property, real or personal, charged with debts or legacies; but though real property be charged with the payment of legacies, the personal property is not to be exonerated;

5. The following property, ratably: real property, devised without being charged with debts or legacies, and specific and demonstrative legacies;

6. Personal property expressly exempted in the will.

§ 617. In the application of the personal property of a decedent to the payment of debts, legacies must be charged in the following order, unless a different intention is expressed in the will:

1. Residuary legacies;
2. General legacies;
3. Legacies given for a valuable consideration, or for the relinquishment of dower, or some right or interest;
4. Specific and demonstrative legacies.

§ 618. Legacies to husband, widow or kindred of any class, are chargeable only after legacies to persons not related to the testator.

§ 619. Abatement takes place in any class only as between legacies of that class, unless a different intention is expressed in the will.

§ 620. In a specific devise or legacy the title passes by the will, but, in case of legacies, possession can only be obtained from the personal representative; and he may be authorized by the surrogate to sell the property devised or bequeathed, in the cases herein provided.

§ 621. The rights of a purchaser or incumbrancer of real property, in good faith, and for value, derived from
any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless the instrument containing such devise is duly proved as a will, and recorded in the office of the surrogate having jurisdiction thereof, or unless written notice of such devise is filed with the clerk of the county where the real property is situated, within four years after the devisor's death.

The provisions of the Revised Statutes (1 R. S., 748, § 3), from which this section is taken, made the following exceptions to the foregoing rule:

1. Where the devisee shall have been within the age of twenty-one years, or insane, or imprisoned, or a married woman, or out of the state, at the time of the death of such testator; or,

2. Where it shall appear that the will or codicil containing such devise, shall have been concealed by the heirs of such testator, or some one of them.

In which several cases, the limitation contained in this section shall not commence, until after the expiration of one year from the time when such disability shall have been removed, or such will or codicil shall have been delivered to the devisee, or his representative, or to the proper surrogate.

These disabilities are such as almost to destroy the value of the provision, and the commissioners have therefore omitted them. As, however, the probate is often delayed by litigation, a provision that notice may be filed in the office of the county clerk, with equal effect, has been added.

§ 622. Where specific legacies are for life only, the first legatee must sign and deliver to the second legatee, or, if there is none, to the personal representative, an inventory of the property, expressing that the same is in his custody for life only, and that, on his decease, it is to be delivered and to remain to the use and for the benefit of the second legatee, or to the personal representative, as the case may be.

The following sections are new.

§ 623. In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death.
§ 624. A legacy, or a gift in contemplation, fear or peril of death may be satisfied.

§ 625. Legacies are due and deliverable, at the expiration of one year after the testator's decease. Annuities commence at the testator's decease.

§ 626. Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease.

§ 627. The four preceding sections are in all cases to be controlled by a testator's express intention.

§ 628. Where it appears, by the terms of a will, that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor.

§ 629. An authority to an executor to appoint an executor is void.

§ 630. No person has any power, as an executor, until he qualifies, except that, before letters have been issued, he may pay funeral charges and take necessary measures for the preservation of the estate.

From 2 R. S., 71, §§ 15, 16.

§ 631. No executor of an executor, as such, has any power over the estate of the first testator.

2 R. S., 71, § 17; 448, § 11.

§ 632. The provisions of this Title in relation to the revocation of wills, apply to all wills made by any testator living at the expiration of one year from the time this article takes effect.

2 R. S., 68, § 76.

§ 633. The provisions of this Title do not impair the validity of the execution of any will made before this
article takes effect. or affect the construction of any such will.

2 R. S., 68, § 87.

§ 634. The term "will," as used in this Code, includes all codicils as well as wills.

2 R. S., 68, § 77.

§ 635. Except as otherwise provided, the validity and interpretation of wills is governed, when relating to real property within this state, by the law of this state; when relating to personal property, by the law of the testator's domicil.

§ 636. Those to whom property is given by will, are liable for the obligations of the testator in the cases and to the extent prescribed by the Code of Civil Procedure.

See Appendix D, in the original draft of this Code.

TITLE VI.

SUCCESSION.

The object of the very important change proposed by this Title, is to simplify the settlement of estates, and particularly titles to real property, by vesting the whole estate of the decedent in the executors or administrators.

By the existing law the term "real property," as between the heir and the executor, has a very different extent of meaning from the same term in other uses, and doubtless different from that popularly attached to it by testators and others contemplating the provision which their families may require in case of their death.

There seems to be no reason why the property of the landholder should be devolved by law upon one class of persons, while the property of the merchant, who may leave a family situated in the same circumstances, is devolved by law upon another class, or in a different method. For this reason the commissioners recommend one method of distribution for both real and personal property, and for this purpose have followed substantially the method the law now pursues in respect to personal property.
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In case it is not thought best to adopt this change, the provisions of another chapter upon this subject contained in Appendix A, in the draft of this Code, will be found to conform to the present distinction between real and personal property as between heir and executor, and the statutes of distribution and descent, with some modifications which those rules seem to require.

SECTION 637. Succession defined.

638. Office of personal representatives.
639. Who are personal representatives.
640. Certain personal and other property not assets but retained by family.
641. Who to retain such property.
642. Order of succession.
1. Husband.
2. Wife and children.
3. Wife and next of kin.
5. Children alone.
643. Where there is neither widow nor children.
644. Successors of deceased parent.
645. Relatives in equal degree; in unequal degrees.
646. Several heirs, how to hold.
647. Abolition of dower and curtesy.
648. Certain estates, &c., not to be affected.
649. Trusts.
650. Trust estates vest in the Supreme Court.
651. Property in common.
652. Joint property.
653. Succession to real property of a copartnership.
654, 655, 656. When advancement to be set-off or deducted.
657. Relatives of the half blood.
660. Aliens.
661. Mother, &c., of illegitimate decedent may succeed.
662. Illegitimate child may succeed to mother's property.
663. Illegitimacy.
664. Posthumous relatives.
665. Divorce bars succession between the parties.
666. Who are representatives.
667. Escheat.
668. Title of state subject to charges.
669. Liability of successors for decedent's obligations.

§ 637. Succession is the coming in of another to take the property of one who dies without disposing of it by will.

The term "descent," hitherto chiefly used in this state to denote the devolution of an inheritance, was derived from the ancient principle of the English law,
that an inheritance could never ascend or pass from
son to father, but must descend or pass to descendents.
But as the American law allows property to pass in
both ways, there arises an incongruity in continuing
this use of the term; an incongruity which causes
practical embarrassment, since the word "descendants"
must still be confined to its strict meaning, and cannot
embrace all those who may take by our statute of
descents, so called, and the word "descend" must
often be used in the same view and in contradistinction
to the devolution of property in the ascending line.
The term "succession" is the more appropriate phrase
of the civil law, and this, already in common use
among us, the commissioners have adopted to denote
the transmission of the property of a decedent by
operation of law.

§ 638. The property, both real and personal, of any
one who dies without disposing of it by will, passes,
in the first instance, to the personal representatives
of such person, as trustees:

1. To make the provision for the surviving husband
or wife or child, which is directed by section 640;

2. To apply the property to the payment of the
debts of the decedent, according to the Title on Wills
and the provisions of the Code of Civil Procedure;
and,

3. To distribute any remaining property among
those entitled to succeed to the property of the
decedent, according to the provisions of this Title.

§ 639. The personal representatives of a decedent
are his executors or administrators, including admin-
istrators with will annexed, who have duly qualified
according to the provisions of the Code of Civil
Procedure.

See Appendix D, to the original draft of this Code.

§ 640. Where a decedent leaves a husband, wife or
child, the following property is to be immediately
delivered by the personal representative, to such wife
or husband, and child or children, and is not to be
deemed assets:

1. Any estate or interest, to the value of one thou-
sand dollars, in a lot and buildings thereon, occupied
as a residence by the decedent, and which, by law, is exempt, as a homestead, from sale on execution;

2. All sewing machines, spinning wheels, weaving looms, and stoves, used by the family;

3. The family Bible; one pew, family pictures, and school books used by the family; and books, not exceeding in value one hundred dollars, used as part of the family library;

4. Sheep, to the number of ten, with their fleeces, and the yarn and cloth manufactured from the same; two cows and four swine;

5. All wearing apparel and clothing, and the wife’s ornaments, proper for her station; all necessary beds, bedsteads and bedding; necessary cooking utensils; three tables, twelve chairs; knives and forks; plates, teacups and saucers; one sugar-dish, one milkpot, one teapot, one coffeepot, and twelve spoons;

6. All family stores, or provisions, or supplies, for ordinary domestic use;

7. Household furniture, or other personal property, or money, to the value or amount of two hundred and fifty dollars; and,

8. Letters and other private writings.

§ 641. The property mentioned in the last section is to remain in the possession of the husband or wife, if there is one, during the time such husband or wife resides with and provides for the child or children of the marriage. When any child ceases so to reside, he is entitled to receive an equal share, or the value thereof, of such property, except that a wife may retain, as her own, her wearing apparel and ornaments, and one bedstead and bedding.

These two sections are modified from 2 R. S., 83, §§ 9, 10; Laws of 1850, 499; Laws of 1859, 343; subdivision 9 of § 640, is new.

§ 642. All property remaining after payment of a decedent’s debts, and satisfaction of the dispositions of his will, is to be distributed, together with any
damages recovered by the personal representatives for any wrongful act, neglect or default which caused the decedent’s death, to the successors of the decedent as follows:

1. If the decedent leaves a husband, the whole surplus goes to him, notwithstanding that it was the separate property of the wife, unless during the marriage she alienated such property, or effectually disposed thereof on her decease, by will or by gift in view of death;¹

2. If the decedent leaves a wife and lineal descendants, one-third part goes to the wife, and the other two-thirds to the nearest lineal descendants and the successors of those who are deceased;

3. If the decedent leaves a wife and no descendants, and leaves a father or mother, brother or sister, the whole surplus, if it does not exceed in value at the time of distribution ten thousand dollars, goes to the wife; if it exceeds ten thousand dollars, but does not exceed twenty thousand dollars, then ten thousand dollars go to her; if it exceeds twenty thousand dollars, then one-half goes to her; the remainder, if any, goes to the father and mother or the survivor of them, or, if neither is living, to the brothers and sisters, and the successors of those of them who are deceased;

4. If the decedent leaves a wife, and no descendant, parent, brother, or sister, the whole surplus goes to the wife;

5. If the decedent leaves no husband or wife, the whole surplus goes equally to the nearest lineal descendants, and the successors of those who are deceased.²

¹It is held that the Married Woman’s Acts of 1848 and 1849, do not affect the husband’s succession to property left by a wife on her death (Hansom v. Nichols, 22 N. Y., 110). Real property is made subject to the rule governing personal property in this respect. This of course is contrary to the present law.

²This and the following section are modified from 2 R. S., 36, § 75, as amended by Laws of 1845, 257, ch. 236.
§ 643. If a decedent leaves no husband or wife, and no descendant, the whole surplus of the estate goes to the next of kin, and the successors of those who are deceased, as follows:

1. To the father or mother, or either of them;

2. If there is no parent, to the brothers and sisters, in equal shares, and the successors of those who are deceased;

3. If there is no parent or brother or sister, or successor of a brother or sister, then to the next of kin and the successors of those who are deceased.

§ 644. The successors of a deceased parent cannot take by representation in place of the parent.

§ 645. Where the successors of a decedent, except parents, are all in equal degree of consanguinity to the decedent, their shares are equal; but if several are of unequal degree, each of the nearest degree succeeds to the share to which he would have been entitled had all those in the same degree, who have died leaving issue, been living; and the issue of those who have died, respectively succeed to the shares which such descendants or next of kin would have received if living.

From 2 R. S., 97, § 75, subs. 9 and 10.

§ 646. Whenever real property, or a share thereof, vests in several persons under the provisions of this Title, they take, as owners in common, in proportion to their respective rights.

1 R. S., 733, § 17.

§ 647. Dower and curtesy are abolished.

The commissioners recommend this change in connection with the provisions proposed under the chapter on Husband and Wife, and with those proposed in relation to the wife's succession to the husband's estate, in § 642.
§ 648. This Title does not affect any limitation of an estate or interest by deed or will.

1 R. S., 754, § 20; omitting the reference to Dower and Curtesy.

§ 649. The interest of any person in real property held in trust for him, if not devised by him, vests in his successors, according to the provisions of this chapter.

1 R. S., 754, § 21.

§ 650. Upon the death of a sole trustee of an express trust, whether a resident of this state or not, the trust estate does not devolve by succession, but the trust, if then unexecuted, vests in the supreme court, with all the powers and duties of the original trustee, and must be executed by a person appointed for that purpose, under the direction of the court.

1 Glen v. Gibson, 9 Barb., 634.

* 1 R. S., 730, § 68. The original statute applies only to trusts of real property (Banks v. Wilkes, 3 Sandf. C. h., 99; compare Hawley v. Ross, 7 Paige, 103).

§ 651. On the death of one of several owners in common, his title passes in like manner with his other property.

§ 652. On the death of one of two or more joint owners, with right of survivorship, his title passes to the surviving joint owners.

§ 653. On the death of a partner, the surviving partners succeed to all the partnership property, whether real or personal, in trust for the purposes of liquidation, even though the deceased was appointed by agreement sole liquidator; and the interest of the deceased in the ultimate distribution of the partnership assets passes to those who succeed to his other personal property.

1 Evans v. Evans, 9 Paige, 178; Case v. Abeel, 1 id., 303.

This is so, even as to non-mercantile partnerships (Allen v. Blanchard, 9 Cow., 631).

* Murray v. Mumford, 6 Cow., 441.
§ 654. When any real or personal property, or both, whether within or without this state, of a person who dies intestate as to all his property, has been advanced by such intestate, directly, or by virtue of a beneficial power, or of a power in trust with a right of selection, to a person entitled to succeed to his property, and with a view to a portion or settlement in life, and so expressed in the instrument establishing the settlement or portion, the value thereof as expressed in the instrument must be reckoned, for the purposes of this section only, as part of the property of such intestate which his successors are to receive; and if such advancement equals or exceeds the share which such relative would be entitled to receive, of the property so reckoned, then such relative and his successors have no share in the property of the intestate. But if the advancement is less than such share, he and his successors are to have so much only of the property as is sufficient to make it equal to such share.

Modified from 1 R. S., 754, §§ 23, 24, 25.

The provisions from which this section is taken, although in terms embracing the case of any intestate, apply only in cases of total intestacy (Thompson v. Carmichael, 3 Sandif. Ch., 120). Questions of considerable embarrassment, which frequently arise in determining what is to be deemed an advancement, and what is to be taken as its value, have led the commissioners to insert the provision, that in order to constitute a settlement an advancement, within these provisions, its purpose and value must be expressed in the instrument.

§ 655. The exclusion from succession, and the adjustment of shares under the provisions of the last section, take effect only upon judgment in a civil action.

There seems to be no sufficient reason why the succession should be interrupted or affected until the fact of the existence of the advancement, and its value, have been finally determined. Under the present statute, so long as the question whether gifts made by the deceased were advancements or not, is undetermined, the question as to who is entitled to succeed, or in what shares they are to take, is also in suspense. The commissioners have
thought it better, therefore, for the settling of titles, to provide that the succession shall not be affected until a judgment is had, declaring the existence and extent of the advancement.

§ 656. Unless both the purpose and the value of the settlement or portion, are expressed in the instrument of settlement, there is no legal advancement within the provisions of section 654.

1 R. S., 737, § 137.

§ 657. Relatives of the half blood, on either the paternal or maternal side, and their descendants, and the successors of both, succeed equally with those of the whole blood, except that to real property, which came to the decedent by succession, devise or gift of his relative, none who are not in any wise of the blood of such relative can succeed.

1 R. S., 753, § 16; 2 id., 97, § 75, sub. 10. The modification of the phraseology of the first part of this section is adopted to embrace, distinctly, the case of relatives of the half blood on the mother's side, and of the whole blood on the father's, in accordance with the decision in the case of Brown v. Burlington, 5 Sandf., 418.

In McCarthy v. Marsh, 5 N. Y., 283, it was held that the word "ancestors" as used in section 22 of this chapter of the Revised Statutes, embraced collateral kindred as well as progenitors. Since the word, as used in section 15, should doubtless have the same meaning, the commissioners have substituted for it here, as well as in that section, the word "relatives."

The words "of the blood" in the latter part of section 15, include the half blood as well as the whole (Beebe v. Griffing, 14 N. Y., 235).

§ 658. In determining succession, degrees of relationship are reckoned by counting from the decedent up to the common ancestor, and then down to the relative in question; reckoning a degree for each person. In such computation the decedent is excluded, the relative included, and the common ancestor counted but once.
§ 660. Aliens may take in all cases, by succession, as well as citizens; and no person capable of succeeding under the provisions of this chapter, is precluded from such succession, by reason of the alienage of any relative.

1 This provision is now. See section 170, and note on page 51.
2 From 1 R. S., 754, § 22, and see McCarty v. Marsh, 5 N. Y., 353.

§ 661. The mother of an illegitimate child, and the relatives on the part of the mother, succeed to its property as if the child were legitimate.

§ 662. In case of the death of a mother leaving no lawful issue, and no husband, and leaving illegitimate children or their descendants, such children and descendants succeed in the same manner as if such children were legitimate.

Law of 1855, ch. 647.

§ 663. No person can succeed through an illegitimate relationship, except in the cases hereinbefore provided.

1 R. S., 754, § 19.

§ 664. Relatives of a decedent, conceived before his death, but born thereafter, succeed, as if born in his lifetime and surviving him.

1 R. S., 754, § 18; 2 id., 97, § 75, subd. 13.

§ 665. Where a marriage has been dissolved for the misconduct of either party thereto, the guilty party is not entitled to succeed to the property of the other.

This provision already exists as against the wife, in cases of dower and succession to personal property (3 R. S., 145, § 46).
§ 666. Where a person, who would have been entitled, if living at the death of another, to succeed to his property, dies before the latter, the property which he would thus have taken by succession, if living, passes to those who would have been entitled to succeed thereto, if he had so taken it, and had died immediately thereafter.

§ 667. If there is no one capable of succeeding under the preceding sections, the property of a decedent devolves to the people of the state.

§ 668. Real property passing to the state under the last section, whether held by the state or its grantees, is subject to the same charges and trusts to which it would have been subject if it had passed by succession; and the supreme court has power to direct the attorney-general to convey the same to the parties entitled, or to a new trustee appointed by the court.

1 R. S., 718, §§ 1, 2.

§ 669. Those who succeed to the property of a decedent are liable for his obligations in the cases, and to the extent, prescribed by the Code of Civil Procedure.

See Appendix D, chapter III, in the original draft of this Code.