Accountancy

and

Business Management

A General Reference Work on

BOOKKEEPING, ACCOUNTING, AUDITING, COMMERCIAL LAW, BUSINESS ORGANIZATION, FACTORY ORGANIZATION, BUSINESS MANAGEMENT, BANKING, ADVERTISING, SELLING, OFFICE AND FACTORY RECORDS, COST KEEPING, SYSTEMATIZING, ETC.

Prepared by a Corps of

AUDITORS, ACCOUNTANTS, ATTORNEYS, AND SPECIALISTS IN BUSINESS METHODS AND MANAGEMENT

Illustrated with over Fifteen Hundred Engravings

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Foreword

WITH the unprecedented increase in our commercial activities has come a demand for better business methods. Methods which were adequate for the business of a less active commercial era have given way to more elaborate systems and countless labor-saving ideas in keeping with the financial and industrial progress of the world.

¶ Out of this progress has risen a new literature—the literature of business. But with the rapid advancement in the science of business its literature can scarcely be said to have kept pace, at least, not to the same extent as in other sciences and professions. Much excellent material dealing with special phases of business activity has been prepared, but this is so scattered that the student desiring to acquire a comprehensive business library has found himself confronted by serious difficulties. He has been obliged, to a great extent, to make his selections blindly, resulting in many duplications of material without securing needed information on important phases of the subject, except at the sacrifice of much time and patience.

¶ In the belief that a demand exists for a library which shall embrace the best practice in all branches of business—from buying to selling, from simple bookkeeping to the administration of the financial affairs of a great corporation—these volumes have been prepared. Prepared primarily for home study, the authors have striven for simplicity and directness of style and have used a large number of practical problems to further illuminate the text. In addition to the purely accounting and management phases, the newly developed subject of Income Tax has received adequate treatment.

¶ Editors and writers have been selected because of their familiarity with, and experience in handling various subjects pertaining to Commerce, Accountancy, and Business Administration. Writers with practical business experience have received preference over those with theoretical training; practicability has been considered of greater importance than literary excellence.

¶ These volumes are offered with the confident expectation that they will prove of great value to the trained man who desires to become conversant with phases of business practice with which he is unfamiliar, and to those holding advanced clerical and managerial positions.

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COMMERCIAL LAW

PART I

LAW IN GENERAL

1. Rights. Men are endowed with certain individual rights. These rights are principally of two classes, personal and property. Men have the right to live in peace and quietude. In so far as it does not interfere with the same privilege on the part of others they have the right to be unmolested in the pursuit of happiness. They have the right to defend themselves against the attacks of others, to satisfy bodily hunger and thirst, and to preserve their bodies in health and strength.

Besides these personal rights, men have the right to acquire and keep property. This right is also subject to the limitation of not interfering with the same privilege on the part of others. Men have the right to acquire property, both chattel and real. For the purpose of rendering their existence and enjoyment secure, they have the right to keep the title and possession of this property in themselves.

In primitive times, property rights were few. Personal rights were recognized and enforced by might. As the requirements of civilized life became more complex, property rights were needed and recognized. Rules of conduct and rules for the holding and transfer of property were recognized and enforced. Might ceased to be the principal method of enforcing rights. Rules began to be recognized and enforced with regard to persons and property. These rules are known as laws.

2. Law. Law may be defined to be a rule of human conduct. It may be said to embrace all rules of human conduct recognized by courts of law. Laws are necessary to enable men to enforce and enjoy their rights, both personal and property. Customs of men become rules by which human affairs are regulated. Men may disagree as to what their rights are, or as to their exact scope or limitations. In this event, rules of conduct or laws must determine their

scope and limitations. Disputes among men arise about their personal or property rights. The rules recognized by the courts in settling these disputes are laws. These rules or laws relate both to persons and property. A law which prohibits murder is a rule by which the state protects the lives of its citizens; a law which prohibits theft is a rule for the protection of property.

3. **Sources of Law.** Law is derived from the customs of the people and from the written declarations or agreements of the people or their representatives. The customs of the people, constituting a large part of our law, are found principally in the decisions of courts. Each state of this country prints and keeps a permanent record of at least the most important decisions of its court of last resort. Many decisions of lower courts are printed and preserved. Every law library of importance has the printed reports of the supreme court of each state of this country; as well as the reports of the higher courts of most of the countries where the English language is spoken or officially recognized. The reports of the higher courts of England, Ireland, Canada, Australia, and of many of the island possessions of this country and of England, are found in most law libraries. The second source of law is the written declaration of the people or their representatives. These declarations consist of legislative acts, treaties and constitutions. In this country, legislative acts may be either national or state. Many statutes are nothing more than recognized customs enacted into written laws. Other statutes are variations or restrictions of recognized customs. National legislative acts are numbered consecutively, printed and bound into volumes known as the *Federal Statutes.* Each state numbers its statutes consecutively and prints and binds them into volumes known as the *State Statutes.*

4. **Divisions of the Law.** There are two great divisions of the law, *written* and *unwritten.* The greater portion of the law consists of the customs of the people, as evidenced and preserved by the written decisions of the courts. These customs, to be recognized as law, need not be found in written decisions, but the most important ones have become embodied therein. New customs are necessary and are recognized to meet new and changing conditions. These new customs are continually adding to our unwritten law. While this great portion of the law is called unwritten law, the greater portion of it

actually is in writing, and is preserved in permanent form by our court reports, both national and state.

The second division of law is known as written law. It consists of treaties, constitutions, and legislative acts. *Treaties* are international compacts. *Legislative acts* are the laws passed by the people or their representatives. In this country they consist of the laws passed by the United States Congress, and by the representative bodies of each state. *Constitutions,* in this country, consist of the State Constitutions and the United States Constitution. In England the constitution is not written, but is a part of the unwritten law of the land.

5. Classification of Law. A number of useful classifications of the law are recognized. Any classification is more or less arbitrary, and no classification has been recognized universally.

Law may be classified as *public, administrative,* and *private.* Public law embraces the law of nations, called *international law;* the laws regulating the enforcement and recognition of constitutional provisions, called *constitutional law;* and the laws protecting citizens against the actions of dangerous characters, called *criminal laws.*

The public as a unit is said to be interested in public law. Public laws are recognized and enforced in theory, at least, for the benefit of the public and not for any particular individual. For example, if a murder is committed, the state through its officers prosecutes and punishes the criminal on the theory that a wrong has been done the state. The heirs or representatives of the person murdered can sue and recover money compensation, called *damages,* from the murderer, but the state punishes the criminal. This work does not treat of public law.

Administrative law, sometimes called *Law of Procedure,* embraces the rules and regulations relating to the enforcement of personal and property rights. The laws relating to courts, the method and manner of starting legal actions, the trial of cases, and the rendering and enforcement of judgments are common examples of Administrative Law. *Private law* embraces the *law of contracts* and of *torts.*

Contracts consist of agreements of every nature. The great majority of dealings of men are carried out by means of contracts.

This is the most important, as well as the most extensive subject known to the law.

Torts embrace all private wrongs not arising out of contracts. Any injury inflicted by one person upon the person or property of another, which is not a breach of contract, is a tort. Tort is the French word for private wrong. If *A* carelessly drives his automobile into *B*'s wagon, he commits a tort. If *A* carelessly drives his horse over *B*'s field, he commits a tort. If *A*, wrongfully strikes *B*, he commits a tort. Torts and crimes frequently over-lap. The same act may constitute a tort and a crime. If *A* drives his automobile faster than the laws of the state or city permit, and while so doing runs over and injures *B*, he commits both a tort and a crime. He is liable to the state for imprisonment or fine for the crime, and he is liable to *B* in money for damages for the tort.

The same act may constitute a crime, a breach of contract, and a tort. If *A*, engaged as a chauffeur to operate an automobile carefully and skillfully, violates the speed law, and in so doing runs over and injures *B*, he commits a crime and is liable to the state for punishment or fine. He is also liable in damages to *B* for the tort committed, and is liable in damages to his employer for breach of contract. This work has largely to do with the law of contracts and torts.

The term *Commercial Law*, applied to this work, is a term used arbitrarily to embrace the laws relating to commercial affairs. It has no distinct place in the general classification of law.

CONTRACTS

6. Contract, Defined and Discussed. A contract has been defined to be an agreement between two or more competent parties, enforceable in a court of law, and based upon a sufficient consideration, to do or not to do a particular thing.

The law relating to contracts is the most important, as well as the most extensive, branch of commercial law. It touches, directly or indirectly, most of the dealings of men. It is the legal basis of all business transactions.

In the daily routine of their life, most families make many contracts. By reading the morning paper left at his door, a person impliedly agrees to pay the publisher the customary price. By ordering

the daily supply of groceries by telephone, the housewife impliedly contracts to pay for their value, upon delivery, or at the customary time of payment. By purchasing a number of car tickets from the street car conductor, a person makes a contract. By ordering a lunch, a person impliedly agrees to pay the customary price. In the more important business transactions, formal contracts are written out and signed. In these transactions the parties endeavor to define their duties and obligations clearly and expressly, in order that they may understand each other and in order that neither can dishonestly claim that the contract contains a certain provision or condition. Contracts are legal or illegal, void or voidable, depending upon their form and nature. An understanding of the necessary elements of valid contract is the foundation, to the understanding of commercial law.

7. Offer, Acceptance and Agreement. To constitute a transaction a valid contract, there must be an offer on the one hand, and an acceptance on the other. This necessitates at least two parties to every contract. One must make a proposition, the other must accept it. The acceptance must be of the exact terms of the offer, to constitute a legal acceptance. If the attempted acceptance is not made in the precise terms of the offer, it constitutes a counter offer, which, to constitute a contract must, in turn, be accepted by the original offeror.

If *A* offers *B* one hundred dollars for *B's* horse, and *B* in turn agrees to take one hundred dollars, the transaction constitutes a valid contract. If *A* offers *B* one hundred dollars for *B's* horse, and *B* in turn offers to sell the horse for one hundred and twenty dollars, the transaction does not constitute a contract, for the reason that *A's* offer has not been accepted. *B*, however, makes a counter offer, which if not assented to by *A*, constitutes no contract. If, however, *A* agrees to accept *B's* offer to sell the horse for one hundred and twenty dollars, this constitutes a valid contract, in which *B* is the offeror and *A* the acceptor. These counter offers in response to offers may go on indefinitely without constituting contracts. So long as the response to the offer varies the terms of the offer, it constitutes a counter offer, and not an acceptance. To constitute an acceptance, the exact terms of the offer must be agreed to.

Courts lay down the principle that there must be a meeting of

the minds of the contracting parties, to constitute the transaction a valid contract. This means that the offer must be accepted in its precise terms. The minds of the contracting parties cannot meet, unless the acceptance is of the exact terms of the offer. This principle is sometimes called *mutuality*. An acceptance must be communicated to the offeror. A mere mental operation, or an attempted acceptance, not communicated to the offeror, does not constitute a legal acceptance.

The offer, or acceptance, may be in the form of an act as well as by verbal or written communication. If a person orders a barrel of flour of his grocer, the order constitutes the offer, and the delivery of the flour and the receipt of same by the purchaser, constitutes the acceptance. The purchaser is bound to pay the market price for the flour, regardless of the fact that the price has not been mentioned.

An offer can be recalled at any time before acceptance. To recall an offer, the offeror must communicate his intention so to do, to the acceptor before acceptance. Agreements to hold offers open for a stipulated time are recognized. These options are, in themselves contracts, and to be binding must contain all the essential elements of a contract.

An offer which has been accepted constitutes an *agreement*. An agreement, as the word suggests, means a meeting of the minds of two or more parties. The word is frequently used as synonymous with contract, but it is merely an element of a contract. While there must be an agreement in every contract, an agreement of itself does not constitute a contract. There may be an agreement between persons under legal age, but this agreement does not constitue a contract.

Besides an agreement, or meeting of the minds, a contract must have competent parties, a legal valuable consideration, and a lawful object. These are often called the elements of a contract.

8. **Parties to a Contract.** A contract must have at least two competent parties. Each party to a contract may consist of one or more persons.

To be competent to make a contract, a party must be of legal age. Legal age is twenty-one years for males, and ordinarily, eighteen for females. Legal age is fixed by statutes of the different states. These statutes differ somewhat as to the legal age of females. Some

fix it at twenty-one, others at eighteen, and some even younger than eighteen, in case of marriage. Intoxicated persons, insane persons and idiots are not competent to make contracts. Artificial persons or corporations can make contracts within the scope of the powers given them by the state.

A person who does not voluntarily consent to the terms of a contract is not a party to it. Where fraud or duress is used in obtaining a party's consent to a contract, the contract is at least voidable. It is not enforceable if the defrauded party objects on that ground.

9. Consideration. Consideration may be *good* or *valuable.* Good consideration consists of love and affection existing between near relations. Good consideration is a sufficient consideration to support a deed given by one relative to another. But this is the only kind of contract supported by a good consideration.

Valuable consideration has been defined to consist of some right, interest, profit or benefit, accruing to the promisor, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the party, to whom the promise is given. In short it is a benefit to the promisor, or a detriment to the promisee. All contracts, with the exception of sealed instruments, must be supported by a valuable consideration. Sealed instruments, except where abrogated by statute, import a consideration.

A promises to sell his watch to *B* for ten dollars. *B* accepts the offer by offering to pay *A* ten dollars. There is a valuable consideration, consisting of *B's* promise to pay *A* ten dollars.

A promises *B* two dollars if *B* will guard *A's* house for two hours. There may be no actual benefit resulting to *A*, since it may have been unnecessary to have the house guarded. But if *B* guards the house for two hours, *A* is legally bound to pay him the contract price of two dollars. The valuable consideration is the detriment or responsibility of *B* in guarding the house for two hours.

Mutual promises constitute a valuable consideration. If *A* promises *B* two dollars if *B* will work for him next Thursday, and *B* promises *A* to work for him next Thursday, the contract is mutual, and is supported by a valuable consideration. The consideration consists of the promise on the part of each of the contracting parties.

A past consideration will not support a contract. By a past consideration, is meant a benefit received in the past, for which no legal liability was incurred or exists. *A* gives *B*, his son, five hun-

dred dollars. One year later, in consideration of the past gift, *B* promises to construct a dam for *A*. The consideration is past and does not support the attempted contract.

A consideration, to be valuable and sufficient to support a contract, need not be adequate. A mutual promise, no matter how slight or trivial, or the payment of anything valuable to the promisor, is sufficient. Sometimes the inadequacy of the consideration tends to prove fraud in the making of the contract. When it is sought to avoid a contract on the ground of fraud, the inadequacy of the consideration may be considered in connection with the question of fraud. When fraud does not enter into the question, adequacy of the consideration is not questioned.

A sells *B* one hundred acres of land. The deed recites a consideration of one dollar. The deed of transfer is good and the smallness of the sum named does not affect the contract.

A promise to do something which one is already legally bound to do does not constitute a valuable consideration to a contract. *A* owes *B* one hundred dollars upon a promissory note. The note is past due and *A* fails to pay it. *A* promises to pay the note within ten days, on condition that *B* promise to give *A* a barrel of apples. *B* agrees. *A* cannot compel *B* to deliver the barrel of apples, nor has *A* any defense to the payment of the promissory note, since his promise to pay the note was a promise to do something he was already bound to do.

An illegal consideration does not support a contract. Any consideration contrary to established law is illegal. *A* promising to pay *B* one thousand dollars if *B* will burn *C's* barn is an example of illegal consideration.

10. Express and Implied Contracts. Some contracts expressly set forth the exact terms and conditions to be performed by both the contracting parties. For example, *A* makes a contract with *B*, by the terms of which, *B* is to construct a house for *A*. The contract is carefully prepared in writing, *B* is to receive five thousand dollars ($5,000.00) when the house is completed, and the contract contains provisions as to the details of the work and materials. Such a contract is called an *express contract* by reason of the terms having been expressly agreed upon by the parties. A contract need not be in writing to be express. The parties may enter into an express contract orally as well. Few contracts are made, however, in which some

things are not implied. For example, in the contract for the building of a house it is practically impossible, or at least, is impracticable, to set forth in exact detail all the duties of the builder. For example, it would be unnecessary to give the size of the nails and number or quantity of same to be used. The contract impliedly requires the builders to use the proper size and quantity. A contract, however, in which the parties endeavor to set forth the principal things to be done, is known as an express contract.

An *implied contract* is one in which the parties do not expressly agree upon some of the important terms. *A*, a contractor, orders of *B* one thousand feet (1,000 ft.) of No. 1 white pine ship lap siding. The price is not mentioned. *B* delivers the lumber and *A* by implication is obliged to pay *B* the reasonable value thereof. The greater portion of business contracts are implied. An implied contract should not be confused with uncertain contracts. Uncertain contracts are void by reason of their uncertainty. *A* offers *B* one thousand dollars for five acres of land. *B* accepts the offer. In case the parties had no particular five acres of land in mind, the contract is void by reason of this uncertainty. The parties' minds did not meet on the question of what particular piece of land was to be transferred. In most implied contracts the article to be delivered is a part of a large quantity, and the particular part does not matter. Articles ordered from stock, such as groceries, shingles, slate, cement and lumber are common examples of this principal.

11. Unilateral and Bilateral, Executory and Executed Contracts. The mutuality or meeting of the minds, constituting one of the essential elements of the contract, may result from an express promise for a promise, or from an act performed in response to a promise. *A* promises to sell his automobile to *B* on the following day for five thousand dollars ($5,000.00). *B* promises to pay *A* five thousand dollars ($5,000.00) the following day. The mutuality consists of the mutual promises of *A* and *B*. Such contracts are known in law as *bilateral* contracts.

A promises to pay *B* one thousand dollars ($1,000.00) if *B* will move his house to the rear of *A's* lot. *B*, without promising to do so, moves the house. This act on the part of *B* constitutes the acceptance of the contract and completes the mutuality. Such contracts are known in law as *unilateral* contracts.

A contract to be performed in the future is known as an *executory* contract. *A* promises to pay *B* seventy-five dollars, if he will work on *A's* farm during the month of August of the following year. *B* accepts *A's* offer and promises to work for *A* as proposed. The contract is to be performed at a subsequent date, and constitutes an executory contract.

An *executed* contract is one which is performed. *A* promises to sell his bicycle to *B* for fifty dollars ($50.00); *B* pays the fifty dollars ($50.00) to *A* and receives the bicycle. This contract is executed.

A contract may be executed as to one party and executory as to the other. If *A* agrees to sell and deliver his team of horses to *B* for five hundred dollars ($500.00) and *B* pays *A* five hundred dollars ($500.00) but *A* does not deliver the team to *B*, the contract is executed as to *B* and executory as to *A*.

12. Contracts of Infants. A person under legal age is known in law as an infant. The legal age is fixed by statute in the different states. In most states this age is twenty-one for males and eighteen for females. In some states the legal age for females is under eighteen in case of marriage.

An infant's contracts are voidable. Voidable does not mean that the contract is illegal. It is not contrary to law for an infant to make contracts. He may lawfully make them. The law will not compel him to carry them out. He may carry them out voluntarily if he chooses.

A competent party, contracting with an infant cannot avoid the contract on the general ground of the infancy of the other party to the contract. The infant, however, may avoid the contract by reason thereof.

An infant may ratify his contract after becoming of legal age. This ratification is effected by the infant's accepting benefits under the contract after attaining his majority. Ratification may also be effected by an infant after he has reached his majority by promising to carry out the contract. To have such a promise amount to a ratification the infant must make the promise with knowledge that he may avoid the contract if he chooses.

An infant is liable on his contracts for necessaries. *Necessaries* is a variable term, depending upon the social position of the infant. Those articles essential to the health and sometimes to the comfort

of the infant are considered necessaries. Food and clothing are the most common examples. A person selling an infant necessaries, cannot recover in excess of their reasonable value regardless of the contract price, and cannot recover at all, if the infant is already supplied. Most courts hold that a party selling necessaries to an infant must determine at his peril that the infant is not supplied. Articles which would be luxuries for one infant, might be necessaries for an infant accustomed to wealth.

An infant is not entitled to his wages unless he has been emancipated. The father or guardian is entitled to the wages. Emancipation may be by written declaration to that effect, on the part of the father. It may also be implied from the refusal or failure on the part of the father to treat the infant as his child.

13. Novation and Contracts for the Benefit of Third Persons. If *A* owes *B* one hundred dollars ($100.00) and *B* owes *C* one hundred dollars ($100.00), the three parties may agree that *A* may pay *C* one hundred dollars ($100.00), discharging the indebtedness of both *A* and *B*. This contract is vaild in law, and is called *novation*.

Much of our common or unwritten law was taken from the common law of England. The common law of England did not permit a third party, for whose benefit a contract was made, to enforce the contract. For example, if *A* and *B* enter into a contract by which *A* is to pay *C* some money, *C* cannot enforce the contract. This kind of a contract is commonly known as a contract for the benefit of a third person. With a few exceptions, the states of this country refuse to follow the English doctrine. The general American doctrine is that a third party may enforce a contract made for his benefit. For example, *A*, a furniture dealer was indebted to *B* for a bill of goods; *C* purchased *A's* business, and in a formal written contract, as part of the consideration, agreed to pay *B* the amount of *A's* bill. After the transfer of the business, *A* became insolvent and *B*, learning of the contract between *A* and *C*, sued *C* thereon and was permitted to recover. The general American doctrine will not permit two parties, making a contract for the benefit of a third, to rescind or avoid the contract after the third party has been notified of it, and has assented thereto. Of course, two parties cannot bind a third party to perform any condition of a contract without his consent. This would

violate some of the fundamental principles of contracts. There would be no consent, no meeting of the minds, and sometimes no consideration.

14. Contracts of Insane Persons, Idiots, and Drunkards. An insane person, or one that does not understand the nature of the contract in question, is not bound by his contracts. He may avoid them. Like an infant, he may ratify them when he becomes sane, if he chooses. Statutes of all the states provide for the determination of insanity by judicial decree. Such a judicial determination is presumed to give notice to all. An idiot's contracts are the same as an insane person's.

A drunkard can avoid a contract made while he was intoxicated, and if the drunkenness amounts to insanity, it is regarded in law as such. Contracts made by a drunkard when not drunk, or by a lunatic during a lucid interval are valid and binding.

15. Contracts of Married Women. At common law, upon marriage, the wife lost her legal identity in her husband. Her estate became his, her personal property became his, and she could not thereafter enter into any legal obligation. The statutes of the states generally at the present time permit a married woman to contract as independently as a man, relative to her separate estate. In some states there are a few limitations, such as contracting directly with her husband or as surety for her husband.

16. Custom and Usage as Part of a Contract. Parties may enter into any contracts they choose, so long as the terms are legal. If parties expressly agree, either orally or verbally, on the precise terms of a contract, these terms cannot be varied by usage or custom. Usage and custom may be used, however, to explain the intent of the parties. Merchants and traders recognize various trade customs, without which it would be impossible to interpret their contracts. For example, *A* ordered five thousand barrels of cement of *B*, at eighty-five cents a barrel, to be delivered in sacks F. O. B. Mill. In a suit for the purchase price, the court permitted *B* to show that there was a well-known custom in the cement trade to add to the invoices forty cents per barrel for sacks, making the invoice selling price of the cement and sacks one dollar and twenty-five cents ($1.25) per barrel.

To constitute a part of the contract, usage and custom must be

of such a general nature as to be considered within the contemplation of the parties.

17. Contracts in Writing. Parties may make contracts verbally, as well as in writing. A contract is not illegal because it is verbal. It is good business policy to make important contracts in writing. Their terms are easily proven. There is not the temptation to attempt to vary the terms. Parties cannot claim they did not understand each other. It may be laid down as a general rule that oral contracts are as legal as written ones. By the term, *legal* is meant that the law does not prohibit them. Parties may lawfully make oral contracts, and carry them out if they choose. Some contracts, however, are not enforceable at law unless in writing. These contracts are legal. Parties may lawfully make them and voluntarily carry them out, but they cannot invoke the aid of the law in enforcing their terms.

18. Statute of Frauds. The class of contracts, required by law to be in writing in order that they be enforceable, is said to be within the Statute of Frauds.

The Statute of Frauds originated in England in 1677. It was passed for the purpose of preventing frauds and perjuries. It required that certain important contracts must be made in writing, in order to be enforceable at law. The purpose of the statute was to remove the temptation of fraud and perjury in connection with the making and enforcing of certain contracts. Two sections of the English statute apply especially to contracts; the fourth and the seventeenth. The fourth section is as follows:

"No action shall be brought whereby to charge any executor or administrator, upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise, to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The seventeenth section of the English Statute of Frauds is as follows:

"No contract for the sale of any goods, wares, or merchandise for the price of ten pounds sterling or upwards, shall be allowed to be good exeept the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."

The English Statute of Frauds has been enacted in substance in all the states. Reduced to single propositions the statute provides:

1. That an executor or administrator shall not be bound by contract to pay damages out of his own estate, unless the contract be in writing.

For example, *A* is executor of *B's* estate. *C* is a creditor of *B*. *A* orally promises *C* to pay *B's* debt. This contract is not enforceable because not in writing.

2. A party promising to answer for the debt, default or miscarriage of another, shall not be bound unless the contract is in writing.

For example, if *A* owes *B* $100 and *C* promises *B* to pay *A's* debt, the contract is not enforceable if not in writing. This clause of the statute is discussed more at length in the chapter on suretyship.

3. A contract made in consideration of marriage is not enforceable unless made in writing.

For example, *A* orally promised *B* that if he would marry her, she would convey to him her farm. *B* married *A*, but could not enforce the contract. A promise to marry is within this section of the statute.

4. Any contract or sale of lands must be in writing to be enforceable.

For example, *A* orally promises *B* to sell his house and lot for ten thousand dollars ($10,000.00). The contract is not enforceable. Most of the states do not require that leases of less than a year's duration be in writing, to be enforceable.

5. An agreement, not to be performed within the space of one year, must be in writing to be enforceable.

For example, *A* orally promises to work for *B* as sales agent for three years. This contract is not enforceable.

6. No contract for the sale of goods the price of which exceeds fifty dollars ($50.00) shall be enforceable unless made in writing

This provision of the English Statute has not been reënacted by

all the states. About half the states do not require that contracts for the sale of personal property shall be in writing, regardless of the price involved. Some of the states fix the price as high as two hundred dollars ($200.00) and others, as low as thirty dollars ($30.00).

The details of the entire contract need not be in writing to satisfy the provisions of the statute. A memorandum embodying the substance of the agreement, showing the consideration, and signed by the party to be bound, or by his authorized agent, is sufficient.

Contracts called *specialties*, have to be in writing, regardless of the Statute of Frauds. The most common examples are bills and notes, drafts and checks. These special contracts are made to circulate as money, and must be reduced to writing to be enforceable. There can be no such thing as an oral check, or draft, or promissory note. The oral contract for which they are given may be enforced, if not within the provisions of the Statute of Frauds.

19. Contracts by Correspondence and Telegraph. Parties need not meet personally to enter into contracts. They may legally make them by telegraph or by letter.

It is well settled by the courts that a party may make an offer by letter, and that in so doing he impliedly gives the party addressed, the right to accept by letter. In law, the contract is complete the moment the letter of acceptance is mailed, regardless of its ever being received.

The offerer may stipulate in his offer by letter, that the contract shall not be made until he is in receipt of a reply. In this event, the acceptor's letter must actually be received by the offerer, before the contract is complete. But if no such stipulation is made, the contract is complete when the letter of acceptance is mailed.

If no time for acceptance is stipulated in the offeror's letter, the acceptor has a reasonable time in which to accept. What is a reasonable time, depends upon the nature of the transaction, and the circumstances surrounding it. If the offeror stipulates in his letter that the offer must be accepted by any stipulated time, the offer, of itself, lapses at the expiration of that time. If *A* mails a letter to *B*, offering to sell one hundred bushels of wheat for one hundred dollars ($100.00), and the following day *B* mails a letter, properly addressed, postage prepaid, to *A*, accepting the offer, and the letter is lost, the contract is complete and *B* may recover from *A* thereon.

If *A*, by letter offers to sell *B* one hundred bushels of wheat for one hundred dollars ($100.00), the offer to remain open until Thursday, and *B* mails his letter of acceptance Wednesday, and the letter is lost, the contract is binding and *A* is liable thereon. If *A* by letter offers to sell *B* one hundred bushels of wheat for one hundred dollars ($100.00), the offer to be accepted upon receipt of *B's* reply, and *B's* reply is lost in the mails, there is no contract.

20. Revocation. It is a well recognized principle of contracts that an offer may be revoked, or withdrawn, at any time before acceptance. In case of revocation by mail, however, the letter of revocation must be received by the acceptor, before he has mailed his letter of acceptance. For example, *A* mails *B* a letter offering to sell *B* one hundred bushels of wheat for one hundred dollars ($100.00). *B* mails his letter of acceptance. By the next mail *B* receives a letter of revocation. The contract is valid since the letter of revocation was not received, until after the letter of acceptance was mailed.

The only offers that cannot be withdrawn at any time before acceptance, are what are known in law as *options*. Options are contracts to keep an offer open for a stipulated length of time. They require a consideration, an agreement and all the elements of an ordinary contract. They are contracts. *A* agrees by letter to sell *B* one hundred bushels of wheat, and to keep the offer open three days. On the second day, and before *B* has mailed his acceptance, *B* receives a letter from *A*, by which *A* withdraws his offer. *B* cannot now accept *A's* offer, since there was no consideration for *A's* promise to keep the offer open three days.

A writes *B*, offering to sell him one hundred bushels of wheat for one hundred dollars ($100.00), and to keep the offer open for ten days. *B* writes *A* that he will give him $2.00 if he will keep the offer open ten days. *A* accepts the offer. On the sixth day *B* receives a letter from *A* revoking the offer to sell, and on the following day *B* mails his letter of acceptance. There is a valid contract in this case, since *B* had a contract with *A* based on a valuable consideration to keep the offer open ten days.

Contracts by telegraph are analogous in principle to contracts by letter. An offer by telegraph impliedly authorizes the receiver to accept by telegraph and the offer is accepted when the reply message is deposited with the operator. If lost, or not sent, the contract is not affected in the least.

21. Contracts under Seal, Formerly, at common law, contracts under seal were frequent. At the present time few contracts are made under seal. Originally a seal was an impression made in wax placed on a written document. Sealed instruments differ from other written instruments in that they import a consideration. At common law, no consideration need be proven to a sealed instrument. Formerly, private seals were in common use. Later, a scroll made with the pen or a line or any mark designated as a seal was sufficient.

Private seals have been abolished by statute in many of the states, so that their use is now limited. The modern tendency is not to use sealed instruments, or when used, to regard them as different in no respect from other contracts.

22. Sunday Contracts. All the states of this country have statutes prohibiting the transaction of business on Sunday. These statutes are based on "the Lord's Day Act" of England. The English statute provides that persons shall not do or exercise any worldly labor, business or work of their ordinary callings, upon the Lord's Day, or any part thereof, works of necessity and charity only excepted.

While the statutes of the different states differ in details, they are based upon the English statutes. Under the English statute, it is difficult to determine in many cases what constitute "works of necessity and charity." The duties of clergymen, physicians and of nurses clearly are covered. It is sometimes stated that a person cannot make contracts, within the ordinary scope of his customary business, on Sunday. This is true, if it does not relate to charity or necessity. Deeds, notes and ordinary contracts, made and delivered on Sunday are void. Subscriptions for church funds may legally be made on Sunday.

23. Illegal Contracts. A contract prohibited by law, or made for the purpose of doing something prohibited by law, is illegal, and void. If *A* promises *B* one hundred dollars ($100.00) if *B* will poison *C's* horse, the contract is contrary to law and illegal. If *B* poisons *C's* horse, he cannot recover the one hundred dollars ($100.00) from *A*.

Contracts which are against public policy are illegal and void. Public policy means the public welfare. Marriage brokerage contracts and contracts in restraint of trade come within this provision. Lobbying contracts, contracts to influence votes, and for railroad rebates are against public policy and void.

24. Wagering or Gambling Contracts. In England, at common law, wagering or gambling contracts were valid. Gambling contracts were recognized as legal by some of the states at one time. At the present time, by statute the states declare gambling contracts illegal and void.

A contract for the sale of goods, to be delivered in the future, even though the seller does not have possession of the goods at the time the contract of sale is made, but expects to purchase them from a third person, is not regarded as a gambling contract, and is valid.

Contracts for the purchase of stocks or goods in which there is no expectation to deliver, but simply an agreement to pay the difference in price at a certain date according to the state of the market, are gambling contracts, and void.

25. Fraud and Duress. Fraud may be said to be misrepresentation of a material fact, known by the party making the misrepresentation to be false, and made for the purpose of influencing the other party to the contract, and acted upon by the other party to his detriment.

For example, *A* offers to sell *B* a horse for two hundred and fifty dollars ($250.00). He tells *B* the horse is sound, knowing that the horse has a disease which renders him worthless. He makes the representation of soundness for the purpose of inducing *B* to buy. *B* relies upon the representation, purchases the horse, and afterwards discovers the worthless condition of the horse. *B* can return the horse and recover the purchase price. This is known as rescinding a contract on the ground of fraud.

A fraudulent contract is not void, but voidable. The defrauded party may avoid the contract if he chooses, but the contract itself, is not without effect, simply by reason of the fraud.

A mere failure to disclose facts or conditions, if not accompanied by active measures to distract the defrauded party's attention from the thing to be concealed, ordinarily does not amount to fraud.

If one party by means of threatened or actual violence compels another to enter into a contract, or to part with something of value, the contract is said to have been obtained by duress. Such contracts may be avoided by the injured party, who may recover what he has lost.

A, a police officer, wrongfully arrests and imprisons *B* and releases

him only after *B* has signed a promissory note for one hundred dollars ($100.00). *A* cannot recover on the note.

A, who is superior in physical strength to *B*, by threats of personal violence, compels *B* to admit that he is indebted to *A* for one hundred dollars ($100.00), which *B* pays *A*. *B* may recover the money from *A*. The contract is voidable on account of duress.

26. Mistake. One of the essential elements of a contract is that there must be a meeting of the minds of the contracting parties. If there is a mutual mistake on the part of the contracting parties, their minds do not meet and no contract results. *A* offers to sell *B* his farm for five thousand dollars ($5,000.00). *A* has two farms. *A* has one in mind, and *B* the other. Their minds do not meet and there is no contract.

A mistake as to the legal effect of a contract does not avoid it. This is known as a mistake of law.

A mistake on the part of one of the parties only, ordinarily does not avoid the contract.

27. Impossible Contracts. Parties may enter into any kind of a contract they choose, so long as the provisions and conditions are legal. As a general rule, a party is liable in damages to the other party, for failure to observe and carry out the terms of his contract. There is, however, a class of contracts, known in law as impossible contracts. Many contracts are made upon the assumption that the persons making the contract, or the particular thing under consideration will continue to exist until the contract is performed.

A agrees to paint a picture for *B*, for one thousand dollars ($1,000). *A* fails in health or dies. *A* or his estate, is not responsible in damages to *B*, since the contract contemplated *A's* remaining in health and life.

A agrees to make *B* a chair out of a particular piece of walnut lumber. The lumber is destroyed by fire through no fault of *A*. *A* is not liable in damages, since the parties contemplated the continued existence of the lumber. If, however, *A* contracts to build *B* a walnut chair within ten days for fifty dollars ($50.00) and his factory and walnut lumber are destroyed by fire, *A* is answerable to *B* in damages, for failure to deliver the chair. He has entered into a lawful contract, and has not excepted liability on account of fire.

A contract for personal services is rendered of no effect by the

failure of health, or by death of the party, who is to perform the services. Where, however, the contract provides for the doing of a certain specific thing, not to be performed by a certain person, and not depending upon the continued existence of a certain thing, the parties are bound to perform, regardless of accident.

Floods, earthquakes or lightning do not excuse performance. These accidents are known in law as *Acts of God.* (See *Acts of God* chapter on Carriers.) Acts of God do not excuse performance unless expressly provided against in the contract.

A law changed after the contract is made, making it unlawful to perform the contract, excuses performance.

Strikes do not render it impossible to perform contracts, within contemplation of the law. If a party desires to become exempt from performance by reason of strikes, he must put such a provision in his contract.

If the party to the contract, to whom the performance is due, renders performance impossible for the other party, the latter is excused on the ground of impossibility. For example, *A* contracts to do the wood finishing on *B's* house within six months, *B* to construct the masonry work. *B* fails to construct the masonry work; this exempts *A* from liability.

28. Conflict of Laws. The laws of different states differ in some particulars. Where this difference affects the interpretation or enforcement of a contract, the doctrine of conflict of law applies. If a contract is valid in the state where made, it is usually valid everywhere. This rule is subject to the limitation that a state will not enforce a contract clearly against the policy of its own laws. If a contract is made in one state, to be performed in another, the laws of the latter apply. Otherwise, the laws of the state where the contract is made apply. The laws relating merely to the court procedure or the method of enforcing a contract, belong to the state called upon to enforce the contract, and, even though the laws of the state where the contract was made differ, the former will apply.

The laws of New York permit an express company to limit its liability for loss of goods to fifty dollars ($50.00), if so stipulated in the bill of lading, in case no valuation is fixed by the shipper. The laws of Ohio do not permit an express company to limit its liability in this way. *A*, in New York, shipped goods valued at four hundred

dollars ($400.00) to *B*, in Cleveland. *A* placed no valuation on the goods and accepted a receipt limiting the liability of the express company for loss of the goods, to fifty dollars ($50.00). The goods were lost. *B* sued the express company in Ohio for the value of the goods. The court held that the law of Ohio held, since, by the terms of the contract, the goods were to be delivered in Ohio.

29. Assignments of Contracts. By assignment of a contract, is meant the transfer of one's property rights in the contract. One cannot assign his duties under a contract. For example, *A* contracts with *B* to have the latter build him a house, for five thousand dollars ($5,000.00). *B* cannot transfer to another, the obligation on his part to construct the house. *B*, may, however, transfer to another, his right to recover the money for the house. *A* may also transfer to another, his right to have the house constructed.

Contracts for personal service such as the painting of a picture, or the writing of a book, cannot be assigned. In such cases the personal work of a particular person is contracted for and cannot be transferred.

An assignment of a contract is a contract for the sale of a property benefit of a contract. The assignment must contain all the elements of a simple contract. The assignor of a contract can transfer only such property rights as he possesses. The other party to the contract retains any defense against the assignee, which he had against the assignor. *A* agrees to build a house for *B*, for five thousand dollars ($5,000.00), according to certain plans. *A* constructs the house with variations, subjecting him to a reduction in price of five hundred dollars ($500.00). *A* assigns his rights in the contract to *C* and *C* can collect from *B* only four thousand five hundred dollars ($4,500.00). The defense of *B* against *A* is good against *A's* assignee, *C*.

Upon assigning a contract, the assignor or assignee must notify the other party to the contract, of the assignment, else payment to the assignor will discharge the other party. For example, *A* owes *B* one hundred dollars ($100.00). *B* assigns the claim to *C*. *C* does not notify *A* of the assignment and *A* pays *B*. *B* is insolvent and *C* cannot recover from him. *C* cannot recover from *A*, since *A* has received no notice of the assignment.

The following is a recognized legal form of assignment.

For valuable consideration, I
hereby assign all my right,
title and interest in the
annexed (account, contract, or
whatever the instrument may be).
to———

———————————

Signature of assignor.

Date———————

30. Joint and Several Liability in Contracts. If *A* makes a contract with *B*, only two parties are bound by the contract and are liable for its breach. If *A* and *B* contract with *C* and *D*, four parties are bound and are liable. *A* and *B* may be liable as one party to *C* and *D*, or they may be liable as two parties to *C* and *D*. If the contract shows by its terms that *A* and *B* contract as a unit, and not as separate individuals, their contract is said to be *joint*. If the terms of the contract show that *A* and *B* intend to contract as individuals, as well as a unit, their contract is said to be *joint* and *several*. It the terms of the contract show that *A* and *B* intend to contract as individuals only, and not as a unit, their liability is said to be *several*.

The importance of this distinction is that in case of a joint obligation, all the joint obligors must be joined when sued, else the case may be dismissed if objection is made; while in case of a joint and several obligation, or of a several obligation, individual obligors may be sued separately.

A promissory note reads, "We promise to pay" and is signed by *A* and *B*. This is a joint obligation, and in a suit thereon *A* and *B* must be joined, or the one sued may have the case dismissed, by reason thereof. If, however, judgment is rendered against both, and they hold no joint property, the creditor may enforce his judgment against either. This is known in law as, *liability in solido*. A promissory note reads, "We or either of us jointly and severally promise to pay," and is signed by *A* and *B*. *A* and *B* are severally, as well as jointly liable, and may be sued separately.

Where two or more parties sign a contract, binding themselves to do one thing or a series of things, the law presumes the obligation to be joint. If the language used shows that the parties singly, or individually bind themselves to do the thing, or series of things in

common, the contract is several, as well as joint. *A* owes *B* three hundred dollars ($300.00) upon a promissory note. *C*, *D* and *E* sign the following guaranty:

If *A* fails to pay the note when due, *C* individually promises to pay *B* one hundred dollars ($100.00), *D* individually promises to pay *B* one hundred dollars ($100.00), *E* individually promises to pay *B* one hundred dollars ($100.00).

As to each other *C*, *D* and *E*, are severally liable. As to *B*,—*C*, *D* and *E* respectively are jointly and severally liable, with *A* for one hundred dollars ($100.00) each.

31. Discharge of Contract by Performance and Tender. A contract is terminated, when the parties thereto perform its provisions. The liability of parties ceases by performance of the provisions of the contract. *A* promises to construct a house for *B*, according to certain specifications, within a year. *B* promises to pay *A* five thousand dollars ($5,000.00), upon completion of the house according to contract. *A*, within a year, constructs the house according to the plans and specifications. *A's* obligation is at an end. *B's* obligation still requires him to pay *A* five thousand dollars ($5,000.00), and he is liable to a suit for this amount until it is paid. When *B* pays *A* five thousand dollars ($5,000.00), his obligation and the contract are terminated, as to both parties.

Tender of payment is equivalent in law to payment. By *tender* is meant an offer to pay in recognized legal money. *A* has an option for the purchase of a house of *B*, for five thousand dollars ($5,000.00). *B* desires to have the option lapse, having obtained a better offer. If *A* offers *B* legal tender before the option expires, the contract is complete in law.

United States statutes stipulate what constitute legal tender. These statutes provide that the following shall constitute legal tender:

1. Gold coin.
2. Silver dollars.
3. Subsidary silver coin up to ten dollars.
4. Nickels and pennies not exceeding twenty-five cents.
5. United States notes, except for duties on imports, and interest on public debts.

Silver certificates, bank notes and private checks are not legal tender.

32. Discharge of Contract by Subsequent Agreement. Contracts may be terminated by another contract, made after the contract in question has been entered into. For example, *A* promises to construct, within one year, a house according to certain plans, for *B*. *B* promises to pay *A* five thousand dollars ($5,000.00), upon completion of the house. *A* completes the excavation of the cellar and *B* fails in business, and desires not to have the house constructed. He offers *A* five hundred dollars ($500.00), for the work already done, and to release him from his obligation. *A* accepts *B's* proposition. The original contract has been terminated by the subsequent one.

33. Warranty and Remedies for Breach of Warranty. A *warranty* is a contract collateral to the principal contract, by which a party to a contract specifically covenants certain things. Warranties apply especially to sales of personal property. (See *warranty* under Sales of Personal Property.) *A* promises to build a house for *B* and warrants the paint to stand untarnished and uncracked for one year. The covenant on *A's* part relating to the paint is a warranty.

Breach of warranty ordinarily does not entitle the other party to rescind the contract. That is, it does not permit him to refuse to carry out his part of the contract, but entitles him to bring an action for damages, for its breach.

34. Recission and Discharge of Contracts by Breach. If a party fails or refuses to carry out a provision of a contract, he is said to have committed a *breach of contract.* When one party to a contract commits a breach, the other party may accept the breach and sue for damages, or he may refuse to accept the breach and wait until the time for complete performance arrives, and then, if the other party has not performed, sue for damages.

When a party to a contract commits a breach, and notifies the other party of his refusal further to carry out the contract, the other party cannot increase the defaulting party's damages by continuing performance thereafter. For example, *A* contracts with *B* to have a fence finished and erected around *A's* house. After *B* has half of the fence manufactured and erected, *A* refuses to go on with the contract. *B* cannot increase the damages by manufacturing and erecting the balance of the fence. The reason for this is that it would not benefit *B* at all, but would merely injure *A*. *B* is entitled to recover his profit for the entire job, when *A* breaks the contract.

He could recover no more by manufacturing and erecting the balance of the fence.

The law does not recognize trivial things. A party cannot claim breach of contract for failure of the opposite party to a contract, to perform an unimportant thing. The law recognizes substantial performance as actual performance. This does not mean that a party cannot put such terms in a contract as he chooses, but means that, in the absence of any provisions of the contract to the contrary, a party is not presumed by law to contract for trivial things. Time of performance is an illustration of this principle. *A* contracts with *B* for the building of a house. *B* promises to complete it in one year. If completed in one year and a day, there is a substantial performance, unless the contract expressly shows that the precise day of performance was regarded as important.

Where contracts provide for separate performances, a failure or refusal to fulfil one performance will not always amount to a refusal or failure to perform the balance. *A* agrees to ship *B* five thousand barrels of cement, in car load lots of one hundred and fifty barrels each to be shipped each week. *B* receives and refuses to pay for the first car. This may not amount to a breach of the entire contract, so as to justify *A* in refusing to ship the balance. The tendency of American courts, however, is to treat this as as one contract; that is to treat the promises as dependent, and not independent.

The acceptance by one party, of a breach of contract made by the other, and the refusal on the part of the former further to carry out the contract, is known in law as *recission*. To rescind a contract, a party must return what he has received thereunder, called putting the other party *in statu quo*. He must also accept the breach promptly. For example, *A* promises to sell *B* three horses to be delivered one each day, upon the three following days. *A* delivers one and fails to deliver the second. To rescind the contract, *B* must return promptly to *A* the horse already delivered. He may then sue *A* for damages suffered. If *B* does not promptly return the horse to *A*, he must permit *A* to go on with the contract, waiving the delay, or pay for the horse already delivered, less damages for *A's* breach of contract.

35. Discharge by Bankruptcy. By a United States' statute, certain persons may become bankrupts and thereby be discharged

from their obligations. By the terms of this act, the bankrupt's property is turned over to an officer, called a trustee in bankruptcy who disposes of it, and distributes it *pro rata* among the bankrupt's creditors. Any person except a corporation, who owes debts, may become a voluntary bankrupt.

The United States statute further provides that certain persons may be declared bankrupts at the instance of their creditors. The United States statute provides that:

"Any natural person, except a wage earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company and any corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits, owing debts to the amount of one thousand dollars ($1,000.00) or over, may be adjudged an involuntary bankrupt, upon default, or on impartial trial and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws may be adjudged involuntary bankrupts."

Any of the above enumerated parties may be made an involuntary bankrupt at the instance of creditors if he has committed an act of bankruptcy.

The bankruptcy statute defines an act of bankruptcy as follows:

"Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors or any of them; (2) transferred, while insolvent any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, or being insolvent, applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States; or (5) admitted in writing his inability to pay his debts, and his willingness to be adjudged a bankrupt on that ground."

Bankruptcy discharges a bankrupt from his contracts.

36. Remedies for Breach of Contract. Originally, at common law, there was no power given a party to a contract, to compel the other party specifically to perform the provisions of the contract. For example, *A* promises to pay *B* one thousand dollars ($1,000.00) for one thousand bushels of wheat, to be delivered within ten days. *B* fails and refuses to deliver the wheat. *A* could not at common law,

and cannot under the present rules of law, compel *B* to deliver the wheat. *A's* remedy is an action for damages. *A* may go into the market at the time and place of delivery, provided for in the contract, and purchase one thousand bushels of wheat of the quality provided for in the contract, and collect as damages from *B* the advance in price, if any, together with expenses connected therewith. If *A* is obliged to pay one thousand five hundred dollars ($1,500.00) for the wheat, which by the terms of the contract, he had purchased for one thousand dollars ($1,000.00) from *B*, he may recover five hundred dollars ($500.00) damages from *B*. If *A* succeeds in obtaining the wheat for nine hundred dollars ($900.00), he can only recover nominal damages from *B*, commonly five cents, for breach of contract. In case *A* obtains the wheat for nine hundred dollars ($900.00), *B* cannot recover one hundred dollars ($100.00) from *A*, since he has violated the contract, and cannot take advantage of his own wrong.

Parties frequently fix the amount of damages for a possible breach at the time the contract is made. This is known in law as *liquidated* damages. If reasonably compensatory, the courts will recognize and enforce liquidated damages; if clearly unreasonable they are regarded as penal, and the courts will not enforce them. For example, *A* agrees to construct a rolling mill for *B*, for fifty thousand dollars ($50,000.00), and to complete the structure within one year, and to pay damages of two hundred dollars ($200.00) per day, for each and every day consumed, in excess of a year in finishing the structure. If this is a reasonable loss to *B*, for the failure to have the use of the mill, the courts will enforce the provisions; otherwise they will remit the excess over the fair value of *B's* loss.

37. Equity and Specific Performance. Originally, at common law in England, the king and his subordinates heard suits. Certain specified actions or remedies, only, were allowed. It was soon observed that many complaints were made, and disputes arose, which did not come within the scope of these common law actions. The king appointed a chancellor to assist him. It was the duty of the chancellor to hear disputes, not within the scope of the recognized common law action, and to determine and decide these upon equitable principles. This court became known as the court of *chancery*, or court of *equity*. A regular system of courts of chancery grew up in England, with fixed rules of procedure and of recovery. This

country has Courts of Equity. In many states, the same judge sits as a court of law, and of equity. Equity does not hear cases where there is a complete and adequate remedy at law. Equity courts have a judge only, and no jury. Courts of equity sometimes specifically enforce contracts in case there is no adequate remedy at law. For example, *A* purchases a lot of *B* in a particularly desirable locality. There is no other vacant lot near it. In case *B*, refuses to carry out his contract, by conveying this lot to *A*, equity will compel *B* to convey the lot to *A*. Here *A* has no adequate remedy at law. Money damages will not enable him to procure what he contracted for.

Specific performance is rarely granted in case of sales of personal or chattel property. There are a few exceptions. If *A* purchases "Maud S." from *B* for ten thousand dollars ($10,000.00), "Maud S." being a two minute race horse, purchased for breeding purposes, and *B* refuses to deliver her, a court of equity might grant specific performance. Money damages might not enable *A* to purchase a similar horse. The same principle applies in case of purchases of rare works of art.

While a contract for personal services cannot be specifically enforced by a court of equity, some relief may be granted by injunction. For example, *A*, an actress, agrees to perform for one year for *B* and later refuses. While a court manifestly cannot compel A to perform for *B*, it will by injunction prevent her performing for others.

38. Forms of Contracts. The following is a form of simple contract.

Chicago, Ill., June 23, 1909.

Contract entered into this .... day of ..... 1909, by and between *A*, the first party, and *B*, the second party.

In consideration of the promises hereinafter made by the second party, the first party agrees ..... (here state first party agreement).

In consideration of the promises of the first party, the second party agrees ..... (here state agreement of second party).

Signed ..... First Party.

Signed ..... Second Party.

The following is a form of a formal contract.

Articles of agreement entered into in New York City this..... day of .... 190– by and between *A*, hereinafter designated as the first party, and *B*, hereinafter designated as the second party.

Whereas, the first party is a wholesale dry goods merchant having

a place of business in New York City, and is desirous of employing a traveling salesman, and whereas, the second party is a traveling salesman having had ten years' experience in the dry goods business, now, therefore in consideration of the promises hereinafter made by the second party the first party agrees,

First. To pay the second party the sum of $2400 in installments of $200 payable each month for a period of 12 months.

Second. To pay the second party's traveling expenses not to exceed $50.00 per week, to be mailed weekly as ordered by second party.

Third. To furnish second party a full line of samples.

In consideration of the promises of the first party the second party agrees,

First. To devote his entire time and attention to the business of selling goods of the first party.

Second. To furnish lists of customers called upon each day, said lists to be mailed to said first party, New York address, each evening.

Third. To waive his right to any salary in excess of his traveling expenses if his sales do not average $5000 per week.

In witness whereof the parties have affixed their names and seals in duplicate the day and year above written.

.....First Party.

.....Second Party.

PRINCIPAL AND AGENT

39. In General. *Agency* is the term applied to the legal relation existing between persons who transact business or perform duties through representatives. Few duties are performed, and few business transactions are completed solely through the personal efforts of the interested parties. Most business dealings are completed in part, at least, by representatives or agents. Much important business is transacted by corporations. Corporations must act through agents. They have no identity apart from officers and agents. Individuals, as well as the smaller business concerns, perform many of their duties and make many of their contracts through representatives or agents. The law relating to agency, next to the law of contracts is probably the broadest as well as the most important branch of commercial law. Its application is almost universal. A distinction is sometimes drawn between representatives appointed to make contracts with third persons, and representatives appointed to perform menial or mechanical work, by calling the one class, agents, and the other servants. There is little reason for any such distinction. The same rules of law apply to both agents and servants. The prin-

cipal distinction is in the nature of the service, which need not be considered in discussing the general legal principles.

The party appointing another to represent him in his relation to third persons is called the *principal.* The person appointed to act as a representative is called the *agent.* The legal relationship existing between the principal and the agent, and the principal, agent and third person, constitutes the *law of agency.* If a dry goods merchant, *A*, employs *B*, a traveling salesman, to sell his goods, and *B* sells goods to *C*, *A* is the principal, *B* the agent, and *C*, the third person contracting with *A*, through *A's* agent *B*.

40. Who May be a Principal. A principal is one who appoints an agent. *A*, employs *B* to deliver goods; *A* is principal and *B* agent. Any person, natural or otherwise, competent to enter into a contract, may enter into a contract through an agent. There is one possible exception to this rule. It is a well recognized rule of law that an infant cannot appoint an agent. An infant may enter into a contract which is not void at law, but which is merely voidable. (See subject, "Infant" in Chapter on Contracts.) That is, an infant may lawfully make and carry out a contract. The law does not prohibit it. But the law will not compel an infant to carry out his contracts, except for necessaries. When it comes to the appointment of an agent, however, the law refuses to give an infant this power. By an infant is meant a person under legal age.

Any person of legal capacity may appoint an agent. In other words, a person may do through an agent the things he, himself, may do. An insane person, an idiot or a drunken person cannot appoint an agent. A corporation may do business through agents, limited only by its corporate capacity. A partnership may do business through agents, limited only by the purposes for which the partnership is formed.

41. Who May be an Agent. Any one, except a very young child and persons whose interests are opposed to those of the principal, may act as agent. A child may be employed to deliver goods, and thus make and complete contracts for his principal. Persons of unsound mind may serve as agents. Persons who cannot act as principal, through lack of capacity to contract, may act as agent for others. For example, *A*, fourteen years old, cannot be bound by a contract with *B* for the purchase of one hundred bushels of wheat, but *A* may

be employed as agent by *C*, a competent person, to purchase of *B* one hundred bushels of wheat.

A person whose interests are opposed to those of his principal is disqualified from acting as agent. That is, a person cannot be agent for both parties to the same transaction. For example, if *A* is employed as traveling salesman by *B* to sell goods, he cannot serve as agent for *C* in the purchase of goods from *B* without the knowledge and consent of both *B* and *C*.

Artificial persons, such as partnerships and corporations may act as agents. It is usually held that children under seven years of age cannot act as agents, by reason of tender age.

42. **How Agents May be Appointed.** Agents may be appointed by any act of the principal which shows that it is the principal's will that the agent shall act as the principal's representative.

Agents may he appointed by oral statement, by written document, by conduct on the part of the principal, or by ratification of an unauthorized act.

Most agencies are created by oral authority. Any word by which the will of the principal is manifested is sufficient. *A* tells *B* to order a barrel of flour from *C*. This constitutes *B* an agent for *A*. *B's* asking *A* if he shall order a barrel of flour from *C*, to which *A* nods, constitutes *B*, *A's* agent. *A* writes to *B* and requests him to order a carload of flour from *C*. This constitutes *B*, *A's* agent. *B*, without any authority from *A*, orders a car load of flour from *C*, which *A* accepts, and for which he promises to pay. This constitutes *B*, *A's* agent by ratification.

Some few contracts of agency must be in writing. *A* employs *B* to act as his salesman for a period of two years. As between *A* and *B*, the contract is not enforceable, by reason of the *Statute of Frauds* (see Statute of Frauds, chapter on Contracts). But as between *A* and third parties dealt with by *B* as agent, *A* cannot refute the agency.

Some contracts which must be made in writing, such as land contracts require the agent's authority to be in writing.

If a person knowingly permits another to act as his agent, he cannot afterwards repudiate the agency. For example, *A* stands by and watches *B* sell *A's* horse to *C*. Although *B* had no authority to make the sale, *A*, by his conduct, cannot claim there was no agency.

An agent's assertion of agency does not of itself constitute an agency. If *A*, without *B's* knowledge, claims to *C* to have authority to sell *B's* horse and does attempt the sale, title to the horse does not pass to *C*, because *A* had no authority to make the sale. A mere declaration of authority on the part of the agent without the knowledge or consent of the principal does not create an agency.

43. Purposes for Which an Agency May be Created. With the exception of fulfilling contracts for personal services, a person may do, through an agent, anything he may lawfully do by himself. For example, *A* employs *B*, an artist of fame, to paint a picture. Manifestly *B* cannot employ a student or another artist to paint the picture. *A* contracted for *B's* personal skill and work, and cannot be made to accept the work of another. In the majority of business transactions, however, the personal element does not enter. The thing to be done, or the article to be furnished, is the feature of most contracts. By whom the thing is done, or by whom the article is furnished, does not matter. For example, *A* purchases one hundred bushels of wheat from *B*. *B* delivers the wheat through his agent. Ordinarily *A* cannot, nor does he wish to complain. *A* contracts with *B* to have *B* furnish him an oak chair of given dimensions. *B* employs *C* to make and deliver the chair. *A* cannot complain so long as the chair corresponds to the terms of the contract.

A party cannot do through another what he himself cannot lawfully do. For example, a party cannot employ an agent to purchase votes for him. Neither can a person lawfully corrupt legislators by means of an agent, nor lawfully commit a crime by means of an agent.

44. Ratification of Agency. Where a person assumes to act as an agent for another without authority, or in performing an agency, exceeds his authority, he does not bind the person for whom he assumes to act, unless such person subsequently, with knowledge of the fact, consents to be bound thereby. Such assent is known in law as *ratification*.

A person cannot ratify an act which he, himself, has no power to perform. For example, *A*, pretending to act for *B*, offers *C*, a legislator, one hundred dollars ($100.00) to vote against a certain measure. *B* cannot ratify this act, since he himself cannot lawfully perform it. If however, *A*, knowing that *B* desires a certain rare

picture, finds it and orders it in *B's* name, *B* may ratify the act by accepting and paying for the picture.

Much discussion has arisen as to the ability of a person to ratify a forgery of a negotiable instrument. The courts differ on this question. It is, however settled that in case of a forgery, if the alleged principal fails to deny the signature when the paper is presented to him, or by remaining silent, induces another to purchase it, or to injure his position by reason thereof, the alleged principal is estopped from further denying the authenticity of the signature, and may be compelled to pay the instrument. For example, *A* forges *B's* name to a promissory note payable to *C*. *C* presents the note to *B* for payment. *B* may refuse to pay the note by reason of forgery. If, however, *A* forges *B's* name to a note, payable to *C*, and *D* shows *B* the note, saying that he is about to purchase it if it is genuine, and *B* remains silent and permits *D* to buy the note, *B's* silence amounts to a ratification of the forgery and he must pay the note to *D*.

When an alleged principal's attention is called to the fact that an alleged agent has assumed to act as his agent, he must choose between repudiating the act and accepting it. This choice is known in law as the principal's *right of election*.

45. Classification of Agents. Agents are usually classified as *universal*, *general* or *special*. By universal agent is meant an agent empowered to represent his principal in every capacity. A principal could have only one universal agent. In business affairs, a universal agency is seldom, if ever, found. It is useful, however, as a classification to show the different kinds of agents, depending upon the degree of their authority.

A general agent is one authorized to perform all the duties of his principal of a certain kind. *A*, an insurance company, appoints *B* its sole agent to solicit insurance in the city of Boston. *B* is a general agent for the purpose of soliciting insurance in the city of Boston. General agencies are common in business practice.

A special agent is one authorized to act for his principal in a particular matter or transaction. For example, *A* employs *B*, an attorney, to try a certain law suit. *B* is a special agent.

In practice it is not always easy to determine whether an agent is a general or a special one. A principal does not always limit his agent's powers by actual authority conferred upon the agent. His

intention and his instructions to the agent may limit the latter's authority, but third persons may rely upon the apparent authority of the agent, rather than the actual. For example, *A* employs *B* as a traveling salesman to sell dry goods. He instructs *B* not to sell any bills less than five hundred dollars ($500.00) in amount. *B* sells *C* a bill amounting to four hundred dollars ($400.00), *C* does not know of the limitation of *B's* authority. *A* is bound by *B's* sales to *C*. *C* has the right to rely upon *B's* apparent authority. *A* has given *B* actual authority to sell goods, and this authority carries with it the implied or apparent authority to sell in any reasonable amounts.

Actual authority to do certain things carries with it the right to do those things which impliedly, or from custom or usage apparently accompany the authority conferred.

Third persons dealing with an agent must, on the other hand, ascertain at their peril that an agent has the authority claimed. For example, if *A*, without authority, claims to be agent for *B*, and sells an order of goods to *C*, and collects from *C* a certain amount, when in fact he is not the agent of *B*, *C* has no contract with *B*. A third person dealing with an agent must ascertain at his peril, that the alleged agent has authority from his principal to act as agent in a certain capacity. When this is ascertained, the third person has a right to treat the agent as having the authority to do all the things necessarily or customarily belonging to his agency.

46. Duties of Principal to Agent. The relation of a principal to his agent arises out of a contract, express or implied. The contract may expressly provide that the agent is to receive a specified sum for his services. In this event, the principal is legally liable to pay this amount to his agent. The principal may have a defense to his contract, the same as to any contract. But if the agent has performed his contract of agency, he can enforce payment therefor. For example, *A* employs *B* to sell furniture for a compensation of one hundred dollars ($100.00) per month and expenses, the contract to cover a period of twelve months. When *B* performs this service, he may, by legal action, compel *B* to pay him one thousand two hundred dollars ($1,200.00). If *B* fails to work for *A* as provided for by the terms of the contract, and at the expiration of six months enters *C's* employ, in most jurisdictions, he can recover nothing from *A*, since he has not fulfilled his contract. In some jurisdictions, he

may recover from *A* the value of his services, less the damages *A* has suffered by reason of breach of contract.

Many agencies are created without any express provision as to compensation. In this event, a contract relation exists, as much as in the former case. There is an implied contract that the agent shall receive a reasonable compensation for his services. For example, *A*, a contractor, requests *B*, a teamster, to haul stone for the construction of a bridge. *B* works for *A* a week, nothing having been said as to compensation. *B* can recover from *A* the reasonable and customary value of his services.

There is also a duty on the part of the principal to protect his agent against unnecessary risks of injury. There is a duty on the part of a master to protect his servant. An agent or servant assumes the risks which naturally belong to the kind of work in which he is engaged. For example, *A* employs *B* to work in a saw mill. *B* assumes the risks incident to the employment. If a log accidentally rolls on him, *A* is not liable in damages, or if *B* carelessly cuts his hand on the saw, *A* is not responsible. But if the boiler explodes through carelessness of *A*, or if the saw flies to pieces on account of wear, and injures *B*, *A* is liable.

It is said that a principal or master is obliged to furnish his agent or servant with a reasonably safe place in which to work, and with reasonably safe tools and instruments with which to work. If the principal negligently fails to these things, and the servant is injured without negligence and carelessness on his part, the principal is liable to him in damages for any injuries.

47. Duties and Liabilities of Principal to Third Persons. When a person employs another to act for him, he is liable to third persons for the acts performed by the agent, so long as the agent acts within his authority. If *A* appoints *B* his agent to purchase live stock, *A* must pay third persons for the live stock purchased in his name by *B*. A person employing another to act as his agent is responsible to third persons for acts performed by the agent, which are within the apparent authority of the agent, as well as for the acts which are within the actual authority. If *A* appoints *B* his agent to purchase live stock and instructs him to purchase only hogs, but limits his authority to pay over five cents per pound, and *B* purchases at five and a half cents from *C*, who does not know of this limitation, *A* is

bound by the contract. In giving an agent authority to do certain things, the agency carries with it the customary or implied authority to perform those acts incident to the general character of the agency. Thus, authority to purchase usually carries with it authority to fix the price. This is especially true of authority to sell.

Notice to an agent is notice to a principal. If an agent is authorized to sell goods, and in making a sale, is notified by the purchaser that the goods are purchased conditionally, in the absence of any special instruction limiting the power of the agent to sell conditionally, brought to the attention of the purchaser, the principal will be bound by the condition.

A principal is liable to third persons for his agent's torts or wrongful acts. If *A* directs his agent *B* to destroy *C's* property, *A* is liable to *C* for the damage done. A principal is not only liable to third persons for the damages done under his express direction by his agent, but he is also liable for the acts carelessly done by the agent in the course of his employment. A street car company employs *B* as motorman. *B*, carelessly and negligently, while operating a car runs over *C*. *A* is liable for *B's* negligent act. A principal, however, is not liable for the wrongful acts of his agent, performed outside of his employment. *A*, a street car company, employs *B* as conductor; *C*, standing on the street insults *B*. *B* stops his car, gets off and assaults and injures *C*. *A* is not liable, since *B* did not commit the act complained of while in the course of his employment, but went outside the course of his employment and acted on his own behalf.

48. Duties and Liabilities of Agent to Principal. An agent must obey the instructions of his principal. If he disobeys his instructions, he is liable to his principal for losses sustained. For example, if *A* employs *B* to sell flour at four dollars ($4.00) per barrel and *B* sells one hundred barrels at three dollars and seventy-five cents ($3.75), he must respond in damages to *A* for twenty-five cents a barrel. If, however, a discretion is given the agent, and he makes a reasonable mistake in using his discretion, he is not liable. If his instructions are not clear, and he carries out what he thinks are his instructions, which prove not to be the desire or intention of his principal, he is not liable.

An agent must account to his principal for money collected, and

for moneys or property coming into his possession by reason of his agency. If he deposits money in his own name and it is lost through a bank failure, he is responsible to his principal. If he carefully deposits it in the name of his principal and the bank fails, he is not responsible.

An agent must act carefully in the preformance of his principal's work, or as it is usually said, he must not act carelessly or negligently. He must act as a reasonably prudent man would act, under similar circumstances, or be liable to his principal in damages.

An agent must be loyal to his principal's interests. He cannot act secretly for another. He cannot act secretly as agent for both parties to a transaction. If he makes profits in his agency dealings, he must account for them to his principal. *A* employs *B* to sell Christmas novelties. *B*, shortly before Christmas receives a large order from *C*, who offers *B* one hundred dollars ($100.00) in excess of the regular price, if the goods arrive the following day. *B* succeeds in having the goods reach *C* the following day. *B* must account for the extra one hundred dollars ($100.00) to *A*, his principal.

An agent must faithfully carry out his agency. He is responsible for failure to act loyally. *A* employs *B* to sell butter. *B* obtains an offer from *C*, a rival butter manufacturer, to commence work for him on commission two weeks hence. *B* tells his customers not to purchase for two weeks, at which time he can make them a better price. *B* is liable to *A* in damages for this act of disloyalty. He has broken his contract.

An agent, who is employed to perform personal services, cannot transfer his responsibility or agency to another.

One who agrees to act as agent for another without compensation, cannot be forced to fulfil his agency. He is not liable in damages to his principal for failure to act, but if he chooses to act without compensation, he is liable if he acts with great negligence. If *A* requests *B* to drive his horse home and *B* drives the horse and leaves him without tying him, and the horse runs away and destroys the carriage and ruins himself, *B* is liable for gross negligence.

49. Rights and Liabilities of Agent to Third Persons. An agent acting within the scope of his authority, in making contracts with third persons, binds his principal by the contract, but does not bind himself. *A* is authorized by *B* to purchase a horse. *A* purchases

a horse from *C*, notifying *C* that he is purchasing as agent for *B*. *C* must look to *B* for the purchase price, since *A* acted solely as agent and is not personally liable under the contract.

If an agent, intending to act as agent, makes a contract in his own name, without informing the third party with whom he is dealing, of the agency, he binds himself. Under these circumstances, he usually binds his principal also. This question is discussed more at length under the title "Undisclosed Principal." If *A* is employed by *B* to purchase a horse, and *A* purchases a horse from *C* for two hundred dollars ($200.00), without telling *C* of the agency, the purchase price to be paid the following day, *A* binds himself personally to pay *C* the two hundred dollars ($200.00) and *C* is not obliged to look to *B* for payment.

If an agent, honestly believing he has authority to act as agent when he has not, makes a contract as agent for his supposed principal, he binds himself personally and not his principal. A writes to *B*, "Purchase for me *C's* bay team, if same can be secured for two hundred and fifty dollars ($250.00), half payable in six months." *B* reads the letter aud purchases the team in the name of *A* for two hundred and fifty dollars cash ($250.00), overlooking the condition in *A's* letter that half was to be paid in six months. *B* binds himself to *C* and does not bind *A*.

When an agent falsely or fraudulently represents himself as agent, he binds himself and not his alleged principal.

If an agent, honestly believing he has authority to act, does not have such authority, but discloses all the facts connected with his authority, to the third person with whom he is dealing, he is not personally bound. *A*, having previously acted as agent for *B*, in purchasing onions by the crate, receives the following wire from *B*, "Purchase one hundred crates, ship at once." *A*, supposing this refers to the purchase of onions, shows the telegram to *C*, and tells him that in the only other transaction in which he acted for *B* he purchased onions, and that he supposes this wire refers to onions. He purchases one hundred crates of onions from *C*, and later discovers that *B* intended turnips, instead of onions. *A* is not bound personally. He has acted honestly and revealed all the facts in his possession to *C*, who must act at his risk as to *A's* actual authority.

50. Undisclosed Principal. A principal, whose agent deals

with a third person for his benefit, without disclosing the name of his principal, or perhaps without disclosing the fact of agency, is said to be an *undisclosed principal.* For example, *A* employs *B* to purchase one hundred crates of oranges. *B* purchases the oranges from *C* for *A* in his own name, not telling *C* that the purchase is made for *A*. In this case, *A* is an undisclosed principal.

As a general rule an undisclosed principal, when discovered, is liable upon the contract of his agent.

In case of an undisclosed principal, the agent is liable personally as well as the undisclosed principal. If *A* instructs *B* to purchase for him five cars of coal, and *B* purchases the coal of *C* in his own name, without disclosing the fact of his agency, *B* is personally liable to *C* for the purchase price.

The undisclosed principal is not liable to a third party if the third party with full knowledge of the agency, elects to hold the agent. If *A* employs *B* to purchase goods for him, and *B* purchases the goods in his own name from *C*, and *C*, before payment, learning that the goods were purchased for *A*, elects to hold the agent *B*, by suing him for the purchase price, or by doing or saying anything that shows his determination to hold the agent, rather than the principal, he cannot thereafter hold *A*.

The undisclosed principal may enforce against third persons the contract of his agent. If *A* employs *B* to purchase goods from *C* and *B* makes the purchase in his own name for future delivery, *A* may compel *C* to deliver the goods to him. This rule applies in all cases where the third party is not injured by its application.

The liability of an undisclosed principal to third persons, upon contracts made by an agent in the agent's name, is subject to the further exception, that when the third party has led the undisclosed principal to believe that he is looking to the agent alone for fulfillment of the contract, and relying upon such conduct the undisclosed principal settles with the agent, he is no longer liable to the third party. In this event the third person is said to be estopped from the right to sue the undisclosed principal. This rule is based upon equitable reasons. There can be no such thing as undisclosed principal in case of a negotiable instrument. No one is liable on a negotiable instrument, such as a note, draft, or check, except the maker, indorser, drawer or acceptor.

51. Apparent Authority of Agent. While it is true that an agent must have authority from his principal, before he can bind his principal in the capacity of agent, and while it is equally true that third persons, in dealing with agents, must determine at their peril that the agent has actually received authority to act for his principal, a third party has the right to rely upon the implied and customary powers accompanying an actual authority conferred upon an agent. Few contracts are made express in all their terms. Language is not susceptible of such nicety. In the express or implied contracts used in creating agencies, many things are implied. A third person dealing with an agent, is not limited by the actual authority conferred upon the agent by his principal, if the character of the authority apparently confers other customary or implied powers. Third persons are said to have the right to rely upon the apparent rather than upon the actual authority of the agent. This does not mean that an agent can create an agency and bind his principal without having received any authority from his principal to act as agent, but means that where an authority of a certain character has been conferred upon an agent, third parties dealing with the agent, have a right to rely upon the apparent or customary powers conferred, rather than upon any secret or unexpected limitations upon such authority. For example, an agent has authority to sell silk goods and to make exchanges in silk. This authority is printed on the order sheets furnished the agent. The agent exhibits these order sheets to the customer and exchanges are made. The principal cannot claim that the agent had authority to exchange only goods of the principal's manufacture. The authority conferred upon the agent to make exchanges, apparently was to make exchanges of any silks. The principal cannot complain if third parties rely upon the apparent authority.

52. Secret Instructions. So long as the agency is legal, a principal may create an agency of as limited an extent, or of as broad a nature as he desires. So long as the limitations which the principal places upon his agent's authority are not of a nature to mislead third persons, the agent cannot bind his principal by exceeding these limitations. But if a principal confers an authority upon an agent which impliedly embraces a number of powers, the principal cannot limit these powers by secret instructions. The limitations upon an agent's apparent authority must be brought to the attention of the third

party. For example, *A*, a wholesale dry goods dealer, may employ *B*, a salesman, to take written orders only. If *B* attempts to take oral orders, the principal, *A*, will not be bound thereby. But if *A* gives *B* authority to take written orders only, and secretly instructs *B* to take no order less than fifty dollars ($50.00) in amount, or in excess of two thousand dollars ($2,000.00), and *B* takes *C's* order for forty-five dollars ($45.00), *C* not knowing of this limitation, *A* is bound. If, however, *A* instructs *B* to take only written orders, and in amounts ranging only from fifty dollars ($50.00) to two thousand dollars ($2,000.00), and prints these conditions plainly upon the order blank, *C*, in signing one of these order blanks for forty-five dollars ($45.00), does not bind *A*. In this case, *A* has placed the limitation of *B's* authority in *C's* possession.

53. Wrongful Acts of Agent. An agent is personally responsible for wrongful acts committed. The fact that he acts in a representative capacity, does not excuse him from committing wrongs, nor does it relieve him from personal liability therefor. The principal, as well as the agent, is liable for the wrong committed, if authorized. If *A* instructs his agent, *B*, to sell goods by fraudulent representations and *B*, by means of said fraud, sells goods to *C*, *B* personally, as well as *A* is liable to *C*, for the wrongful act. In the language of the courts, an agent is liable to third parties for *malfeasance*, but not for *misfeasance*. That is, an agent is liable to a third party for wrongful acts done, but is not liable to third parties for mere failure to observe the terms of his agency. In the latter case, he is liable to his principal only.

54. Delegation of Authority and Sub-agents. Where personal judgment and discretion are required of an agent, he cannot transfer his duties to another, without the consent of his principal. *A*, a wholesale dry goods merchant, employs *B*, an experienced traveling salesman, to sell goods. *B*, by his contract, is bound to give his personal skill to *A* and cannot employ *C* to act as salesman for him. *A* presumptively employs *B* to use his own skill and judgment. *B* is not permitted to delegate his authority to another.

Where, however, mere mechanical or ministerial work is to be performed the agent is permitted to employ others to assist him, or to perform the work. For example, *A* employs *B*, an expressman, to carry his trunk to the depot. *B* may employ a boy to assist him

in performing the work, or may employ another to perform the work. Usage and custom have much to do in determining whether or not an agent is permitted to delegate his authority. The performance of a mere ministerial duty may be delegated. *A* employs *B* to act as stenographer in reporting the trial of a case. When it comes to writing out the testimony, *B* may perform the task himself, or delegate it to another.

When an agent employs a subordinate, or delegates his authority to another on his own responsibility, the agent stands as principal for the sub-agent, and the original principal is not responsible to third persons for the acts of the sub-agent. If, however, the agent is authorized by the principal to appoint a sub-agent, the agent is bound only to exercise care in the selection of such sub-agent, and the original principal is liable to third persons for his acts. The sub-agent is answerable to the principal, and not to the agent for his acts. For example, *A*, a florist, employs *B* to deliver a box of flowers. *B* employs *C*. The nature of the duty is such that *B* may delegate it. But if *C* is negligent in the performance of the work, *B* is liable to *A* for the negligence, for the reason that *A* did not expressly or impliedly direct *B* to employ another.

A, in Chicago, deposits for collection, a check drawn on a New York bank. *A* knows that it is the custom of bankers to employ other banks for the purpose of making collections. If the Chicago bank uses due care in selecting another bank to assist in making the collection, and this bank makes the collection and fails before the Chicago bank receives the money, *A* must stand the loss, and not the Chicago bank. *A* authorized the employment of a sub-agent. There is some conflict of authority on the legal question involved in the above example.

55. Agent's Authority to Collect. An agent authorized to solicit orders is not thereby authorized to make collections on such orders. If, however, the agent is entrusted with the goods, and delivers them at the time the sale is made, he is authorized to receive payment therefor.

An agent authorized to sell, is not authorized to exchange or trade goods. He is authorized to make sales for cash only. If he accepts checks, or sells on credit, he is personally liable for losses. There is a tendency at present to permit the agent to accept checks in pay-

ment. The custom of making payment by check is so well recognized in many lines of business, that in some transactions it impliedly gives an agent this authority. This was not formerly the rule, and is still disputed by many courts.

56. Agent's Signature to Written Instruments. The proper method for an agent to employ in signing a written instrument, as agent, is to describe himself as agent for his principal in the body of the instrument, and then sign his principal's name at the end thereof, by himself as agent. For example, if *A*, is agent for *B* in making a contract of sale, the body of the instrument should state that "*B* by *A*, his agent, agrees," and the signature should be

(*B*.....)
(by *A*, his agent)

If the contract is merely signed "*A*, agent," the agent probably binds himself only. This is especially true in case of sealed instruments, such as deeds. In case of promissory notes, an agent who has authority to make such instruments, may make them in the name of his principal without using his own name at all. The more common form, however, is to sign the principal's name, per the agent as agent, or to sign the agent's name as agent for the principal, giving the principal's name. The mere signing of the agent's name as agent is a mere description, and probably binds the agent and not the principal. For example, if *A* is agent and *B* the principal, a promissory note executed by the agent should be signed

(*B*.....)
(by *A*, his agent)

A simple contract should state in the the body of the instrument that *A*, as agent for *B*, is making the contract, and the contract should be signed

(*B*.....)
(by *A*, his agent)

or *A*, agent for *B*. A promissory note or simple contract made and signed in the name of the principal, the agent's name not appearing, is probably binding, but it is not good business practice. The exact condition of affairs should be shown, and the name of the agent, as well as that of the principal, should appear in the document.

57. Authority of Agent to Warrant. As to whether or not an agent authorized to sell personal property has implied authority

to warrant its quality, is not uniformly settled. If there is any rule on the question, it probably is controlled by usage and custom. If there is a general well known custom to warrant a particular article, the agent has implied authority to warrant the quality of the article sold. If no such usage or custom exists, or if the usage or custom is purely local and not general in its application, the agent has no authority to warrant the quality of the goods sold. It must be remembered that a principal is bound by the general character of authority he confers upon his agent, by the agent's apparent authority rather than by the actual authority, unless the latter is actually brought to the notice of third parties. It has been held that an agent authorized to sell a horse is authorized to warrant the soundness of the horse, and that an agent authorized to sell reapers is authorized to warrant their durability and fitness. It was held that a principal, who authorized an agent to sell goods at a certain price, did not authorize the agent to warrant to third persons that his principal would not sell to others at a less price.

58. **Factors.** A factor, usually called a commission man or consignee, is an agent entrusted with possession of his principal's goods, and ordinarily empowered to sell in his own name. Like any agent who has possession of his principal's goods with power to sell, a factor has power to collect. He differs from a broker in that he has possession of the goods of his principal, and is authorized to sell in his own name, rather than in the name of his principal.

In the absence of contrary custom or express direction, a factor may sell on credit. A factor, until instructed otherwise, may use his discretion as to the time and price of sales, and is entitled to deduct his commission based upon custom in the absence of special contract.

A factor may sue the purchaser in his own name, for the purchase price. The principal may sue in his own name also. Persons dealing with factors may hold the principal responsible for the contracts and representations of the factor, the same as any undisclosed principal. Factors are also personally liable to third persons for their contracts.

A factor must account to his principal for money collected, less his commission and expenses. He is not obliged to keep such money separate from his own, but he must keep accurate account of same, and remit promptly when it is due, according to custom or special contact.

59. Brokers. A broker differs primarily from a factor in that ordinarily he does not have possession of the article dealt in, and acts in the name of his principal rather than in his own name. There are many kinds of brokers engaged in common business life. Some of these are insurance brokers, pawnbrokers, bill and note brokers, and merchandise brokers. In the absence or special authority, a broker does not have authority to collect.

60. Auctioneers. An auctioneer is a special kind of agent employed to dispose of goods to the highest bidder at a public sale.

Some states provide by statute that auctioneers must be licensed, and that they may charge only certain fees. Most licensed auctioneers are required to give bond. In the absence of statutory regulations, any person competent to perform the duties of an auctioneer may so act. An auctioneer differs from an ordinary agent in that, in some respects, he is agent for both seller and purchaser. He is agent for the seller in offering the goods for sale, and in obtaining bids. When the highest bid is received, however, and the hammer falls, he is deemed to be agent for the purchaser, with authority to complete the sale in the purchaser's name. If the contract of sale is within the Statute of Frauds and required to be in writing, the auctioneer has the authority of the purchaser to sign his name to a memorandum of sale, either by himself or through his clerk. The bidder is bound by this contract, made in his presence at the time and place of the sale.

The owner may fix such reasonable terms as he chooses, and the auctioneer must follow out the terms made by the owner. If an owner advertises the terms of the sale, bidders are deemed to have notice of these terms. These terms cannot be varied by the auctioneer. If, however, the owner publishes no special terms of sale, the auctioneer has implied authority to fix customary and reasonable terms. Bidders have the right to rely on such terms and the principal is bound by them.

In the absence of special instructions to the contrary, an auctioneer must sell for cash. He has possession of the goods, consequently has implied authority to receive payment of the price. He has no implied authority to warrant the goods. He cannot bid in his own interest. If bidders fraudulently combine not to bid against each

other, for the purpose of obtaining the goods at a cheap price, no title passes to the highest bidder, by reason of the fraud.

So long as the auctioneer acts within his authority and reveals the name of his principal, he incurs no personal liability. But if he exceeds his authority in making a sale he is liable in damages to his principal. If he does not reveal the name of his principal to bidders, he is liable personally to them.

An auctioneer is entitled to recover from his principal the amount of his compensation, including disbursements and expenses incurred in the sale, care and preservation of the property. He is said to have a *lien* on the goods or proceeds of the sale, for his compensation. By this is meant that he has a right to retain possession of the goods until his compensation is paid, or in the case of sale, to deduct his charges from the proceeds of the sale.

When authorized to sell goods on credit, in case payments are not made when due, the auctioneer may sue in his own name. He may also sue in his own name for wrongful acts of third parties, whereby the goods are injured. The principal also may bring this action in his own name. The principal is liable for the acts of his auctioneer, committed within the actual or apparent scope of the latter's authority.

61. Del Credere Agency. An agent authorized to sell is not permitted to sell on credit, unless expressly so authorized or unless the custom or usage of the particular kind of agency impliedly carries with it this power.

Some agents are, by their contracts of agency, authorized to sell on credit, on condition that they guarantee to save their principals from losses resulting therefrom. Such an agency is called a *del credere* commission, and the agent is called a *del credere* agent. This term means that in consideration of the agreed commission or salary paid the agent, the latter agrees to pay to the principal, when due, the sums which third parties, who buy the principal's goods from the agent, fail to pay.

This agreement to indemnify the principal against losses on credits made by the agent, is regarded as an original promise on the part of the agent, and not a promise to pay the debt of another. By reason of this attitude on the part of the courts in interpreting this contract as an original promise on the part of the *del credere* agent

to pay his own debt, and not the debt of another, the contract does not have to be in writing. (See Statute of Frauds.) For example, *A*, a manufacturer of farm machinery, employs *B* as agent to sell farm machinery on credit, on condition that *B* personally guarantees the sales. *B* sells a mowing machine to *C*, to be paid for within ninety days. *C* fails to make payment. *A* may sue and recover the amount of the purchase price from *B*.

62. Real Estate Brokers. A real estate broker is one employed to make contracts involving the sale or leasing of real property. The sale of lots, of houses and lots, and farms are common examples.

A real estate broker is seldom authorized to do more than find a purchaser or tenant, not being authorized to make the lease or contract of sale. By reason of this limitation generally placed on a real estate broker's authority, many disputes arise over real estate brokers' rights to compensation. A principal may enter into any kind of contract he desires with a real estate broker, and is liable when the broker has performed his contract, and not before. The difficulty is in determining when the broker has substantially performed his contract. If *A* hires *B* to procure a purchaser for his house and lot, and agrees to pay him 2% of the selling price when he obtains the signature of a financially responsible purchaser to a contract of sale, *B* is not entitled to his commission until he obtains such a party's signature to a contract. The fact that *A* has entered into this contract with *B*, does not, in the absence of an express stipulation to the contrary, prevent *A* from selling the property himself, or from employing as many other brokers as he pleases to attempt to make the sale.

Most brokers, however, are employed on certain terms to obtain a purchaser or tenant. If the agent succeeds in obtaining such a purchaser or tenant, the principal must pay the broker the agreed compensation. The owner cannot act unfairly by the broker. If the broker obtains a tenant or purchaser by seeking him out, and by interesting him in the property, the owner cannot avoid the payment of commission by discharging the broker and completing the deal himself. In the absence of an express agreement to give the broker a certain fixed time in which to make the sale or find a tenant, the owner may discharge the agent at any time he sees fit, just as the agent may cease his efforts at any time he chooses. The owner can-

not discharge the agent just as the latter is completing the sale, in order to take advantage of the agent's efforts, without paying him the agreed compensation. The agent, in this event is held substantially to have performed his contract. Contracts with real estate brokers should be carefully drawn, and should contain express stipulations as to the powers and limitation of the broker's authority. The temptation is great on the part of both parties to claim that the sale was, or was not made, through the efforts of the broker. The contract of a real estate broker differs not at all from any other contract. The conditions are such, however, that the agreement is frequently indefinite, and it is difficult to determine when a substantial performance has been made.

In the absence of any agreed compensation, the real estate broker is entitled to receive the customary fees. In the absence of any custom regulating the commission, he is entitled to receive a reasonable compensation.

A real estate broker is not permitted to represent both parties, or to receive compensation from both parties. If a broker is promised compensation from the purchaser which he agrees to accept, without the consent of the owner, he cannot receive compensation from either party.

63. Termination of Agency. If an agent performs the terms of his agency, the agency is said to be terminated by performance. He ceases to be agent, by reason of having performed his contract.

If an agent is employed to act as agent for a specified time, the lapse of the stipulated time, of itself, terminates the agency.

An agency is a contract, express or implied, and it may be terminated at any time by any act of the parties thereto showing such to be their intention. There is one exception to this rule, and that is, that an agency coupled with an interest cannot be terminated by an act of one of the parties. This exception is discussed in a separate section.

Where an agency is terminated by failure or refusal of the principal, or agent to carry out his terms of the contract, the defaulting party is liable in damages to the other party. This does not prevent the termination of the agency however.

Where an agency is terminated by the failure or refusal of either party to observe the conditions of the contract of agency, the agency

still subsists on the part of third persons, who have dealt with the agent, and who have not received notice of the termination. Upon revoking the agent's authority, the principal must notify third persons, who have dealt with the agent, or who have knowledge of the agency contract, and who would be likely to continue to deal with him as agent. If the principal does not give third parties such notice, he is still liable to them on contracts subsequently made by the agent in the principal's name. For example, if *A*, a wholesale druggist, employs *B* to sell goods for one year and *C* knows of the contract, and at the expiration of six months, *A* discharges *B* for failure to give him his exclusive time, *A* must notify *C* of *B's* discharge, else *B* can still bind *A* by making contracts with *C*.

64. Revocation of Agency by Operation of Law. When one of the parties to an agency contract dies, becomes insane or bankrupt, the agency is said to terminate *by operation of law*. When the principal dies, the agency terminates. Death of itself, constitutes notice to third persons of the termination of the agency. This is true of all agencies except those coupled with an interest, discussed in another section. If any agent and a third person innocently make a contract in the name of the principal after the death of the principal, and without notice of the principal's death, the contract is not enforceable against the principal's estate. Death of the principal revokes the agency. Death of the agent also revokes the agency.

Insanity of the agent, or of the principal terminates an agency not coupled with an interest. It is regarded the same as death of one of the parties.

An agency is terminated by the bankruptcy of either principal or agent. Mere insolvency on the part of the principal or agent does not, of itself, terminate the agency, but bankruptcy, voluntary or involuntary, terminates it, and is of itself, notice to third persons. An innocent third person who has parted with his money on a contract made with the agent after the agency has been terminated by reason of insanity, or bankruptcy of the principal, may not enforce his contract, but may recover his money. Injury or disability of an agent, rendering it impossible for him to carry out the terms of the agency, terminates the agency.

65. Agency Coupled with an Interest. An agency coupled with an interest cannot be terminated by attempted revocation of

the principal, nor is it terminated by death, insanity or bankruptcy of the principal or agent.

If the agent has an interest in the subject of the agency outside his interest in his compensation, he is said to have an agency coupled with an interest. Such an agency is irrevocable. *A* pays *B* one thousand dollars ($1,000.00) for one eighth interest in a patent, and in consideration of this purchase is given the agency to sell the patented article for a fixed commission. This constitutes an agency coupled with an interest, and is not revoked by an attempted revocation of the principal or by the principal's death. *A* is indebted to *B*, his attorney, for one hundred dollars ($100.00). *A* gives *B* a note for one hundred and fifty dollars ($150.00) to collect, agreeing to pay him 10% of the amount collected, and to permit him to deduct the one hundred dollars ($100.00) indebtedness. This constitutes an agency coupled with an interest, and cannot be revoked by *A*.

To constitute an agency coupled with an interest, the interest must be coupled with the subject matter of the agency, and not merely with the compensation the agent is to receive. For example, if *A* sends his attorney, *B*, a note to collect, agreeing to give *B* 25% of the amount collected, this does not constitute an agency coupled with an interest, and may be revoked at any time by *A*.

QUIZ QUESTIONS

LAW IN GENERAL

1. How many classes of rights are there?
2. Name them.
3. How did men derive these rights?
4. What limitations, if any, are there to rights?
5. Have property rights always been recognized?
6. *A* finds a watch in the street and, without making any attempt to find the owner, keeps it. Is the right of possession in *A*?
7. In primitive times were personal or property rights more generally recognized?

8. How were rights originally enforced?
9. How are rights enforced at present?
10. How did laws originate?
11. Define *law.*
12. What does law embrace?
13. What connection have laws with courts of justice?
14. What connection, if any, have customs to laws?
15. What is the purpose of law?
16. What class of laws is enforced for the benefit of the state?
17. *A* steals *B's* horse. *B,* by proper legal action, recovers possession of the horse. Is the law enabling *B* to recover the horse a law for protection of citizens, or for the protection of property?
18. What are the sources of law?
19. Do decisions of courts form any part of law? If so, what?
20. What are the New York State Reports?
21. What are the Philippine Island Reports?
22. Is the treaty existing between the United States and Japan, law? If so what kind of law?
23. Define statutes. How are statutes enacted?
24. To what classification of law do statutes belong?
25. Is the English Constitution written or unwritten law?
26. Do customs and statutes bear any relation to each other?
27. How is the record of the state statutes kept?
28. What are the general divisions of law?
29. Is any part of the unwritten law written?
30. Is all unwritten law written?
31. Is any written law unwritten?
32. Is unwritten law stable?
33. How, if at all, can the written law of a state or country be changed?
34. Are treaties unwritten law? How, if at all, are the records of Congress kept?
35. Give a general classification of law.
36. Is there a universally recognized classification of law?
37. Define *adminstrative law* and give an example.
38. Define *public law* and give an example.
39. Define *private law.* Classify private law.
40. Define *constitutional law.*

41. Define *criminal law* and give an example.

42. Can the heir or personal representative of a murdered man ever recover money compensation for the murder?

43. If so, is it by means of private or public law?

44. Is a criminal tried and punished by private or by public law?

45. Define *law of procedure* and give an example.

46. What do contracts embrace?

47. What does the word *tort* mean?

48. Give an example of a tort.

49. Does the same act ever constitute a breach of contract, a tort, and a crime?

50. Define *commercial law.*

CONTRACTS

1. Define *contract.*

2. Give an example of a business transaction which constitutes a contract.

3. What is the purpose of putting important contracts in writing?

4. What is meant by *offer?*

5. Give an example of offer.

6. A coat marked $25 is placed by a merchant in a window. Does this constitute an offer?

7. An advertisement is put in a paper advertising chairs for $7.00 each. Does this constitute an offer?

8. What is an *agreement?*

9. Is an agreement a contract?

10. Give an example of an agreement.

11. What is meant by *acceptance?*

12. Give an example of a contract having no acceptance.

13. *A* offers to sell *B* his watch for $10.00. *B* offers *A* $8.00. Is there an acceptance? Is there a contract in the above case?

14. What is a *counter offer?* Give an example of a counter offer.

15. What is meant by the term *meeting of the minds?*

16. Give an example of an acceptance not of the exact terms of the offer.

17. What is meant by *mutuality?*

18. Distinguish *meeting of the minds* and *mutuality.*

19. May there be an acceptance of a contract by an act? If the above question is answered in the affirmative, give an example.

20. Must an acceptance be communicated to the offer?

21. *A* writes *B,* "I will sell you my horse for $150. If I do not hear from you to the contrary by Thursday noon I will consider the horse yours." *B* does not reply. After Thursday noon, to whom does the horse belong?

22. Define *option.* Give an example of an option.

23. Does an option require a consideration to render it valid?

24. What is an *element* of a contract?

25. Give the elements of a contract.

26. How many parties to every contract?

27. What is meant by *legal age?*

28. *A,* a male, sixteen years old, contracts with *B,* a female, eighteen years old. Can *B* avoid the contract on the ground of the infancy of *A?*

29. Is fraud or duress a defense to a contract?

30. How many kinds of consideration are there?

31. Is a good consideration sufficient to support a contract?

32. Define *valuable consideration.*

33. Give an example of a contract which may be supported by a good consideration.

34. What is meant by a *sealed instrument?*

35. Is something beneficial to the promisee a sufficient consideration to a contract?

36 *A* promises *B* to pay him $100 if *B* will promise to work for him for one month. *B* promises. Is there a consideration to this contract? If so, what is it?

37. Define *mutual promise.*

38. Is a mutual promise a valuable consideration? Give an example of mutual promise.

39. Define *past consideration.* Give an example of past consideration.

40. Does a past consideration support a contract?

41. What is meant by *adequate consideration?*

42. Does a consideration have to be adequate to support a contract?

43. May adequacy of consideration be considered in determining whether or not fraud was used in procuring a contract?

44. Give an example of a promise to do something one is already bound to do.

45. Is a promise to do something one is already bound to do a sufficient consideration to support a contract?

46. Give an example of illegal consideration.

47. Does an illegal consideration support a contract?

48. Do all the terms of a contract have to be express?

49. Define *express contract.*

50. A housewife orders a sack of flour from her grocer by tel phone. The flour is delivered and accepted by her. Is this an implied contract?

51. Give an example of an express contract.

52. Do any contracts have every term expressly set forth?

53. Define *implied contract.*

54. Are uncertain contracts void or voidable? Give an example of an uncertain contract.

55. Give the distinction between *unilateral* and *bilateral* contracts.

56. *A* promises to sell his dog to *B* if *B* will promise to pay him $5.00 the following day. *B* promises to pay *A* $5.00 the following day. Is this contract unilateral or bilateral?

57. *A* promises to pay *B* $100 if *B* will dig a well for *A*. *B* digs the well. Is the contract unilateral or bilateral?

58. Distinguish *executory* and *executed* contracts.

59. *A* promises to pay *B* $5,000 if *B* will deliver to him a deed of his farm. *B* delivers the deed. Is the contract executed or executory?

60. Is the above contract executed as to *A?* Is it executory as to *B?*

61. Are infants bound by their contracts? Define *infant.*

62. Are infants' contracts void?

63. Distinguish *void* and *voidable.*

64. Can a competent party contracting with an infant avoid the contract on the ground of infancy of the other party?

65. Can an infant ratify a contract after becoming of legal age?

66. Explain how, if at all, an infant may ratify his contracts.

67. Define the term *necessaries*.

68. *A*, an infant, has not sufficient clothing. *B*, a merchant, sells him a coat worth $7.00, for $14.00. Can *B* recover anything from *A*? If so, how much?

69. Is an infant entitled to receive his wages?

70. What is meant by *emancipation of an infant?* Is emancipation of an infant ever implied?

71. What is meant by *novation?* Give an example of novation.

72. Are contracts made for the benefit of a third person enforceable by such third person?

73. Are contracts of an insane person enforceable?

74. Are contracts of insane persons, intoxicated persons, and idiots void or voidable?

75. *A*, while intoxicated, purchased a coat from *B* for $10.00. The following day, when sober, *A* promises to pay for the coat. Can *B* enforce the contract?

76. Can an insane person make a valid contract during a lucid interval?

77. Can married women enter into contracts?

78. Do custom and usage ever enter into a contract?

79. *A* purchases forty barrels of yellow grease from *B*, like sample furnished. The grease arrives, ranging in color from white to black. *B* offers to show a custom among grease dealers, known to *A*, that a composite sample is used in selling grease. Can he show this custom as part of the contract?

80. Are oral contracts ever valid? Why, if at all, do some contracts have to be in writing?

81. What is meant by the *statute of frauds?*

82. When and where did this statute originate? What was the purpose of this statute?

83. Does the statute serve any useful purpose at the present time?

84. Do the states of this country have a *statute of frauds*, or is it a part of their unwritten law?

85. By the terms of the *statute of frauds* what contracts must be in writing?

86. Are contracts covered by the Statute of Frauds illegal if not in writing?

87. *A* orally promises *B* to work for him for two years for the consideration of $2,000. Can either party enforce the contract?

88. What is meant by the term *specialty?* Are specialties included in the Statute of Frauds?

89. Can you make an oral promissory note?

90. Can contracts be made by letter and telegraph?

91. *A*, by letter, offers *B* $1,000 for *B's* team of horses. *B* mails a letter of acceptance which is lost in the mails. Is there a valid contract?

92. *A*, by letter, offers *B* $10 for a harness. By the following mail, *A* writes revoking the offer. *B* receives the letter of revocation five minutes after mailing his acceptance. Is the contract revoked?

93. *A*, by letter, offers *B* $1,000 for his racing horse and says, "I will consider my offer accepted upon receipt of your reply." *B's* letter of acceptance is lost in the mail. Is there a valid contract?

94. *A* wires *B* that he will pay him $100 per share for his Pennsylvania Railroad stock. *B* hands his telegram of acceptance to the telegraph operator who fails to send it. The following day *A* wires a revocation of his offer. Is there a valid contract?

95. Does a revocation by wire or letter have to be received to be effected?

96. Does an acceptance by wire or letter have to be received by the offerer to constitute a valid acceptance?

97. In what respect do sealed instruments differ from ordinary contracts?

98. At present what constitutes a seal?

99. At present is it the tendency of the law to favor sealed instruments?

100. Are Sunday contracts void or voidable?

101. What makes Sunday contracts unenforceable?

102. What was *The Lord's Day Act* of England?

103. What is meant by works of charity and necessity?

104. *A* makes and delivers a promissory note to *B* for $100 on Sunday. Is the note enforceable?

105. What makes a contract illegal?

106. Are illegal contracts void or voidable? Give an example of an illegal contract?

107. What is a gambling contract?

108. Are gambling contracts void?

109. Why are gambling contracts illegal?

110. Define *fraud.*

111. Is a false representation made during the formation of a contract known by both parties to be false, a defense to the contract?

112. Give an example of a false misrepresentation which will serve to avoid a contract?

113. Can there be duress without personal violence? Define *duress.*

114. Give an example of duress.

115. Do duress and fraud render a contract void or voidable?

116. Define *mistake* in connection with making a contract. Define *mistake of fact.*

117. Define *mistake of law.*

118. Does mistake of one party to a contract avoid the contract?

119. Does mistake of law avoid a contract?

120. Does mutual mistake render a contract void or voidable?

121. What is meant by a *contract impossible of performance?* Give an example of a contract impossible of performance.

122. *A*, on April 4, enters into a contract dated April 2, by which he promises to deliver to *B* within twenty-four hours, five tons of coal. Is *A* liable on this contract?

123. Do floods, earthquakes, or lightning preventing performance excuse performance?

124. Is a party to a contract excused from performance by reason of a strike?

125. May a party to a contract stipulate against strikes and Acts of God in such a manner as to avoid liability therefor?

126. If a party to a contract renders performance impossible can he force performance?

127. What is meant by *conflict of law?*

128. Does the law of the place where a contract is made, or the law of the place where the contract is enforced, prevail?

129. If a contract is made in one place, to be performed in another, the law of which place prevails in the interpretation of the contract?

130. What is meant by *assignment* of a contract?

131. *A*, a singer, contracts to sing at *B's* opera house for one week. Can *A* assign her contract to *C*, another singer? Can *B* assign his contract to *D*?

132. What is meant by *giving notice of assignment?*

133. Is an assignment a contract?

134. What are the elements of a valid assignment?

135. Does an assignment require a consideration?

136. Write an assignment of a simple contract.

137. Define *several liability.*

138. Can a party be jointly and severally liable on the same contract?

139. If two parties are jointly liable on a contract can one of them be sued thereon without the other?

140. If two parties are severally liable on the same contract, can both be sued together thereon?

141. Define liability *in solido.* Give an example of liability *in solido.*

142. How may a contract be discharged by performance? Give an example of a contract discharged by performance.

143. What is meant by *tender?* What constitutes legal tender?

144. Does United States statute or a state statute make certain money legal tender?

145. What kinds of money constitute legal tender?

146. *A* owes *B* $5.00. He tenders him the amount in nickels. Is the tender good?

147. *A* owes *B* $500.00. He tenders him a certified check for the amount. Is the tender good?

148. Can a contract be discharged by a subsequent agreement?

149. *A* agrees to dig a well for *B* for $10.00. Before *A* starts work, *B* changes his mind, and offers *A* $1.00 in settlement. Is the contract discharged if *A* accepts the $1.00?

150. Define *warranty.*

151. Give an example of warranty to a contract.

152. Does breach of warranty discharge the contract?

153. Does breach of warranty give rise to an action for damages?

154. Define *rescission.*

155. Give an example of rescission.

156. Define *statu quo.*

157. Define *breach of contract.*

158. Give an example of breach of contract.

159. In case of breach of contract must the other party wait until the time for performing the entire contract elapses, or may he sue at once?

160. Define *bankruptcy.*

161. By what kind of law is bankruptcy regulated?

162. Does bankruptcy discharge a contract?

163. Define *voluntary bankruptcy.*

164. Who may become a voluntary bankrupt?

165. Define involuntary bankruptcy. Who may become an involuntary bankrupt?

166. Define *act of bankruptcy.*

167. Enumerate acts of bankruptcy.

168. At common law could one party to a contract compel another to perform it specifically? Under present law can a contract for sale of personal property be enforced specifically?

169. What is the measure of damages for failure to deliver merchandise under a contract of sale?

170. How did the court of equity originate?

171. Are juries used in courts of equity?

172. What classes of cases are tried in equity?

173. Does a court of equity have jurisdiction of a case where there is a plain and adequate remedy at law?

174. With what kind of contracts is equity especially concerned?

175. Give an example of a contract which may be enforced specifically by a court of equity.

176. Write a form for a simple contract between *A* and *B* for the sale of a horse.

PRINCIPAL AND AGENT

1. What is meant by the term *agency?*
2. Give an example of a transaction completed by an agent.
3. Is there a limitation upon the kinds of business which may be transacted by an agent?
4. Distinguish principal and agent from master and servant.
5. Define and give an example of *principal.*
6. Define and give an example of *agent.*
7. Define and give an example of *agency.*
8. Define *infant.*
9. Is a married woman seventeen years of age an infant?
10. May an infant be a principal?
11. Define and distinguish *void* and *voidable contracts.*
12. May an idiot, insane, or drunken person act as principal?
13. May a corporation or partnership transact business through agents?
14. May a child eight years of age act as agent?
15. In general, what persons may act as agents?
16. May a person act as agent who is not capable of acting for himself?
17. May a person whose interests are opposed to those of his principal act as agent?
18. May corporations or partnerships serve as agents?
19. Must an agent's authority to act as agent be in writing?
20. May an agent be appointed or authorized to act by implied contract?
21. Define and give an example of *implied contract.*
22. What is meant by *ratifying an act of an agent*
23. Give an example of a principal's ratification of an unauthorized act of an agent.
24. Give an example of a contract of agency which must be in writing.
25. Why must some contracts be in writing?
26. What are the principal provisions of the Statute of Frauds?
27. Must contracts of agency authorizing an agent to complete a land transfer be in writing?
28. Must a contract authorizing an agent to procure a purchaser for a house and lot be in writing?

29. Can a third party rely upon the statements of an agent that he has authority to act as agent?

30. May a person do through an agent anything which he may lawfully do by himself?

31. *A* employs *B* to purchase votes for an act pending in a state legislature. Is *A* or *B*, or both, guilty of a crime?

32. *A* employs *B* to paint a picture, and *B* employs *C* to paint the picture. Must *A* accept the work of *C*?

33. What things are necessary to enable a person to ratify the acts of an alleged agent?

34. May a forgery be ratified?

35. Give a classification of agents.

36. *A* is employed to deliver a package for *B*. What kind of an agent is *B*?

37. Give an example of a universal agent.

38. Enumerate the duties a principal owes his agent.

39. *A* employs *B* to work in his garden. *B* works for ten days, no compensation having been agreed upon. How much, if anything, can *B* recover from *A*?

40. If an agent abandons his agency before the time of his agency expires, can he recover anything for work performed? If so, how much?

41. What duty, if any, does a principal owe to his servant as to furnishing a safe place in which to work?

42. What rules, if any, does a servant assume?

43. In general, what are the liabilities of a principal to third persons who deal with an agent?

44. Is a principal liable to a third person who has dealt with an agent, who acted within the apparent but not the actual scope of his authority?

45. Is a principal liable to third persons for lots committed by an agent within the scope of the agent's authority?

46. Give an example of a lot or private wrong committed by an agent while acting for his principal, for which the principal is not liable.

47. Enumerate, in general, the duties an agent owes his principal.

48. Is an agent liable to his principal for mistakes of judgment or discretion?

49. Is an agent who acts without compensation ever liable to his principal for negligence? If so, give an example.

50. Enumerate, in general, the liabilities of an agent to third persons with whom he deals.

51. *A*, an agent for *B*, sells goods to *C*, in his own name. *C* afterwards discovers that *A* is agent for *B*. Can *C* hold *A*?

52. If an agent procures a contract for his principal by means of fraud is the agent liable personally on this contract?

53. If an agent, believing he has authority to act as an agent, where in fact he does not, reveals all the facts of his agency to a third party with whom he is dealing, is he liable personally to such third party if it turns out that he acted without authority?

54. Define and give an example of *undisclosed principal.*

55. Is an undisclosed principal when discovered, liable for the acts of his agent?

56. Is an agent of an undisclosed principal personally liable to third persons for acts of agency after the undisclosed principal is discovered?

57. May there be an undisclosed principal to a negotiable instrument?

58. What is meant by *apparent authority* of an agent as distinguished from *actual authority?*

59. Give an example of an agency where the apparent authority of the agent conflicts with the actual authority.

60. If an agent appears to have authority to act for another, but in fact never received any authority, can third persons rely upon his apparent authority?

61. Do customary powers belonging to an agent come within the meaning of apparent authority?

62. May a principal limit an agent's apparent authority by printing limitations in the agent's order sheet and in making contracts with third persons? If so, give an example.

63. Define and give an example of *secret instructions.*

64. Can a principal evade responsibility to third persons by secret instructions given to an agent?

65. If a third party dealing with an agent knows of the secret instructions, is he bound by them?

66. Define and give an example of *sub-agent.*

67. Is a sub-agent responsible to the agent?

68. Is an agent ever responsible for the acts of a sub-agent?

69. What matters, if any, may an agent delegate?

70. Define and give examples of *mechanical* and *ministerial duties.*

71. Distinguish an agency requiring personal skill, discretion, and judgment, from one requiring the performance of ministerial or mechanical duties.

72. When, if at all, is an agent authorized to collect?

73. Is an agent authorized to sell goods, always authorized to collect for them?

74. Is an agent authorized to collect, authorized to take checks?

75. How should an agent authorized to sign a written instrument for his principal, sign?

76. May an agent authorized to sign a promissory note for his principal, sign his principal's name without his own?

77. An agent authorized to sign a written contract for his principal signs his own name followed by the word, *agent; e. g.*, "*A*, Agent." Is the principal bound?

78. When, if at all, is an agent authorized to warrant the quality of personal property sold?

79. Define *warranty.*

80. Give an example of an agent who is impliedly authorized to warrant.

81. Do usage and custom have anything to do with the agent's implied authority to warrant?

82. Define *factor*, and give an example.

83. Do factors have possession of the goods?

84. Do factors have implied authority to collect?

85. Do factors have the right to sell goods in their own name?

86. Is a commission merchant a factor?

87. Define *broker.*

88. Distinguish *broker* and *factor.*

89. Give an example of broker

90. Is a real estate agent a broker, or a factor?

91. In what respect, if any, does an auctioneer differ from an ordinary agent?

92. What is meant by *licensed auctioneers?*

93. Are auctioneers' fees ever regulated by statute?

94. What is meant by *auctioneer's lien?*

95. When, if at all, may an auctioneer sell on credit?

96. May an auctioneer make his own terms of sale? Are all third persons bound by the terms advertised?

97. Define and give an example of *del credere* agent.

98. Must a *del credere* agent receive a separate consideration for his guaranty?

99. When is a real estate agent entitled to receive his commission?

100. Does the contract of a real estate broker differ from the contract of any other agent?

101. How may an agency be terminated?

102. Give an example of an agency terminated by lapse of time, and of one terminated by act of parties.

103. May all agencies be terminated at the will of the parties?

104. What is meant by *notice to third persons of termination of an agency,* and when, if at all, is this notice necessary?

105. Explain *termination of agency by operation of law.*

106. In case of termination of agency by death of principal must third parties be notified?

107. Does injury or liability of an agent ever terminate an agency? If so, under what circumstances?

108. Define *agency coupled with an interest.*

109. Is an agency coupled with an interest revocable at the will of either party?

110. *A* employs an agent at a salary of one hundred dollars per month, promising him 1% commission in addition, on all orders taken in excess of $1,000 per week. Is this an agency coupled with an interest?

111. Give an example of an agency coupled with an interest.

COMMERCIAL LAW

PART II

PARTNERSHIP

66. In General. A party may trade and enter into contracts by himself, or he may associate with himself others. A person is not obliged by law to transact business solely by himself. He is permitted, for the purpose of having labor, capital and skill joined in one enterprise, to combine with others. Where a person joins with himself one or more persons for the purpose of transacting business as a unit, the firm composed of the two or more persons thus joined is called a *partnership.*

A partnership may be defined to be a contract between two or more persons, by which their labor, skill or property is joined in an enterprise for common profit, and in which each partner may act as principal. The principal features of a partnership are, the right of each partner to act as principal for the other partner, and the individual liability of each partner for the acts of the partnership. *A* and *B* agree to combine their efforts in operating a tea and coffee store. Each may bind the other by contract, made within the scope of the business, and each is liable individually to pay the debts incurred by the partnership.

67. How a Partnership is Created. A partnership is created by a contract. This contract may be oral, express or implied. Many partnerships are created by carefully drawn, written instruments, in which the rights and duties of each party are set forth in detail; while others are made by oral agreement. Any contract of importance should, for the purpose of having a record of the exact understanding of the parties, be made in writing. As between themselves, parties cannot be partners except such was their intention. Sometimes, parties are considered partners as to third persons, with whom they deal, and are liable as partners, where there is no intent to form a partnership, and when none exists as between themselves. This relationship, called *partnership by estoppel,* is based on equitable

reasons and is discussed more at length under a separate section. As between the partners themselves, to constitute a partnership, there must be a contract to that effect. This requires an assent on the part of all the parties, based upon a valid consideration. Parties may enter into an agreement to enter into a partnership at a future time. In this event, the partnership does not exist as such until the time provided for in the contract arrives, and until the conditions of the executory agreement have been complied with.

A partnership may be created for any lawful purpose. If the partnership contract is procured through fraud or misrepresentation, it may be avoided by reason thereof.

68. Who May be Partners. Any person competent to contract on his own behalf may enter into a contract. (See "Competency of Parties," chapter on Contracts.) An infant, or person under legal age, may enter into a partnership contract the same as he may enter into any other contract. The law does not prohibit it. But contracts by infants are voidable. They may be renounced by the infant at his pleasure. For example, if *A*, of legal age, enters into a partnership contract with *B*, seventeen years of age, *B* may renounce his obligation to *A* at any time he pleases, before he has reached legal age. *A*, however, cannot renounce his partnership contract on account of the infancy of *B*. *B* may ratify his contract after becoming of legal age. If *B*, after becoming of legal age, refuses to continue the partnership, and refuses to carry out his partnership agreement, he is deemed in law to have renounced his partnership, and is not liable for the obligation of the partnership. If, however, after reaching legal age, *B* continues the partnership relationship for an appreciable length of time, he is deemed in law to have ratified the agreement, and is thereafter liable thereon. *B* may not only renounce the partnership agreement as to his partner, *A* but also as to third persons dealing with the partnership. *A*, however, is responsible individually upon the partnership contracts with third persons, and cannot take advantage of *B's* infancy. It is no defense for him.

Drunken persons, insane persons, and idiots cannot enter into partnership agreements. A married woman could not enter into contracts at common law, but by statute is now permitted to make contracts, with a few minor limitations, such as acting as surety for her husband, or making contracts with her husband.

69. Partnership Name. The members of a partnership may use any name they desire, so long as the name does not interfere with the fixed rights of others. The members of a partnership may use the name of one of the partners, or the combined names of all, or of a part of the partners, or a name separate and distinct from the names of any of the partners. For example, if *A*, *B*, and *C* form a partnership, they may use as a partnership name, "The *A* Co.," "The *A*, *B*, Co.," "The *A*, *B*, *C* Co.," "The *X* Co.," or any fictitious name they may determine upon. Some states provide by statute, that a partnership using a name not revealing the individual members of a partnership, must, in order to sue in the partnership name, file with a county official the names of the members composing the firm. Other states by statute prohibit the use of fictitious names.

A partnership cannot be bound by any other name than its own. Where a partnership has adopted a firm name, contracts made in the name of one of the individual members do not bind the partnership. A partnership may change its firm name. This may be done by agreement, express or implied. If the members of a partnership do not expressly agree to change the name, but a new name is used by one or more of the members, and the change is acquiesced in by the other members, they are deemed in law to have agreed to the new name. A partnership may use two firm names. This sometimes occurs when a firm has branches. One name is used for one branch and another for the second branch. In this event the partners are liable for contracts made in either name.

70. Names Applied to Different Kinds of Partners. Depending upon the nature of their relationship to the partnership, partners are said to be *secret*, *silent*, *ostensible*, *nominal*, or *dormant*.

A *secret partner* is one who keeps the fact of his membership in the partnership from the public. This does not enable him to escape liability as a partner. He is in the position of an undisclosed principal. (See "Undisclosed Principal," chapter on Agency.) So long as a secret partner keeps the fact of his membership from the public, of course he will not be sued as a member. But his liability exists in spite of this secret, and when discovered his liability may be enforced.

A *silent partner* is one who takes no active part in the operation of the partnership business. His name may be known as a partner, or not. He is not necessarily a secret partner. He may be well

known as a member of the partnership, but if he takes no active part in the management, he is said to be a silent partner. A silent partner is individually liable for the obligations of the partnership, the same as any partner

An *ostensible partner* is one who permits himself to be held out or represented as a partner, when in fact he is not a partner. He is responsible as a partner to third persons who deal with the firm, and to whom he has been held out as a partner. For example, *A* and *B* trade as the Rodway Co., *A* in company with *C*, tries to buy goods of *D*. *D* knows *C* but does not know *A* and *B*. *A* with *C's* consent, tells *D* that *C* is a member of the Rodway Co. *C* is liable as an ostensible partner. More commonly the ostensible partner permits his name to be used as a part of the partnership name when in fact he is not a member of the partnership. If *A* and *B* form a partnership and with *C's* consent use the name, "*A B* and *C* Co.," *C* is liable on the partnership obligations, in spite of the fact that as between himself and *A* and *B*, he is not a partner. If a partner is advertised to third parties as such, without his knowledge or consent, he is an ostensible partner, but is not liable as a partner.

A *nominal partner* is one who permits his name to be used as a member of the partnership without being a member of the partnership. Ordinarily he is paid something for the use of his name, but does not have a share in the profits. A nominal partner is liable to third persons as a partner, but as to the other partners, he does not have the rights or liabilities of a partner.

The term, *dormant partner*, is sometimes used synonymously with secret partner. Technically, it means that the partner is both unknown and silent. It combines the elements of a secret and a silent partner.

The terms, *general* and *special* partner, are commonly used. By general partner, is meant the one who shares equally in the profits and losses of the partnership transactions. The term, special partner, means that the partner, as between the other partners, does not share equally in the profits, nor is he responsible to the other partners for an equal share of the losses. As to third persons, the terms general and special partners have no significance; for example, if *A*, *B* and *C* enter into a partnership, *A* and *B* each to furnish two fifths of the capital, and each to have two fifths of the profits, and *C* is to

furnish one fifth of the capital, and receive one fifth of the profits, *A* and *B* are general partners and *C* is a special partner. As to third persons dealing with the partnership *A*, *B* and *C*, each are individually liable.

71. Partnership Agreements as between Partners. In considering the question as to whether a partnership exists, it must be regarded from two points. First, is there a partnership as between partners; second, is there a partnership as to third persons? A partnership may exist as between the partners themselves. When a partnership exists between the partners themselves, there can be no question about its existing as to third persons.

As between the partners themselves, a partnership cannot exist unless there is a contract express or implied, by which they mutually agree or consent to the partnership. If *A* and *B* agree, either orally or in writing, to engage in a partnership enterprise, and do so engage in a joint business, a partnership exists between them. If *A* trades alone as the "*A* Co." and, desiring to obtain credit from *B*, tells *B* that *C* is a member of the *A* Co., even though *C* ratifies the unauthorized act of *A*, by stating to *B* that he is a member of the *A* Co., this does not constitute him as a partner to *A*. As to *B*, however, he is a partner and is liable as such. As to *A*, he is not a partner, and is not entitled to a share in the profits. If the intent of the parties to form a partnership, is clear, from their express agreement, or from an agreement implied from their acts or conduct, a partnership, without question, exists between them. Many business arrangements are made by which property, skill, or labor is combined under peculiar arrangements, as to the division of profits and losses, making it difficult to tell whether a partnership exists. It is not essential that the word, "partnership," be used to have an agreement constitute a partnership. If it is the intent of the parties thereto to create a partnership, one exists regardless of the term used. An agreement to share losses, or to share profits in an enterprise, is some evidence of a partnership, but is not sufficient of itself to constitute a partnership. *A* and *B* may agree each to furnish his own tools in drilling an oil well, and if a profit is made, to divide the profits, and if a loss is sustained to bear the loss out of their individual funds. These facts, do not show an intent to form a partnership, and do not make *A* and *B* partners as to themselves. If,

however, *A* and *B* contribute one hundred dollars ($100.00) each to a partnership fund, and combine the tools possessed by each toward a partnership fund, and agree to share equally the profits and losses, the intention is clear that a partnership is intended, and these facts constitute *A* and *B* partners.

72. Partnership as to Third Parties. Where a partnership exists as between the partners themselves there is no question about its existing as to third persons dealing with the partnership as such. A party cannot hold himself out to the world as a partner, and by means of a private arrangement with his apparent partners, evade liability as a partner. It is generally conceded that a secret arrangement made between partners that one shall not be liable as a partner, if made known to a third person dealing with the partnership, will relieve the apparent partner from liability to such third person. For example, if *A* and *B* are doing business as the "*A B* Co.," and *A* lends his name to the company for a fixed consideration, *B* receives all the profits and is liable for all the debts. If *C* deals with the "*A B* Co.," not knowing of the private contract between *A* and *B*, *A* is liable individually upon the contract. If, however, *C* at the time he deals with the "*A B* Co.," is informed of the actual connection of *A* with the company, he cannot hold *A* liable as a partner

If a third person extends credit to one of the partners, knowing that the purchase is for the benefit of the partnership, he can hold liable, only the party to whom he extended credit. If, however, he sells to one of the partners, not knowing that he is a partner of a firm, and the firm gets the benefit of the purchase, the firm is liable for the debt.

A partnership, like a principal in agency, is liable for the torts or private wrongs of the individual partners, committed in the course of the partnership business. If *A*, a member of the *A B* Co. partnership, uses fraud in purchasing goods, the *A B* Co., is liable for the fraud. If *A*, a member of the *A B* Co., gas fitters, carelessly connect a gas burner, thereby causing an explosion, and injury to *C*, the *A B* Co., is liable for the injury.

73. Powers and Property of a Partnership. A partnership has the power to transact business in its firm name. Unless prohibited by statute, it may sue and be sued in its firm name, regardless of the names of the individual partners.

Each member of a partnership is regarded as an agent of all the other members of the partnership, with authority to bind the partnership by any contract made within the scope of the partnership business. A partner may deal individually in matters outside the scope of the partnership business. For example, *A*, *B* and *C* form a partnership for the purpose of buying, selling and leasing real estate. *A*, *B* and *C* are authorized to act for each other, in doing all the things reasonably connected with the transaction of real estate business. If *A* orders groceries in the firm name, his partners may deny and avoid the obligation, on the ground that is is not within the scope of the partnership affairs. The grocer selling *A* groceries in the firm name cannot claim that *B* and *C* authorized *A* to buy groceries. The purchase is clearly outside the real estate business. If, however, *A* purchases a house and lot in the firm name and uses it personally, the seller can hold the partnership for the purchase price. A partnership is empowered to sign notes, only when necessary to the transaction of the partnership business. Partnerships may hold the title to personal property in the name of the firm. This does not prevent the individual members from holding property individually at the same time. As between the partners themselves, only that personal property mutually agreed to belong to the partnership is partnership funds. Even as to third persons dealing with the partnership, the actual agreement of the individual members as to what is, and what is not partnership funds governs, except in the case of fraud. A partnership cannot represent that it owns certain property, or that certain purchases are made for the partnership for the purpose of obtaining credit, and then claim that it is owned by an individual member. Property purchased by partnership funds, or improved with partnership funds, belongs to the partnership. Real estate purchased with partnership funds is regarded as belonging to the firm, even though title is held in the name of one of the partners. The partner in whose name the property is held is said to be the legal owner, but the partnership is the equitable owner. Firm creditors may subject it to pay firm obligations.

74. Liability of Persons Held Out as Partners. If a person permits himself to be held out as a partner, he will be bound as a partner, as to third persons dealing with the partnership with this in view. It matters not that the party held out as a partner is not a

partner in fact. The real relation will protect the apparent partner, as against the other partners, but not as against third parties who deal with the firm, relying upon his being a partner. What amounts to being held out as a partner is a question of fact, which must be determined by the circumstances surrounding each particular case. If *A*, without authority of *B*, tells *C* that *B* is his partner in the shoe business and that they are trading as the "*A B* Co.," and *C* sells them an order of shoes, without investigating whether *B* actually is a partner, *B* is not liable as a partner for the obligation. The authority to hold a person out as a partner must come from the partner so held out. It may come from his assent or his neglect in denying the relationship when he learns that he is being advertised as a partner. For example, suppose *A* borrows five hundred dollars ($500.00) of *B* and promises to give *B* a one-half interest in his grocery business, if *B* so desires, on condition that *B* spend his afternoons working in the store, and *B*, not considering himself a partner, permits *C* to tell third persons that he is a partner. As a result, *B* cannot deny partnership liability as against third persons who consider him a partner in dealing with the partnership.

75. Duties and Liabilities of Partners as to Each Other. The relation of partners to each other is a contract relation. Each partner must carry out the terms of the contract. Ordinarily, partnerships require the devotion of the entire time and attention of each partner to the partnership business. Partners are not permitted to engage in any business for themselves which will interfere with the partnership business, or take their time and attention away from the partnership business. Each partner owes that duty of fidelity to the other members of the partnership. A partner as an individual may deal with the firm, and may act as agent for others in dealing with the firm, if it is with the consent and knowledge of the other partners. A partner cannot sell his interest in the firm to another, and have the new partner take his place as a member of the partnership, without the consent of the other partners. In any event, the withdrawal of one partner and the substitution of another dissolves the old partnership and establishes a new partnership. One partner may assign or transfer his interest in a partnership but this dissolves the partnership, and gives the purchaser the right to his seller's interest in the funds of the partnership. It gives

the purchaser no right to participate in the management of the business.

If by the terms of a partnership agreement, the partnership is to subsist for a specified length of time, and one partner withdraws or refuses to continue, he is liable in damages to the other partners, for breach of contract. If the partnership is organized without regard to any specified duration, a partner may withdraw at will, and thus dissolve the partnership. Partners must devote their entire time and attention to the business, unless the partnership agreement provides otherwise. Each partner is entitled to an equal share of the profits. If one partner deals unfairly with another, the latter cannot bring an ordinary suit at law for recovery of the amount due him, or for his damages, but he must bring a suit in equity, setting up the facts, and must demand an accounting. The court will then determine the rights of the partners. If a partnership is dissolved, and the partners expressly agree that a certain sum is owing by one partner to another, the latter may sue the former for this amount, in an ordinary action at law.

76. Liability of Partnership to Third Persons. A partnership is liable as such, upon its contracts to third persons. This means that the obligation is in the nature of a joint one against all the partners, and not a several one against the individual partners. There is an individual liability of each partner, called a liability of each partner in solido. This liability is discussed in this section under the title, "Liability of Individual Members of a Partnership." A third person, in commencing a suit against a partnership, must sue all the partners, or be subject to the risk of having the case dismissed at the objection of the one sued. All the property of a partnership may be subjected to the payment of partnership obligations.

77. Liability of Individual Members of a Partnership for Partnership Obligations. While a suit brought against one partner for a partnership debt may be dismissed if objected to by the partner sued, if not objected to, and judgment is taken, it may be enforced against the individual assets of the partner sued. In this event, in most jurisdictions, the other partners are discharged from liability. If the partnership is sued either in the partnership name, or in the name of all the individual partners, the individual members are still liable in solido for the debt. By *in solido* is meant, *liable for the whole.*

If one partner is compelled to pay all or more than his proportion of a partnership debt, he may recover the excess of his share, ratably from the other partners.

A member of a partnership may have partnership assets and individual assets. A creditor of the partnership may satisfy his claim out of the firm assets, or out of a partner's individual assets, except where there are individual creditors. In the latter event, the partnership creditors cannot subject individual partners assets to the disadvantage of the individual creditors. On the other hand, individual creditors cannot subject a partner's share in the partnership assets to the disadvantage of partnership creditors. This means that in case of insolvency of either a partner or of the partnership, firm creditors must first exhaust firm assets, and take the balance of individual assets after individual creditors have been satisfied. It means, further, that individual creditors must satisfy their debts out of individual partner's assets, and can only subject the balance of firm assets after firm creditors have been satisfied. If there are no partnership assets at all, and no solvent partners, firm creditors are treated on the same basis as individual creditors, and the individual assets of the partners are divided *pro rata* among partnership and individual creditors alike.

78. Change of Membership. A partnership depends for its existence upon the continuation of the same membership. If one partner withdraws, the partnership is, by that act, dissolved. If a new member is admitted, the partnership is dissolved and a new one created. A partner cannot escape his liabilty as a partner by withdrawing from the partnership. By this act, he terminates the partnership, and no further liabilities can be created against him except as to those persons having no notice of his withdrawal; but he is still liable for the old partnership debts. A substituted partner is not liable for the debts incurred before he enters the firm, unless he expressly assumes such debts. If he expressly assumes them, this does not relieve the outgoing partner from liability, unless this is assented to by partnership creditors. If it is borne in mind that a change in membership dissolves a partnership, and any partnership that exists thereafter is separate and distinct from the old one, and dates from the withdrawal of the retiring partner, or admission of the new partner, the individual liability of the partners is easily determined.

For example, if *A*, *B* and *C* are partners in a dry goods business, and *B* withdraws, *B* is still personally liable for the debts of the *A B C* Co. The partnership ceases at the time of his withdrawal. If *A* sells his interest to *D*, who becomes a member with the consent of *B* and *C*, *A* is still liable to creditors who became creditors before *A's* withdrawal. *D* is not liable for the debts incurred before his admission as a partner, unless he expressly so agrees.

79. Death of a Partner. The death of a partner terminates the partnership. The remaining partners may agree to continue the partnership, which amounts to the formation of a new partnership. In case of death of one partner, title to the partnership property is in the surviving partners. They must collect the assets and may sue on firm obligations. They cannot, as survivors, continue the business further than is necessary to wind up the affairs of the partnership. They must first pay all firm obligations, and distribute the proceeds among themselves and the representatives of the deceased partner.

80. Survivorship. Survivorship is the term applied to the relation to the partnership of the remaining partners, after a dissolution. The partners remaining after a dissolution are known as *survivors*. The title to the partnership property vests in the survivors, and they must collect the assets, pay the liabilities and distribute the proceeds among themselves and the representatives of the other partners. By statute, in some states, surviving partners are permitted to purchase firm assets at a fair appraised valuation. Surviving partners have the right to retain possession of the partnership property, and to do those things necessary to wind up the affairs of the partnership. They are not permitted to divide any firm assets among themselves, until all firm debts are paid. If *A*, *B* and *C* are partners in the grocery business, and *C* dies, the title to the property rests in *A* and *B*, who have the authority to sue for the debts owing, and may be sued for the debts owed by the firm. They have the right to draw checks on the firm checking account, but no right to incur further obligations. In the absence of special statute, they have no right to purchase the business for themselves, and if they choose to continue it, they do so at their own individual risk, and must account for all profits made.

81. Dissolution of Partnerships. A partnership may be dis-

solved by lapse of time. If a partnership is entered into under an express agreement that it is to subsist for a certain length of time, lapse of the stipulated period works a dissolution. A partnership may be dissolved by mutual agreement of the partners. A partnership may also be dissolved by any change of membership, whether it be the withdrawal of a member, admission of a new member, or death of a member. Bankruptcy of a member, or bankruptcy of the partnership itself, works a dissolution. If one party violates his duties as a partner, or if for any reason, the partnership ceases as a result of a decree of court, there is a dissolution.

82. Notice of Dissolution. Persons who deal with a partnership through one of the partners, or through an authorized agent, have the right to assume that the partnership will continue to exist. If a partnership is dissolved by lapse of time, by mutual agreement, or by withdrawal or entrance of another partner, notice must be given of such change, to protect the members of the former partnership against contracts of third persons, made subsequently to the dissolution. Business people, who have had former dealings with the partnership, must receive actual notice. These notices may be sent by mail, or delivered orally, or in writing. A public announcement in a newspaper is sufficient to protect former partners against contracts subsequently made by persons who have not previously dealt with the firm. In case of dissolution of a partnership by operation of law, such as by death of a member, bankruptcy, or decree of court, no notice is necessary. The act which causes the dissolution is deemed to be notice to everyone.

83. Distribution of Firm and Individual Assets after Dissolution. As a general rule, firm creditors are entitled to firm assets. The balance goes to individual partners. Individual creditors are entitled to individual assets. The balance goes to firm creditors. If, however, the partnership is insolvent as a firm, and there is no living solvent partner, in the distribution of firm assets, firm creditors are treated the same as individual creditors. Firm real estate may be subjected by firm creditors to the payment of their claims. After firm creditors are satisfied, firm real estate is treated as the real estate of the individual members, and descends to the heirs of the partners, and does not pass as personal property to their personal representatives.

84. Limited Partnership. Most states by statute permit limited partnerships to be formed. In general, a limited partnership differs from an ordinary partnership in that some of the members, called special partners, are not individually liable for the obligations of the partnership. The statutes of the different states differ somewhat as to the purposes for which a limited partnership may be formed. In general, however, a limited partnership may be formed to carry on any business except banking and insurance. A limited partnership must have at least one general partner who is individually liable for the obligations of the partnership. The special partners contribute certain fixed sums, which must be paid before the partnership starts business, and beyond which the special partners are not liable. Generally, special partners are not permitted to manage the business. A limited partnership is generally required to file with a public officer a certificate showing its membership, the purpose for which it is organized, the number of shares held by special partners, the assets, the total capital, and the names of the general partners. The purpose of a limited partnership is to enable persons to invest a certain amount of capital in an enterprise without being individually responsible beyond the amount actually invested. Limited partnerships are now largely supplanted by corporations.

85. Form of Partnership Agreement.

Articles of agreement entered into at Chicago, Ill., this ..... day of .... 1909, by and between *A*, hereinafter designated as the first party, and *B*, hereinafter designated as the second party, both of Chicago, Ill. Witnesseth that:

1. Said parties agree to enter into a partnership for the purpose of engaging in and carrying on a general hardware business in the city of *Chicago* under the name of *Cook County Hardware Co.*
2. The first party agrees to furnish his stock of goods, now located at his present hardware store in *Chicago*, and said second party agrees to contribute *$5,000.00* in cash immediately upon the signing of the agreement, said stock of goods, and said *$5,000.00*, to constitute the joint capital of the partnership.
3. Said parties agree to devote their entire time and attention to the interests of the partnership business.
4. Said parties agree to share equally the losses and expenses of said partnership, and at the expiration of each month, to divide equally the net profits reserving a fund sufficient to keep the original capital intact.

5. Said parties agree that the partnership shall continue as long as the partners shall mutually so desire. In the event of either party's desiring to withdraw, said parties agree that each shall choose one arbitrator, the two thus chosen to select a third, who shall appraise the assets of the firm, and divide them into parts, which division shall be accepted as final by the parties hereto. And each party agrees to accept the portion allotted to him by said arbitrators.

In witness whereof, the parties hereto have set their hands the day and year above written.

Signed

A.....

B.....

Signed in the presence of

C.....

D.....

CORPORATIONS

86. Nature of a Corporation. A corporation has been defined to be "a collection of many individuals into one body, under a specific denomination having perpetual succession, under an artificial form and vested by the policy of the law, with the capacity of acting in several respects as an individual." In other words *corporation* is the name applied to an association of persons authorized by law to create, by mutual contribution, a common fund for the purpose of transacting business without rendering the individual members personally liable for the debts of the association, beyond a certain amount. The object is to permit persons to obtain the advantage of large combinations of capital without involving, beyond certain limits, the private property of the individuals composing it. A corporation is an artificial person having an existence in many respects separate and apart from the members composing it. While it can only transact business by means of agents, the obligations created are the obligations of the artificial person, the corporation. The common fund or capital of the corporation, is the only property that can be subjected in payment of the debts. The individual property of the members is not the property of the corporation.

87. Corporations Distinguished from Partnerships. A partnership may be created by mutual consent of the parties desiring to engage in that joint enterprise. The only limitation is that the enterprise must be for a lawful purpose. A person may form a partnership for the transaction of any kind of business which he may

transact as an individual. A corporation, on the other hand, must have permission from the government to transact business. This permission is called its *franchise*. Corporations cannot be formed for every purpose. That is, individuals are permitted to engage in lines of business denied to corporations. A corporation is an artificial person, regarded in law as distinct from the individuals composing it. A partnership is not distinct from the individuals composing it, and the individual members are personally liable for the debts of the partnership. A corporation has a continuous existence; it continues to live regardless of death of some of its members, or regardless of a change of membership. A partnership ceases to exist upon the death of a member, or by a change of membership. A corporation's members do not have the right, as such, to act as agents of the corporation for the purpose of transacting business. The agents of the corporation are appointed in a manner prescribed by law, and by the rules of the corporation. In a partnership, each member is the recognized and authorized agent of the partnership. Each member may bind the partnership by any contract made within the scope of the partnership business. For example, if *A* and *B* form a partnership for the purpose of selling real estate, either *A* or *B* by reason of the partnership agreement, is authorized to sell real estate in the name of the firm. If *A*, *B*, *C*, *D*, and *E* are stockholders in the *X* Co. neither *A*, *B*, *C*, *D* or *E* is entitled, by reason of his being a stockholder, to make contracts for the corporation. A board of directors must be elected by the stockholders, who in turn elect officers, and appoint agents authorized to transact the business of the corporation.

88. **Powers of a Corporation.** Corporations are not permitted, as such, to transact business of every kind. A corporation is an artificial being created by law. It can exist only for those purposes enumerated by law. Corporations, as such, have well recognized, or distinguished, powers or characteristics. The ordinary powers of a corporation are as follows:

First—The power of perpetual succession.
Second—The right to sue and be sued, and to receive and grant in their corporate name.
Third—The right to purchase and hold real estate and personal property.
Fourth—The right to have a common seal.
Fifth—The right to make by-laws.

It was long ago decided that a franchise given by the government to a corporation, cannot be revoked or changed by the government, unless such a reservation is made by the government at the time the franchise is granted. At present, such reservations are made in granting most franchises, either by express reservation in the franchise itself, by general statutory provision, or by constitutional limitations.

89. **Creation of Corporations.** A corporation cannot be organized merely by agreement of the members. It must obtain permission of the government, state or national, to operate as a corporation, before it can lawfully exercise any corporate rights.

Originally, the right to become a corporation was granted by express permission of the king. The franchise, or right granted, was called the corporate charter. In this country, charters originally were granted by special legislative grants. While the United States Constitution does not expressly provide for the formation of national corporations, Congress is deemed to have the right to create them for the purpose of carrying out the express functions of the government, expressly granted by the United States Constitution. For example, the Constitution expressly grants the United States Congress the power to coin money and regulate the value thereof, and to levy and collect taxes. It is given no express power to organize national banks, but under the provisions giving it power to make laws to carry into execution all of the powers expressly granted, it is held to have the power to provide for the organization of national banks.

Most corporations are organized under state laws. Originally, charters were granted by special acts of the state legislatures. These charters were decided to be contracts between the state and the corporation, which could not be changed or revoked at the desire of the legislature. At the present time, most states have general permissive statutes, under which corporations may be organized. These statutes generally reserve the right to the state, to revoke or change the charter at the will of the legislature. Many states have constitutional provisions limiting the power of the legislature to grant irrevocable charters. The statutes of the different states vary somewhat as to the things required of persons desiring to organize a corporation, but the primary requirements are similar. In general, the following are the statutory requirements of the states for the organization of a corporation. The persons desiring to organize a corporation, not

less than three (some states require more), a majority of whom are citizens of the state, must sign a paper, called *articles of incorporation*, which contains the name of the proposed corporation, the place where it is to be located, the purpose for which it is to be formed, and the place where its principal business is to be transacted, the amount of its capital stock, and the number of shares into which it is to be divided. The articles of incorporation are sent to a designated state officer, usually the Secretary of State. Upon the filing of the articles of incorporation with the proper state officers, the incorporators may open the books of the company, for stock subscriptions. The time and place of opening the books is announced, usually by thirty days advertising in a newspaper. A portion of the stock, usually ten percent, must be paid at the time the subscription is made. When the required portion of the authorized capital stock is subscribed, by advertising notice, the stockholders may meet and elect a board of directors. The board usually consists of from five to fifteen directors. The directors are required to take an oath of office. Some of the governing rules of the corporation, usually called by-laws or regulations, are enacted by the stockholders. Some regulations may be enacted by the board of directors. The board of directors may elect the officers provided for by the regulations, and then proceed to transact the business of the corporation. Corporations not for profit may be organized. Such corporations are organized in the same manner as corporations for profit, except that there is no capital stock, and the directors are usually called trustees. Church and fraternal organizations are common examples of corporations not for profit.

90. Names of Corporations. A corporation must of necessity have a name by which it may be designated, and under which it can transact business. The statutes of the different states generally provide that the incorporators must designate the name which the corporation is to use. One corporation is not permitted to use a name already appropriated by another corporation. A corporation has no right to use a name other than the one given it by its charter. A corporation may prevent by injunction another organization from using a name which interferes with its corporate name. This is subject to the limitations that a corporation is not permitted to appropriate a name descriptive of an article or place. For example, a

storage company was incorporated under the name of the "Fireproof Storage Co." An individual with a fireproof building adopted the trade name "The Allen Fireproof Storage Co." The former company was not permitted to enjoin the latter from using the word *Fireproof,* in the name of his company, since the word, *fireproof* is descriptive of the kind of building used in the business, and cannot be appropriated by any one company or person. The states generally, by statute, provide a means by which a corporation may change its name.

91. Kinds of Corporations. Corporations are usually classified as public and private. Public corporations include those corporations organized for the purpose of exercising public functions, and for carrying out government purposes. An incorporated city or village is a common example.

A private corporation is one organized for the private benefit of its members. Private corporations are either corporations for profit or corporations not for profit. Corporations for profit have a capital stock, and are organized for the financial benefit of the members. Ordinary trading or manufacturing corporations are examples. Corporations not for profit have no capital stock, and are organized for charitable or social purposes. Clubs, educational institutions, and churches are common examples.

Corporations organized for private gain, and which serve some public purpose, are sometimes classified as quasi-public corporations. Express companies and telegraph and railway companies are common examples of the class. These companies are strictly private corporations.

92. When Corporate Existence Commences. The states generally provide by statute, for the organization of corporations. At present, corporations seldom are created by special grant of the legislatures. Most states, by constitutional provisions, limit the power of the legislatures to create corporations by special act. Persons desiring to organize a corporation, must comply with the general laws regulating their formation. As was pointed out in the section on creation of corporations, several steps must be taken to complete the organization of a corporation. The question often arises as to when the legal existence of a corporation commences. It is quite generally held that a corporation's legal existence dates from the filing of the

articles of incorporation with the designated state office. After that time the corporation cannot deny its legal existence. Neither can third persons dealing with the corporation deny the legal existence of the corporation. If the corporation fails to fulfil the remaining statutory provisions relating to the completion of the corporation, the state, through its officers, may revoke the corporation's right to continue as a corporation. A corporation does not have the right to transact business, until its organization is completed. It may have a legal existence before that time.

93. Estoppel from Denying Corporate Existence. An association of persons pretending, innocently or otherwise, to be a corporation, not having complied with the legal requirements for creating a corporation, is not permitted to deny its corporate existence, for the purpose of avoiding its obligations. Such an association is liable as a corporation for its obligations, and if there is no corporate property, the members of the association are liable personally.

On the other hand, persons who deal with an association of persons which claims either by name, or by express statement, to be a corporation, cannot evade their liability to the association on the ground that the corporation has not been legally organized.

As between the corporation and the state, which alone can give it power to exist as a corporation, no valid corporation exists until all the legal requirements are complied with. The state, through its proper officers, may deny corporate right to any association of persons who have not fully complied with the statutes regulating the creation of corporations To create a corporation by estoppel, there must be an organization assuming to act as a corporation. If *A* trades in his own name, a person dealing with him cannot claim that *A* is a corporation by estoppel. But if *A* trades as "The Cook County Lumber Co.," and enters into a contract with *B* in the name of The Cook County Lumber Co., and signs his name as president of the company, he cannot deny its corporate existence. If *B* purchases material of The Cook County Lumber Co., he cannot refuse to pay for it on the ground that The Cook County Lumber Co., is not a legally incorporated company.

94. Corporate Charter a Contract. Originally in this country, the right to exist as a corporation was granted by special act of the legislature. It was early decided that this grant by a legislature

could not be revoked or changed by subsequent act of the legislature. It was regarded as a contract. By reason of the fact that corporate charters are contracts, giving corporations the right to a continuous existence under the terms of the original grant, many states now have constitutional provisions, limiting the right of legislatures to grant irrevocable charters. Those states having no such constitutional limitations, have a provision in their statutes authorizing the creation of corporations, and providing that all corporate charters or franchises be revocable or changeable at the will of the legislature. At the present time in most, if not all of the states, a corporation cannot obtain an irrevocable charter. Their charters are granted with the reservation, or upon the condition, that the terms may be changed or revoked at any time.

95. De Facto Corporations. In connection with corporations, the terms *de facto* and *de jure* are often used. By *de jure* corporation is meant a corporation that has a perfectly legal existence; one that has complied with all the laws relating to its creation; one that cannot have its right to exist as a corporation denied by the state under whose laws it was created, on the ground that it has not complied with all the laws relating to its creation. By *de facto* corporation is meant a corporation that has performed some of the functions of a corporation without having complied with all the legal requirements relating to its incorporation. To constitute a corporation *de facto,* it is usually conceded that there must have been laws under which the pretended corporation might lawfully have been organized, followed by some kind of an attempt to organize under these laws, and by a use of corporate functions. As between the corporation and the state, the state may stop the corporation from exercising corporate functions. As between the corporation and third persons dealing with it as such, in the absence of fraud, corporate existence of a *de facto* corporation cannot be denied.

96. Promoters. Persons who undertake the organization of corporations are called *promoters.* The promoter of a corporation need not be one of the incorporators, but he is the active man who engineers the enterprise. He is the one who interests capital, who induces persons to take the required amount of stock, who assembles the parties desiring or induced to organize the corporation. In short, he is the one who manages the organizing and starting of the

corporation. Oftimes much work must be done, many contracts made, and liabilities incurred before a corporation has any legal existence. Just what connection the promoter has with the corporation, whether he may bind the future corporation, or make it liable for his acts of necessity, or by adoption, is often a close question. It must be borne in mind that before a corporation has a legal existence, it can incur no obligations as a corporation. Before a corporation's legal existence commences it can have no authorized agents. If *A*, knowing where valuable undeveloped stone quarries are located, obtains options on the lands, interests men of means to promise to take stock in a future organization, performs all the preliminary work to the creation of a corporation, organized for the purpose of purchasing and operating said lands, and incurs debts in connection therewith in the name of the proposed company, the corporation, when completed, cannot be compelled to pay such obligations. It did not incur them. It had no power to incur them since its legal existence did not commence until a subsequent time. The obligation belongs to the promoter, or to those persons, if any, who authorized him to incur the debts. If, however, recurring to the former example, "The Cuyahoga Stone Co.," is organized by *A* to develop and operate such stone lands, and after the organization is completed with full knowledge of the obligations of *A*, it, as a corporation, agrees to pay said obligations, and to purchase *A's* options on the lands for a specified amount, the obligations now become the obligations of the corporation. The corporation may be sued thereon, and its property subjected. This is called the adoption of a promoter's obligation by a corporation.

A corporation is liable on its express, as well as on its implied contracts, and if it accepts valuable services of a promoter after it becomes a corporation, it is liable on an implied contract to pay for the same. Services rendered by a promoter for a future corporation do not render a corporation liable therefor, unless adopted by the corporation after its legal existence commences. The states generally provide by statute, the time when a corporation's existence commences. These statutes vary somewhat, but in general provide that the corporation's existence commences when the proper articles of incorporation are filed with the Secretary of State.

97. Reorganization of Corporations. The right to exist as

a corporation is a special privilege which cannot be sold or transferred to another. Any property acquired by a corporation may be mortgaged, sold or transferred at the will of the corporation. The right to exist as a corporation, however, is a special privilege granted by the state, and cannot be transferred. Any association of persons desiring to exercise the rights and privileges of a corporation must obtain such rights from the state. They cannot purchase such a right from an existing corporation. Many of the states provide by statute for the organization of a corporation by those persons purchasing the property of public service corporations at a foreclosure sale. A common example is in case of a foreclosure of a mortgage on a railway. Statutes of some states provide that the purchasers of such property at foreclosure sale may, and shall organize a corporation which shall carry out the purposes of the original corporation.

Where a corporation is organized and purchases the assets of the former corporation, the new corporation is not liable for the obligations of the old. Sometimes the new corporation takes over the assets of the old corporation, and expressly assumes the obligations of the old. In this event, the new corporation is liable for its predecessor's debts. If the new corporation, in purchasing the assets of the old, uses unfair or fraudulent methods, the transfer will be set aside at the instance of creditors of the old corporation, or the new corporation will be deemed liable for the debts of the old corporation. In carrying out reorganization schemes, a transfer of assets must be fair and *bona fide,* or the sale will either be set aside as fraudulent, or the new organization will be deemed a continuation of the old, and liable for its debts.

98. Consolidation of Corporations. The right to exist as a corporation does not carry with it the right to combine or consolidate with other corporations. Where two or more corporations combine or consolidate, the resulting corporation is distinct from the combining corporations. The right to consolidate, like the right to exist as a corporation, is a special privilege granted by the state. Consent must be obtained from the state before a valid consolidation can be made. Most states provide by statute for the consolidation of certain corporations under certain prescribed conditions. Before a valid consolidation can be effected, the provisions of these statutes

must be complied with. Some states require the payment of a consolidation tax. Others require that parallel and competing railroads cannot consolidate.

Unless the charter of the corporation permits of consolidation without the consent of all the shareholders, and unless the shareholders have by valid resolution given the directors the right to consolidate, a consolidation cannot be made over the objection of any shareholder. An attempted consolidation under these circumstances may be enjoined by a dissenting stockholder, or if the consolidation is made over his objection the resulting consolidated company is liable in damages to him.

When a consolidation has been legally made, the consolidated company is liable for the debts, and is entitled to the assets of the component corporations.

99. Meetings and Elections of Corporations. A corporation transacts its business through a board of managers. The shareholders or members of the corporation do not transact the business of the corporation directly, but through the governing board. In case of a corporation having a capital stock, this governing board is called the board of directors. In case the corporation has no capital stock, such as a church or charitable organization, the governing board is called the board of trustees. The charter, or statute under which corporations are formed, usually provides for annual meetings for the election of officers. If the corporation has no fixed place of meeting, notice must be given each stockholder of the place of such meeting. A corporation has no power to hold its meetings outside the state of its organization. It may employ agents to represent the corporation outside the state of its creation, but it should hold its corporate meetings within the state. If the time of holding the election of officers is fixed by statute, or by a regulation or by-laws of the corporation, the meeting should be held at that time. If for any reason a corporate election cannot, or is not held at the time designated, the old directors hold over until the new board is regularly elected.

100. Voting at Corporate Meetings, Quorum and Proxy. Each shareholder or stockholder of a corporation is entitled to vote at the corporate meeting for the election of officers. Usually the vote is by shares. Each shareholder is entitled to one vote for each

share he holds. Some states, by statute, limit the right of a single shareholder to a certain number of votes. When this limitation is fixed, it usually limits the shareholders to one vote regardless of the number of shares held. Such a limitation, where found, is for the protection of small shareholders. Corporations keep books in which are kept the names of the shareholders. Only the persons whose names appear upon the corporation's book as shareholders are entitled to vote.

Some states provide by statute for what is known as *cumulative voting*. Instead of voting the number of shares he owns for each director, by cumulative voting a stockholder is entitled to vote for one director the number of shares he owns, multiplied by the number of directors to be elected. This is sometimes called *ticket voting*. For example, three directors are to be elected, and a shareholder holds ten shares. He may have ten votes for each director, or thirty votes for one director. This is for the protection of the small shareholder.

By *quorum* is meant the number of votes required to constitute an election. Sometimes a quorum is based upon a majority of the number of shareholders present. In the absence of statute or corporate regulations to the contrary, this rule applies. Statutes of some states provide that a two thirds majority of the shares of the corporation shall constitute a quorum.

Most states provide by statute for voting by *proxy*. This entitles one shareholder to give another written authority to vote his shares at a corporate meeting. This right does not exist in the absence of statute. A proxy may be revoked at the will of the shareholder giving it.

101. Stockholders of a Corporation. The membership of a corporation is made up of the stockholders or shareholders. A corporation for profit is authorized by its charter to have a certain capitalization, or the capitalization is the total amount of the shares authorized to be issued. The charter usually requires that a certain percentage of shares subscribed be paid in before the corporation is authorized to elect directors. The charter usually provides that at least ten per cent of the capitalization be subscribed, and at least ten per cent of the amount subscribed be paid in, before directors can be elected. A stockholder is liable to the corporation on his subscription and, in the absence of any additional liability fixed by

the charter, is not liable for the debts of the corporation for any amount in addition. Formerly some of the states provided by statute for double liability of stockholders. In case of insolvency of the corporation, stockholders could be required to contribute an amount equal to their subscription in addition to paying their subscription in full. Stockholders' double liability has been abolished by most states. At present a stockholder can be compelled to pay the full amount of his stock subscription, and no more.

Stockholders of national banks, corporations organized under United States laws, are liable for double the amount of their stock. Those persons are regarded as stockholders who appear as such on the books of the company. A person may become a stockholder by purchasing stock from the corporation, or by purchasing it from another stockholder. Any person legally competent to contract may become a stockholder.

102. Certificate of Stock. Written certificates are usually furnished shareholders, by corporations, as evidence of membership. These certificates are made transferable, in order that they may be indorsed by a shareholder, and made payable to a purchaser. When so indorsed, the purchaser is entitled to have the shares transferred on the books of the company, showing that he is a shareholder in the company. A certificate of stock does not of itself constitute ownership. It is merely evidence of ownership. A person may be a stockholder in a corporation by making a valid subscription, and by paying for the same, regardless of having received a certificate of stock. The following is a common form of stock certificate:

The Consolidated Tack Co.
Cleveland, Ohio.
Incorporated under the laws of the state of Ohio.

No. 99 No. of shares –15–

Capital stock $1,000,000.00

This certifies that John Smith is the owner of fifteen shares of $100 each of the capital stock of The Consolidated Tack Co., transferable only on the books of the company, in person or by attorney, upon surrender of this certificate properly indorsed. In witness whereof said corporation has caused this certificate to be signed by its duly authorized officers, and to be sealed with the seal of the corporation.

At Cleveland, Ohio, this 1st day of October, A. D. 1909.

Jack Brown, Treasurer. Tom Jenkins, President.

Corporate Seal.

Blank for transfer, on back of certificate.

For value received ..... hereby sell, assign and transfer unto ———, ——— shares of the capital stock represented by the within certificate, and do hereby irrevocably constitute and appoint ..... to transfer the said stock on the books of the within named corporation.
Dated .....190..

In the presence of

103. Directors of a Corporation. The managing officers of a corporation are called directors. They are the representatives elected by the stockholders, or members of the corporation, to transact the business of the corporation. While in the absence of statutory regulations a director need not be a stockholder, practically all states require directors to be stockholders.

Directors are authorized to act as agents for the corporation in the management of the corporation's business. Their authority is limited not only by the charter of the corporation, but by the regulations, and by-laws of the corporation as well. The directors of a corporation are not authorized by virtue of their office to dispose of the entire assets of the corporation, neither can they transfer their right to act as directors to others. They have the right to purchase property, to sell and mortgage assets of the corporation within the limits prescribed by the charter, regulations and by-laws of the corporation.

The directors of a corporation must act as a board. They are not permitted to act by proxy. The majority of the entire number of directors constitutes a quorum for the purpose of doing business. They may employ agents to make and carry out contracts, and perform ministerial acts of the corporation, but cannot delegate their discretionary powers as directors. Unless provided otherwise by statute, directors must hold their meetings within the state under whose laws the corporation is created. Notice of the meeting giving the place, time and purpose must be given to all the directors before a valid meeting can be held. Directors, like agents, cannot act for their own private interests if opposed to those of their corporation. Directors who privately profit to the disadvantage of the corporation are liable in damages for such acts to the corporation. It is generally

conceded that a director may contract with his corporation, if no fraud is used, and if a quorum of directors without him consents. Directors are liable to the corporation for their dishonesty or negligence.

104. By-Laws, Rules and Regulations of a Corporation. The by-laws of a corporation are the rules and regulations by which the corporation is governed. Sometimes a distinction is drawn between the term *by-law*, and the term *regulation*. For example, the statutes of some states provide that the stockholders may pass regulations for the government of the corporation relating to the time, place and manner of holding corporate meetings, the number of stockholders that shall constitute a quorum, the time and manner of electing directors, the duties and compensation of officers, and the qualification of officers; while the directors have the power to pass by-laws relating to the government of the corporation, not inconsistent with the charter of the corporation and the regulations. This distinction between regulations and by-laws does not seem to be generally recognized. The entire government of the corporation is generally included in the term by-laws. If the charter does not provide otherwise, the by-laws shall be passed by the stockholders rather than by the board of directors.

A resolution is not a by-law. By resolution is meant the recorded and legally passed determination of a corporation to perform some particular thing or item of business. A vote of a board of directors to make certain bids on certain contracts is an example of a resolution. By-laws must not be contrary to the corporation's charter, or to general law. They are not presumed to be known by third persons, but if third persons dealing with a corporation have actual knowledge of them, they are bound by notice of their provisions.

105. Capital Stock of Corporations. The capitalization of a corporation is the aggregate amount of stock it is authorized by its charter to issue. If a corporation is authorized to issue one hundred thousand dollars ($100,000.00) of stock, it is said to be capitalized at one hundred thousand dollars ($100,000.00). This does not mean that the corporation has property worth one hundred thousand dollars ($100,000.00). A corporation is usually authorized to elect directors after one tenth of its stock has been subscribed, and

after one tenth of the amount subscribed is paid in. Thus, a corporation capitalized at one hundred thousand dollars ($100,000.00), may elect directors and start business with only one thousand dollars, ($1,000.00) actually paid in. The term, capital stock of a corporation, is used in many different ways. It is commonly used to designate the capitalization. Sometimes it is used to designate the amount actually subscribed. Strictly, it probably means the money actually paid in on subscriptions. A corporation's assets may be far in excess of its capitalization, or far below its capitalization. It may have property worth five hundred thousand dollars ($500,000.00) and be capitalized at one hundred thousand dollars ($100,000.00) more or less, or it may be capitalized at one hundred thousand dollars ($100,000.00) and have no assets.

106. Payment of Shares of Stock. It may be stated as a general rule that a corporation has no authority to dispose of its stock for less than par value. If a corporation is solvent, ordinarily no objection is raised, but if the corporation becomes insolvent, creditors may complain, and force, by proper legal action, the shareholders to pay the difference between the face value of their stock and the amount actually paid.

In the absence of a statute requiring stock subscriptions to be paid in cash, there is nothing to prevent a corporation from accepting property at a fair valuation in payment of stock. The rule is usually stated to be, that shares of stock must be paid for in money or in *money's worth.* Shares of stock may be paid for in *bona fide* services. The rule by which purchasers of stock are compelled to pay the full par value either in money or money's worth applies only to those who purchase direct from the company, or who purchase from stockholders with notice that the shares have not been fully paid for. If the certificates of stock state that they are fully paid for and the purchaser has no notice otherwise, or if the purchaser does not know that the stock has not been paid for in full, he cannot be made to suffer for the act of the corporation in unlawfully issuing the stock.

107. Calls and Assessments. An *assessment* may be defined to be a levy by a corporation upon a shareholder for an unpaid portion of his stock subcription; a *call* is a notice to a shareholder of an assessment. Ordinarily, assessments may be made by call, at the direction of the directors, until the entire par value of subscriptions are paid

in full. Stock cannot be assessed beyond its par value, unless so provided for by the corporate charter, or unless the subscriber so contracts.

108. Watered Stock. In case property or services are accepted in payment for stock at an inflated valuation, or if stock is issued as fully paid up when it is not, the stock is said to be *watered.* For example, if *A*, a promoter of a corporation, turns over options to the company, actually worth one thousand dollars ($1,000.00), and receives stock in payment, the par value of which is five thousand dollars ($5,000.00), the stock is said to be watered, and the four thousand dollars ($4,000.00) excess valuation is said to represent the amount of water in the stock.

109. Increasing or Decreasing Capitalization. A corporation has no power, by reason of being a corporation, to increase or decrease its capitalization. The states generally provide by statute for the increasing or decreasing of the capitalization. The corporation must comply with these statutes, before its capitalization can be changed. In case the capitalization is increased, the purchasers of such stock are subjected to pay the full face value at the instance of creditors, the same as purchasers of an original issue. That is, if a corporation is unable to pay its debts, one who has purchased direct from the company, shares of stock upon an increased capitalization, at a price below par, may be compelled by creditors to pay the difference between what he has actually paid and the par value. In case of an increase of capitalization, the present stockholders, in the absence of express statutory regulations to the contrary, are entitled to receive the increased shares in proportion to their holdings. This is usually called a *stock dividend.*

110. Common and Preferred Stock. Stock of a corporation may be of two kinds, common and preferred. When stock is issued by a corporation without any agreement to pay certain dividends out of the profits, or to repay the original stock investments if the corporation ceases doing business, in preference to other stock, it is called *common* stock. Corporations are sometimes authorized by their charters to issue what is called *preferred* stock. That is, the corporation pledges to pay a certain percent of its profits, as dividends to the preferred stockholders, before paying anything to common stockholders. If the corporation ceases doing business, preferred stockholders are

first paid the amount of their subscriptions, and if any balance remains, it is paid to common stockholders. In the absence of statutory authority, probably an existing corporation has the right to issue preferred stock by the unanimous consent of all the common stockholders. This is commonly done for the purpose of raising additional funds.

111. Dividends. *Dividends* is the term applied to the money distributed to shareholders, out of the profits of a corporation. The directors are usually empowered to declare dividends. A stockholder cannot compel the corporation to pay him a percentage of the profits until a dividend has been declared. After a dividend has been declared, it is regarded as a debt of the corporation in favor of the shareholder. When a dividend has been declared at the discretion of the board of directors, the preferred stockholders must first be paid the amount of their preference, and the balance must be distributed equally between the common stockholders. No partiality can be shown stockholders. They must be treated alike. Dividends can be declared only out of the profits, except when a corporation ceases doing business, in which event the property of the corporation, after paying liabilities, is distributed as dividends.

112. Certificates of Stock not Negotiable Instruments. A certificate of stock is merely evidence that the holder is a member of the corporation. A person may be a member of a corporation, and be entitled to the rights of a stockholder, without having a certificate of stock. Certificates are convenient as evidence of membership. Transfers of stock are usually made by filling in a blank on the back of the certificate for that purpose, by which the owner declares the transfer to the purchaser, and designates the purchaser, or someone, his attorney to present the certificate to the corporation, to have the transfer registered on the books of the company. It is the usual custom to surrender certificates to the purchaser. A corporation has a right to rely upon its books, and if a person wrongfully or fraudulently attempts to transfer a certificate of stock which he does not own, or has no right to transfer, the purchaser takes no better title than the seller had. In this particular, certificates of stock are not negotiable instruments. Negotiable instruments are good for value in the hands of innocent purchasers, who purchase before the instrument is due. As between the parties themselves, a transfer of a certificate of stock

is good, but as to the corporation or creditors of the seller, the transfer is not effectual until recorded on the books of the corporation.

113. Individual Liability of Stockholders for Debts of a Corporation. A corporation is an artificial person having an existence in law, separate and apart from that of its members. Its profits cannot be divided until the managing agents of the corporation so decree. Its property does not belong to the members, but to the corporation itself. At one time some states provided by statute for double liability of stockholders. In case a corporation was unable to pay its debts, creditors could compel stockholders to pay to the corporation an amount equal to the par value of their stock, after paying the full face or par value of their stock. Statutes providing for double liability have quite generally been abrogated. At the present time, except in the case of national banks, corporations organized under United States law, few states provide for double liability of stockholders. If *A* has subscribed for ten shares of stock, the par value of each share being one hundred dollars ($100.00), and pays one-half the amount of his subscription to the company, in case of insolvency of the corporation, creditors can force *A* to pay the balance of his stock subscription, or five hundred dollars ($500.00). Even though not insolvent, the corporation can collect the balance of five hundred dollars ($500.00) from *A* by call and assessment, and can enforce collection by suit. *A's* subscription is a contract between himself, and the corporation. Unlike partners, stockholders are not personally responsible for the debts of the corporation of which they are members. In dealing with partnerships, a person may rely upon the personal financial worth of the individual members of the partnership. The property of the individual members may be subjected to pay the debts of the partnership. But in case of a party dealing with a corporation, he cannot rely upon the personal worth or responsibility of the members of the corporation, since the members individually are not liable for the corporation's debts. The corporation is separate and distinct from its members, and when the assets of the corporation are exhausted, the property of the individual members is not liable.

114. Officers and Agents of a Corporation. A corporation is an artificial person which must necessarily conduct its affairs through agents. The managing board of a corporation having a capital stock is usually called the board of directors. The managing board

of a corporation having no capital stock is usually called the board of trustees. These managing boards are elected by the members of the corporation. In case the corporation is one organized for profit, the members are called stockholders or shareholders. The directors or managing board, of a corporation may delegate the performance of what are called ministerial duties. They may appoint officers and agents to assist them in the performance of their duties of a certain character. The officers of a corporation elected by the directors usually consist of a *president*, *vice-president*, *secretary* and *treasurer*. If a corporation's business transactions are limited, practically the only duty of the president is to preside at the meeting of the board of directors. If the affairs of the corporation are many and complicated, the president is usually intrusted with many duties. The board of directors meets at stated times, authorizes and passes on certain important matters, but the duty of carrying them into execution, and of performing the routine work, falls on the president. In a corporation of large affairs, the president may pay current bills, make purchases, give notes, if necessary, make sales and give and take mortgages on property. He is often given authority to act as general manager for the corporation. In this event, he may perform all the duties connected with the general operation of the business. The vice-president has authority to perform the duties of the president during his absence or disability. It is the duty of the secretary to keep the records of the corporation. It is the duty of the treasurer to take care of the funds of the corporation. The officers of a corporation are liable to the corporation for breach of trust. They are personally liable to third persons when they exceed their authority. A corporation, through its properly appointed officers, as well as through its board of directors, may appoint subordinate agents to perform work for the corporation. The corporation is responsible for the acts of its agent, performed within the real or apparent scope of the agent's authority.

115. Execution of Contracts and Negotiable Instruments by a Corporation. A corporation can act only through its agents. The agents authorized to act for a corporation are the board of directors, the officers appointed by the board, or the officers. A corporation, as one of its powers, has *the right to use* a common seal. While a corporation *commonly uses* its seal in signing written instruments of

importance, for the purpose of showing authority of its agents to enter into such contracts, a corporation need not use its seal except in those cases when it is necessary that a natural person use a seal. A corporation usually authorizes its officers to make contracts. A president and secretary, acting together, have the right to make contracts for their corporation, by reason of the general authority conferred upon them by the board of directors. The proper signature of a corporation to a written document is the name of the corporation, followed by the signature of the president as its president, and by the signature of the secretary as its secretary. For example, if the India Rubber Company is to sign a contract, the proper signature is:

The India Rubber Co.,
By John Smith, its President.
By John Jones, its Secretary.

When the signature must be acknowledged before an officer authorized to administer oaths, before it will be received for record, as in the case of a deed, the officer authorized to sign the name of the corporation to the deed may make the acknowledgment.

Negotiable instruments, such as promissory notes, drafts and checks, should be signed with the corporate name by the proper officer, as its officer. It is held, however, that by custom, a cashier of a bank may make and indorse negotiable paper in his own name, merely adding the designation *cashier* to his signature, and by this means make the paper that of the corporation, and not incur any personal liability therefor. This is an exception to the general rule. Where a person signs as agent, he should sign the name of his principal, by himself, as agent. If he signs his own name, followed by the word, *agent*, or *president*, or whatever his office may be, he binds himself personally, and not his principal.

116. Ultra Vires Acts. A corporation by its charter is granted certain privileges. It has a right to act within the terms of its charter, but no right to go beyond the terms of its charter. If it performs acts beyond the terms of its charter these acts are said to be *ultra vires*. This does not mean that all the acts which may be performed by a corporation must expressly be enumerated in its charter. Corporations are created for certain purposes. They are permitted to perform all the acts necessary, and incidental to the purpose of their organization. The general laws under which a corporation is created

are a part of its charter. A corporation organized to do a general banking business has no authority to sign bonds as surety for persons or corporations. Attempts to perform such acts of suretyship are beyond their power, and are *ultra vires*. *Ultra vires* acts are unlawful, and a single stockholder may prevent, by legal action, the officers of a corporation from completing an *ultra vires* contract. Third persons are deemed to have notice of the limitation of the powers of a corporation. They are not permitted to act in such a manner as to benefit by *ultra vires* acts, and then escape liability on the ground that the obligation is *ultra vires*. If an *ultra vires* contract is wholly executory on both sides, neither party can enforce it, if the other party complains by reason thereof. But one cannot accept benefits thereunder, and refuse to carry out the contract on his part. He is said to be estopped from so doing. The doctrine laid down by the last statement is disputed in some jurisdictions.

117. Rights and Liabilities of a Foreign Corporation. Corporations have no rights, as such, outside of the jurisdiction of the power creating them. A corporation organized under the laws of one state may be excluded from performing any of its corporate functions in another state. States may permit foreign corporations to exercise their function within their borders, if they so desire. But states cannot be compelled to recognize the corporate rights of foreign corporations. While the United States constitution provides that citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, a corporation is not a citizen within the meaning of this provision. The United States Government may employ or organize corporations to carry out its purposes. Such corporations cannot be denied the right to exercise their functions by any state. For example, the United States Constitution gives Congress the right to regulate commerce with foreign nations, among the several states, and with the Indian tribes. A corporation engaged in interstate commerce cannot be excluded by any state, in the exercise of this function. Outside these governmental agencies, each state has the right to exclude a foreign corporation from exercising any of its corporate functions within their jurisdictions. The states generally provide by statute that foreign corporations may transact business within their territory by filing with the Secretary of State a statement of their capitalization, the amount actually paid in, the

nature of their business, and the names of their officers. Then, by paying a certain tax, they are permitted to maintain an office and transact business within the state thus granting them the privilege. The statutes of the various states regulating foreign corporations commonly use the term, "doing business." They prohibit foreign corporations from doing business within their borders unless they comply with their statutes. The term, "doing business," has been held to mean the maintaining an office or place of business, or manufacturing plant within a state, and does not prohibit a foreign corporation from selling goods by traveling salesmen, or from making or suing on contracts.

118. Liability of a Corporation for its Torts and Crimes. A corporation, as well as an individual, may commit torts and crimes. If an agent, acting within the scope of his employment, defrauds another, the corporation is liable in damages for his act. If, however, an officer or agent goes outside his employment, and commits a wrong, it is his own act, and he, personally, and not the corporation, is liable. A corporation, as well as an individual, may commit a crime for which it may be punished. It must, of course, commit the crime through its officers and agents. If a corporation is guilty of criminal negligence in failing to keep its works in repair, and persons are injured thereby, it is subject to indictment and punishment. If a corporation obstructs navigation or breaks the Sabbath, it is subject to criminal action. The usual punishent for the crime of a corporation is the payment of a fine, but the officers of a corporation may be imprisoned as well.

119. Dissolution of Corporations. A corporation continues to exist indefinitely, unless the period of its existence is limited by its charter, unless its charter is revoked by the power that granted it, or unless it voluntarily or by a decree of court ceases business. A corporation may forfeit its right to continue as a corporation, if it abuses its privileges, if it assumes to have powers and rights which it does not have, or if it fails to exercise its corporate functions. The latter is called *non-user*. Most states provide by statute that corporations shall not commence business until a certain portion of its capital has been raised. If the corporation violates this provision or any provision of the statutes regulating the completion of its organization, its franchise may be revoked by the state. Most states provide

by statute, a means by which a corporation may wind up its affairs. After paying its liabilities the balance of its assets may be divided ratably among its stockholders.

NEGOTIABLE INSTRUMENTS

120. In General. By negotiable instruments are meant those written instruments intended to circulate as money, which by their form and nature are transferred by delivery or by indorsement and delivery. The most common negotiable instruments are promissory notes, drafts and checks. Negotiable instruments are much more commonly and extensively used than money in the transaction of business. Their function is to take the place of money. Their use arose out of the scarcity of currency and facilitates the transaction of business. Their form and nature make them more desirable and practical in many respects than money itself. Negotiable instruments may readily be traced. They may be drawn in any denomination to meet any emergency. They may be indorsed in such a manner that only the person intended by the maker to receive payment can receive payment thereon. Money, on the other hand, has no particular identity. After payment it cannot be traced, nor can mistakes in amount be corrected. If lost, payment thereon cannot be stopped. If found or stolen, its possessor may receive the benefit of it without question. Negotiable instruments were devised to meet a broad and pressing demand. Usage and custom have given them characteristics to meet this demand.

121. Negotiability. Negotiability is the power of a written instrument to circulate as money. To be negotiable, an instrument must contain language of negotiability. The common phrases of negotiability are *Pay to the order of*, or *Pay to bearer*. Any draft, promissory note, check, or bill of exchange containing the words, *pay to the order of*, or *pay to bearer* are known as negotiable instruments. If a negotiable instrument is made payable to bearer, it is transferable by delivery. The holder of it may pass it like money and the taker is entitled to receive payment of it when it is due. A negotiable instrument payable to the order of a designated person is payable upon the indorsement and delivery of the person to whose order it is made payable. For example, if a check is made payable to the order of John Smith, and John Smith desires to transfer it to John

Jones, he writes his name, John Smith, on the back of the check, and delivers the check to John Jones. By this act, John Jones becomes the owner of the check, and may in turn transfer it, or cash it by presenting it to the bank on which it is drawn. If a check is made payable to John Smith or bearer, and if John Smith desires to transfer it to John Jones, he merely hands John Jones the check. No indorsement is necessary.

122. Negotiability Distinguished from Assignability. An ordinary contract or obligation not requiring personal services or discretion may be transferred by oral or written contract of assignment. For example, if *B* purchases a barrel of flour from *A*, his grocer, to be paid for in thirty days, *A* may assign his claim against *B* to *C*. This may be accomplished by a verbal agreement to that effect between *A* and *C*, or *A* may give *C* a written statement to the effect that he has transferred his claim against *B* to *C*. When *B* is notified of this assignment, he is obliged to pay *C* the money. If for any reason the flour was not accepted by *B*, or if *B* has a claim against *A*, *C* can recover from *B* only the amount *B* owes *A*. If *B* owes *A* nothing, on account of the flour being of poor quality, and not accepted for that reason, or if *B* has a claim for an equal amount against *A*, *B* can set up this defense against *C's* claim, and *C* can recover from *B* only the amount that *A* could have recovered against *B*. In other words, in case of an assignment, all defenses that were good against the assignor are good against the assignee. In case of negotiable instruments, however, the transferee who takes the instrument before maturity for value, and without notice of any defenses, has the right to recover the full face value from the maker, regardless of defenses the maker may have against the original payee. In case of assignment, notice must be given the debtor to make the title good in the purchaser. In case of negotiability, no notice to the debtor is necessary.

A negotiable instrument may be assigned. A common example is the delivery for value, of an instrument payable to order without indorsement. The purchaser takes only the rights of a seller.

123. Law Merchant. The law relating to negotiable instruments is said to be based upon the *Law Merchant*. By the Law Merchant, is meant the rules and customs of merchants relating to bills and notes. At an early time, various rules were recognized by

the merchants trading between different countries. Drafts or bills of exchange were given and passed current as money, without notice to the debtor of the transfer. As early as the year 1200, these customs of merchants were recognized in England. At first, they were recognized only in connection with foreign bills of exchange. By foreign bills of exchange are meant bills made or drawn by persons of one country to be paid or accepted by persons of another state or country. Originally, the rules were recognized by merchants only. The courts of England recognized and enforced these rules in actions brought on foreign bills of exchange. Gradually, these rules were recognized and enforced by all the merchants of England. They were applied to inland bills as well as to foreign. Some statutes were passed, notably one making the rules of the Law Merchant apply to promissory notes. This statute compelled the general recognition of the Law Merchant. Gradually these rules were applied to all negotiable instruments by whomever used. The customs which started between merchants of foreign countries were held applicable to all persons, and became the recognized law relating to negotiable instruments. This country adopted these rules, together with the greater part of the common law of England. At the present time, most of the states have negotiable instrument codes. These codes, for the most part, are statutory enactments of the well recognized rules of common law.

The advantage of the codes, however, is to settle disputed points by express statutory enactment. The code must be interpreted by the well settled and recognized principles of the common law. The difference between the contract formed by negotiable instruments and ordinary contracts is based upon the Law Merchant. These customs are as well recognized, and are as much a part of the law as they were when originally used by the merchants of the old world six or seven hundred years ago.

124. **Promissory Notes.** One of the most common forms of negotiable instruments is that of the promissory note. A common form of promissory note is shown in Fig. 1.

A promissory note is not necessarily a negotiable instrument. It depends upon whether it contains words of negotiability. If the note contains the words, *or order*, or, *or bearer*, or words of similar import, it is a negotiable instrument Otherwise it is not. To con-

stitute an instrument a promissory note, it must contain certain elements. It must be signed by the party making or giving it, but it is not necessary that the signature be in any particular place. Any mark or designation intended as a signature, or by which the maker can be identified, regardless of its position on the paper, is a sufficient signature. The proper and usual method of signing negotiable instruments is at the end thereof.

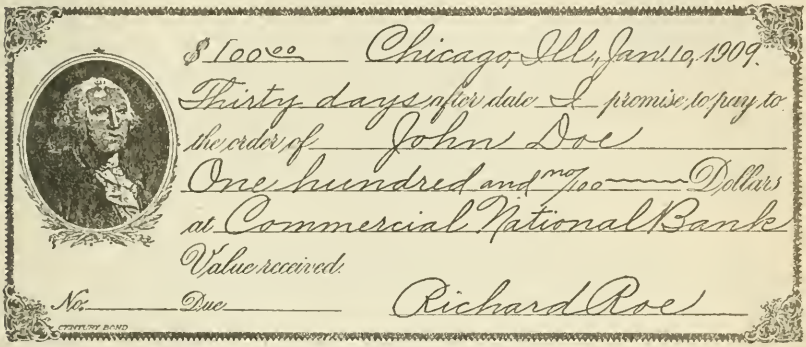


Fig. 1. Promissory Note.

A promissory note must contain an unconditional promise to pay a definite sum of money, at a certain time. If the promise to pay is conditional, the instrument does not constitute a negotiable instrument. The following instrument was sued upon:

> Stratham, March, 28, 1846.
> Due to order of Sophia Gordon, widow, ten thousand dollars to be paid as wanted for her support. If no part is wanted it is not to be paid.
>
> Stephen Scanmore.

Since this was not an unconditional promise to pay, the court held it not to be a promissory note.

The time of payment of a promissory note must be certain, the amount to be paid must be specified, and the instrument must be payable in money. If the instrument is to be paid in anything other than money, it is not a negotiable instrument. An instrument must be delivered, before it has a legal existence as a promissory note. The essentials of a promissory note are also essentials of any negotiable instrument. A promissory note need not be dated, nor need it state that it is given for a consideration. By its nature it imports a consideration. The party signing the note is called the

maker, the party to whom it is made payable is called the *payee*. If the payee transfers it by indorsement, he is called the *indorser*, and the person to whom he transfers it is called the *indorsee*.

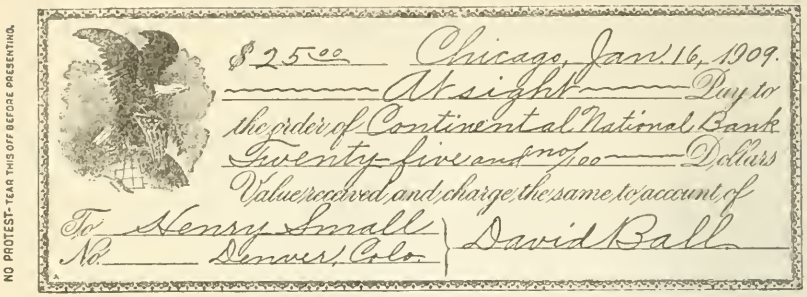


Fig. 2. Sight Draft.

125. Drafts and Bills of Exchange. The term, draft, is commonly used to designate an order from one bank or banks on another, as well as orders on third persons. Orders drawn by one person on another, payable to a third person, are known technically as bills of exchange. At present, the terms, *draft*, and *bills of exchange* are generally used interchangeably. A draft or a bill of exchange is a written order drawn by one person on another, payable to a third person, to the order of a third person, to the drawer himself or his order, or to bearer.

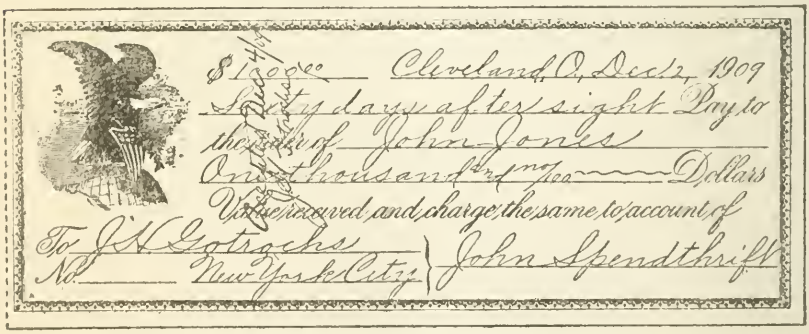


Fig. 3. Sixty-Day Draft, Accepted.

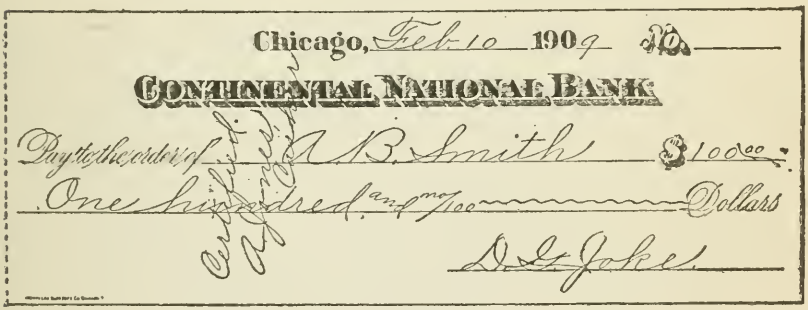
A common form of draft is shown in Fig. 2.

Bills of exchange or drafts are frequently made payable at a

time considerably in the future. Fig. 3 is a form of sixty-day draft. This draft is presented to the drawee, J. H. Gotrochs, and if he accepts, he writes, *accepted*, followed by his name, across the draft. His name written on a draft is sufficient acceptance.

The party drawing a bill of exchange is called the *drawer*, the party on whom it is drawn is called, the *drawee* before acceptance, and the *acceptor* after acceptance. The drawee may accept by signing the instrument, by stating his acceptance on a separate piece of paper, by oral acceptance, or even by conduct making apparent his intention to accept. After acceptance of a draft or bill of exchange, the acceptor is liable to pay the bill according to its terms. He is in the position of a maker of a promissory note.

126. Checks. A check is an order drawn on a bank or banker. It differs in some respects from an ordinary bill of exchange. It


Chicago, Feb 10 1909 No.

CONTINENTAL NATIONAL BANK

Pay to the order of A B. Smith $100.00

One hundred and no/100 Dollars

Certified

D. H. Jokes

Fig. 4. Certified Check.

does not have to be presented for acceptance. It is presented for payment. It presupposes funds of the drawer in the hands of the bank or banker on which it is drawn. It is payable at any time after the date fixed for maturity. It need not be presented at maturity. The maker may recover damages for failure to present promptly if he is damaged thereby. For example, if *A* gives *B* his check on the *X* bank, and between the date for payment of the check and the time of presentment for payment by *B*, the bank fails, *A* may recover as damages from *B*, the amount of his loss by reason of *B's* failure to present the check promptly. No days of grace are allowed in the payment of checks. In this particular, they differ from ordinary bills of exchange.

127. Certification of Checks. By certification of a check is meant a written acknowledgment on checks by an officer or authorized agent of the bank that the check will be paid when presented. In Fig. 4 is shown a common form of certification.

The words *accepted* or *certified*, written on a check by an authorized officer or agent of a bank constitute a certification. If the *holder* or *payee* has it certified, he elects to hold the bank, and thereby releases the maker and prior indorsers. If the *maker* procures the certification he is still liable thereon. When a check is certified, the bank charges it to the account of the maker, and it then becomes a debt of the bank, regardless of whether or not the maker has funds in the bank with which to meet it. This is the reason that a maker and prior indorsers of a check are released from liability thereon when a holder has it certified. By this act, the holder elects to rely upon the bank, rather than upon maker or indorsers.

128. Bonds. Bonds may be defined to be the promissory notes of corporations, private or governmental. They are made under the seal of the corporation issuing them. At common law, a seal destroyed the negotiability of an instrument. At the present time this is not true of bonds. Private corporations often secure their bonds by a mortgage on their entire property. This is accomplished by means of a mortgage called a *trust deed*. The mortgage is given to a trust company, or an individual, to be held for the common benefit of all the bond holders. It is not practicable to give each bond holder a mortgage. This would be inconvenient, and some bond holders could obtain preference over others. But one trust deed, covering all the assets held by a trustee for the benefit of all the bond holders, accomplishes the purpose.

Registered bonds are registered on the books of the corporation issuing them, and in case of transfer the transfer is noted on the books of the company. Other bonds contain coupons, or small promissory notes for certain amounts representing the installments of interest payable at certain times. These coupons may be cut from the bond and sold as promissory notes, or they may be cut at maturity and returned for payment.

No. 1. $1000.00

United States of America,
State of Ohio.

Village of X, Ohio, Improvement Bonds.

Know all men by these presents that the village of X, in the county of Cuyahoga and state of Ohio, acknowledges itself to owe, and for value received hereby promises to pay to bearer, the sum of $1000.00 in lawful money of the United States of America, on the second day of January, 1920, together with interest thereon at the rate of 5% per annum payable semi-annually on the second day of July, and second day of January of each year, as evidenced by the coupons hereto attached, until the principal sum is paid. Both principal and interest are payable at the City Trust Co., Cleveland, Ohio, on the presentation and surrender of this bond, and the coupons hereto attached as they respectively mature.

This bond is issued for the purpose of improving a street of the village of X, from the C. B. Railway to Rocky River by constructing and laying water mains with all necessary connections thereon, under and by authority of Sections 1536-281, and Sec. 2835 of the revised statutes of Ohio, and under and in accordance with resolutions of the council of the village of X, Ohio, adopted Nov. 4, 1908, and Dec. 2, 1908.

It is hereby certified that all proceedings relating to this bond have been in strict compliance with said laws, statutes and resolutions, and all other statutes and laws relating thereto, and that the faith, credit, and revenues, and all real and personal property in the village of X, Ohio are hereby pledged for the payment of principal and interest hereof at maturity.

This bond is one of a series of bonds of like date and effect, but of different amounts and maturities amounting in the aggregate to $3700.00.

In witness whereof, the village of X has caused this bond to be signed by the mayor and clerk of said village, and the corporate seal of said village to be hereunto affixed, and the facsimile signature of the mayor and clerk of said village to be affixed to the attached coupon this second day of January, 1909.

D. B. X._____
Mayor.

[SEAL.]

X. Y. Z._____
Clerk.

Form of Municipal Coupon Bond.

On the second day of July, 1909, the village of X promises to pay the bearer at the City Trust Co., Cleveland, Ohio, twenty-five dollars, being 6 months' interest on its bond.

No. 1 dated Jan. 2, 1909.

D. B. X._____
Mayor.

X. Y. Z._____
Clerk.

On the second day of January, 1910, the village of X promises to pay the bearer at the City Trust Co., Cleveland, Ohio, twenty-five dollars, being 6 months' interest on its bond.

No. 2 dated Jan. 2, 1909.

D. B. X._____
Mayor.

X. Y. Z._____
Clerk.

On the second day of July, 1910, the village of X promises to pay the bearer at the City Trust Co., Cleveland, Ohio, twenty-five dollars, being 6 months' interest on its bond.

No. 3 dated Jan. 2, 1909.

D. B. X._____
Mayor.

X. Y. Z._____
Clerk.

On the second day of January, 1911, the village of X promises to pay the bearer at the City Trust Co., Cleveland, Ohio, twenty-five dollars, being 6 months' interest on its bond.

No. 4 dated Jan. 2, 1909.

D. B. X._____
Mayor.

X. Y. Z._____
Clerk.

Interest Coupons Attached to Municipal Bond.

Similar coupons follow for payment at intervals of 6 months until maturity of bond in 1920.

129 Collateral and Judgment Notes. Banks frequently require borrowers to sign collateral notes. These instruments are promissory notes, with an added agreement to the effect that certain collateral security is given the payee by the maker as security for the note. Such security is usually certificates of stock, bonds, other promissory notes, or chattel property. The collateral note contains a stipulation that upon default, the payee may sell the collateral. The following is a common form of collateral note used by banks:

$5,000.00 Cleveland, Ohio, Dec. 26, 1908.

Six months after date, I promise to pay to the order of the Fictitious Bank at its banking rooms in Cleveland, Ohio, the sum of Five thousand dollars for value received, with interest at the rate of 6% per annum. I have deposited with said bank as collateral security for the payment of this note the following property; 20 shares of stock of the Columbia Sewing Machine Co., par value $100.00 each, 2 diamond rings, 1 warehouse receipt of the City Storage Co., covering

household furniture valued at $3,000.00. The value of this property is now $5,600.00. It is agreed that the payee, or his assigns, may have the right to call for additional security at any time it considers this collateral security insufficient, and on failure of the maker of this note to furnish additional security to satisfy the holder of this note, the note may be deemed payable at once at the holder's option. The holder shall also have power to accept substitutes for this collateral. Should the maker violate any of the conditions of this note, or fail to pay it when due, the holder shall have the power to sell the collateral or any substitute given therefore, at private or public sale, at any time without notice to anyone, and after deducting all legal expenses connected with the sale, and after paying the note, shall return the balance to the maker.

(Signed)

John Smith.

A judgment note contains a provision that upon default of payment, any attorney at law may appear in court and take judgment thereon by presenting the note, without observing the formalities of an ordinary suit at law. This kind of a note is also called a *cognovit* note. The following is a common form of judgment note:

$100.00 Boston, Dec. 8, 1909.

One year after date, I promise to pay to the order of John Jones the sum of one hundred dollars with interest at 6%, and I hereby authorize any attorney at law in the United States to appear before any Justice of the Peace, or in any court of record, after this note is due, and waive the service of summons, and confess judgment against me in favor of the holder of this note for the amount which shall then be due and unpaid thereon, together with interest and costs.

(Signed)

Thos. Thomas.

130. Certificates of Deposit. It is customary for banks to issue customer's receipts showing that a deposit of a certain amount has been made by the customer, which will be held for payment of the receipt upon presentation. These receipts ordinarily are made payable to the customer's order, and circulate like money. They are, in effect, the promissory notes of the bank issuing them. They differ from promissory notes in that banks require a special deposit of its customers before issuing them. Banks issuing such receipts are supposed to hold these deposits as a special fund with which to pay the certificate when presented. The following is a common form of certificate of deposit:

—THE PEOPLES BANK OF CHICAGO—

We hereby certify that John Jones has deposited $1,000.00 in this bank, for which this certificate is issued, and which will be paid to the order of John Jones in current funds of this bank when presented.

The Peoples Bank of Chicago,
June 23, 1909. By A. Z. Marshall, Cashier.

The payee of this certificate of deposit may indorse and transfer it. The holder may collect the amount by presenting the certificate to the bank.

131. Requisites of Negotiable Instruments. Certain elements are recognized, by long usage, as being necessary to constitute an instrument a valid negotiable instrument. The instrument must contain words of negotiability, such as *or bearer, or order,* or words of similar meaning. The instrument must contain a specific promise to pay a certain sum of money at a definite time. The instrument must designate an ascertainable person to whom, or to whose order the money is payable. The instrument must be signed and delivered. It is not necessary that a consideration be stated in the instrument, although in a suit between the original parties, failure of consideration is a defense. For example, if *A* gives *B* his promissory note for one hundred dollars ($100.00) payable to *B's* order, and *A* received no benefit for giving the note, if *B* sues *A* thereon, *A* may plead that he received no consideration for the note. This would be a complete defense to *A*. If, however, *C* purchased the note from *B* before it was due, paying value for same, and having no notice of its being given without consideration, *A* could be compelled to pay it to *C* or his successors. It is not necessary that a negotiable instrument be dated. It is proper, however, and good business policy to date all negotiable instruments. The signature need not be at the bottom of the instrument. This, however, is the proper place for the signature.

I. O. U. $500.00

(*Signed*) *John Jones,* is not a promissory note. It is not a promise to pay at a definite time or to a definite person. It is a mere acknowledgment of indebtedness.

132. Parties to Negotiable Instruments. By usage and custom, parties to negotiable instruments are given certain well recognized names. The name of the party to whom a promissory note is made payable is always called the *payee.* When the payee transfers a

negotiable instrument by indorsement, he is called the *indorser*, and the party to whom he indorses the note is called the *indorsee*. Indorsers and indorsees are designated as *first, second, third, etc.*, indorsers or indorsees according to their position on the instrument.

The maker of a draft is called the *drawer*. The one to whom it is given is called the *payee*. The one on whom it is drawn is called the *drawee*. After acceptance, the drawee is called the *acceptor*. The rights and liabilities of these parties are discussed under separate sections.

133. Rights and Liabilities of a Drawee. The term, *draft*, is sometimes used to designate orders made by one bank on another. For example, *A* in Cleveland, purchased of his Cleveland bank a New York draft, or an order by the Cleveland bank on a New York bank, payable to the order of *A*. Technically, orders on persons are *bills of exchange*, but the term draft, has come to be applied both to orders of one bank on another and to orders of one person on another. In this work the term, *draft* is applied to both kinds of orders. A drawer is a person who makes a draft on another. It is usually payable to the order of a third person. It may be made payable to the bearer or to the order of the drawer, himself. A drawer enters into a conditional contract. By becoming a drawer, he agrees to pay the bill of exchange or draft, if the payee presents it without delay, and in case of non-payment, or non-acceptance, if notice is promptly given him of this fact. In case the draft is a foreign one, that is, made payable or to be accepted, in a different state or country from which it is drawn, it must be protested by the payee to enable him to hold the drawer. A draft is protested by being presented by a notary public, who, by formal written instrument, declares the refusal of the drawee to accept. Protest is discussed more at length under a separate section. In case these conditions are complied with, and the drawee does not accept the bill or pay the bill after acceptance, the payee may hold the drawer. After the formalities above enumerated are observed by the payee or holders of a draft, if the draft is dishonored, that is, not accepted, or paid by the drawee, the payee may sue the drawer, whose liability is similar to that of the maker of a promissory note.

134. Rights and Liabilities of Acceptor. The person to whom a draft is directed is called the drawee or acceptor. When a draft

is presented to the drawee, he may accept it by writing *accepted* thereon, or he may accept by writing his consent in a separate instrument, such as a letter, or by sending a telegram, or he may accept orally or by his conduct. After a drawee has accepted a draft, he is bound by its terms. He must pay the amount mentioned in the draft. After acceptance, his liability is similar to that of the maker of a promissory note. Sometimes an acceptor does not accept in the exact terms of the draft. He may change the time or place of payment, or attach conditions to the bill or draft. This amounts to a refusal on his part to accept the bill, which will entitle the payee to refuse the qualified acceptance and by giving proper notice to the drawer hold the drawer by reason of non-acceptance by the drawee. If, however, the payee chooses to accept the qualified acceptance of the drawee, he may do so, but by this act he releases the drawer and all prior indorsers from liability thereon.

135. Rights and Liabilities of Maker. *Maker* is the term applied to the person who originally makes and signs a promissory note. By this act, he agrees to pay at maturity, to the original payee, or to whomever the note has been indorsed or properly transferred, the amount named in the note. The maker of a note is liable absolutely and unconditionally. While it is customary for the holder of a note to present it to the maker at maturity for payment, this is not necessary unless a place of payment is stipulated in the note. The holder may commence suit against the maker at maturity without presenting the note for payment. If the note contains indorsements, the note must be presented to the maker, and if payment is refused, to enable the holder to hold the indorsers liable, notice of the fact must be given the indorsers. If the note is payable at a particular place, as for example, a bank, the holder must present the note at the bank at maturity, or not be able to collect interest thereafter, if the maker proves that he had funds there sufficient to pay the note at maturity. If the maker has been damaged other than by loss of interest, by failure to present a note at a bank when made payable, he may collect damages therefor from the holder.

136. Blank Indorsement. A negotiable instrument, if payable to bearer, may be transferred by delivery. If payable to the order of the payee, it may be transferred by indorsement and delivery. By indorsement is meant the writing the name of the payee upon

the back of the negotiable instrument. Indorsement may be made in various forms, depending upon the purpose for which made, and the kind of liability the indorser is willing to undertake, or the kind or degree of liability which he wishes to avoid. The most common kind of indorsement consists of the payee's writing his name only on the back of the instrument. A negotiable instrument with blank indorsement is shown in Fig. 5.

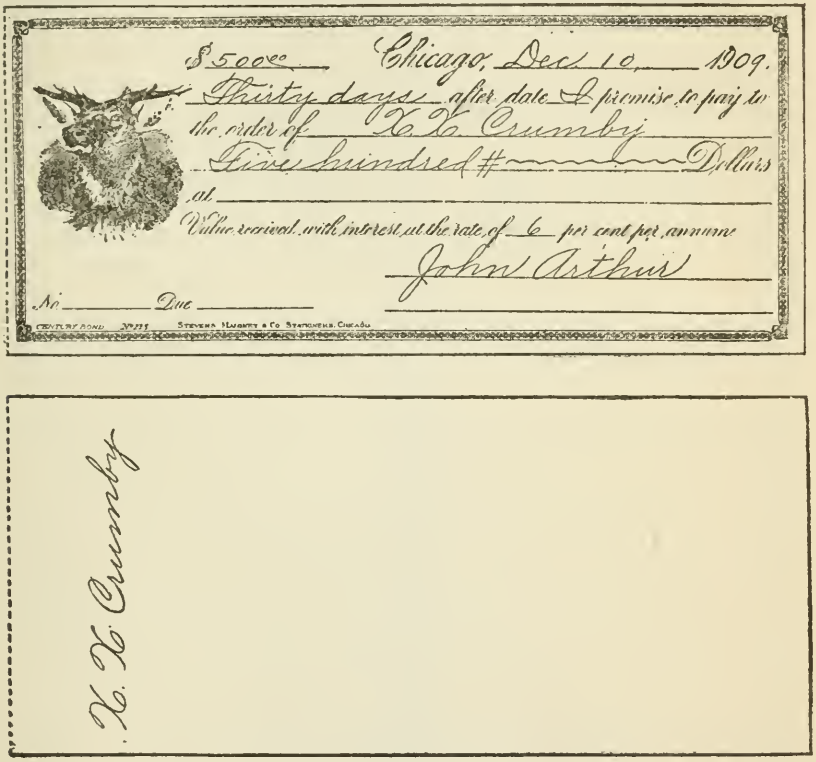


Fig. 5. Promissory Note with Blank Indorsement.

If X. X. Crumby desires to transfer the note to anyone, he signs his name on the back thereof, as indicated in the illustration. This is called a blank indorsement, and makes the note payable to bearer. The note now passes as currency without further indorsement. Subsequent holders may indorse the note if they so desire, or are so required. If the back of a negotiable instrument becomes filled with indorsements, a paper may be attached to carry further indorsements. Such a paper is called an *allonge*.

137. Indorsement in Full. A holder of a negotiable instrument, not desiring to make it payable to bearer, may indorse it by making it payable to some particular person or to the order of some particular person, followed by his signature. This does not destroy the negotiability of the instrument, but prevents anyone but the person to whom it is indorsed, or such person's indorsees, from securing payment of the instrument. This is not true if the instrument is payable to bearer, or if it has been indorsed in blank. Such

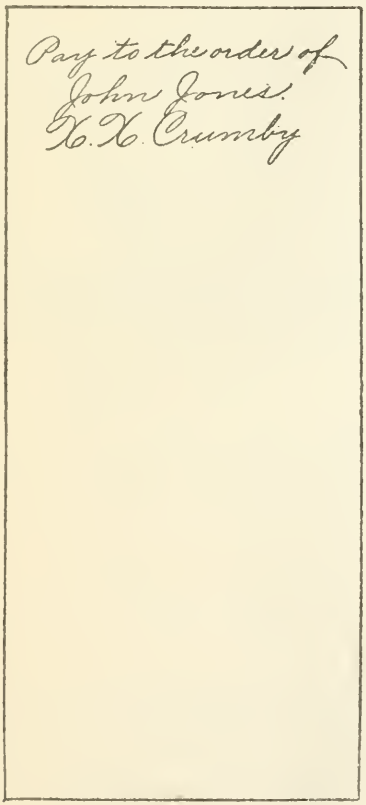


Fig. 6. One Form of Indorsement in Full.

Fig. 7. Another Form of Indorsement in Full.

instruments are payable to bearer, and circulate as money without requiring further indorsement. If subsequently indorsed in full, only those subsequent holders can hold the indorser in full, who can trace their title through him.

Fig. 6 is an endorsement in full of X. X. Crumby. By this indorsement, only John Jones, the person to whom he indorses, may obtain payment of the note. If John Jones indorses the note in blank, that is, signs his name to it, the note becomes payable to bearer, and passes like money, without further indorsements.

By the indorsement, Fig. 7 which is also an indorsement in full, X. X. Crumby becomes liable as indorser to John Jones only, and not to anyone to whom John Jones may indorse the paper. X. X. Crumby's indorsement does not contain the words "or order."

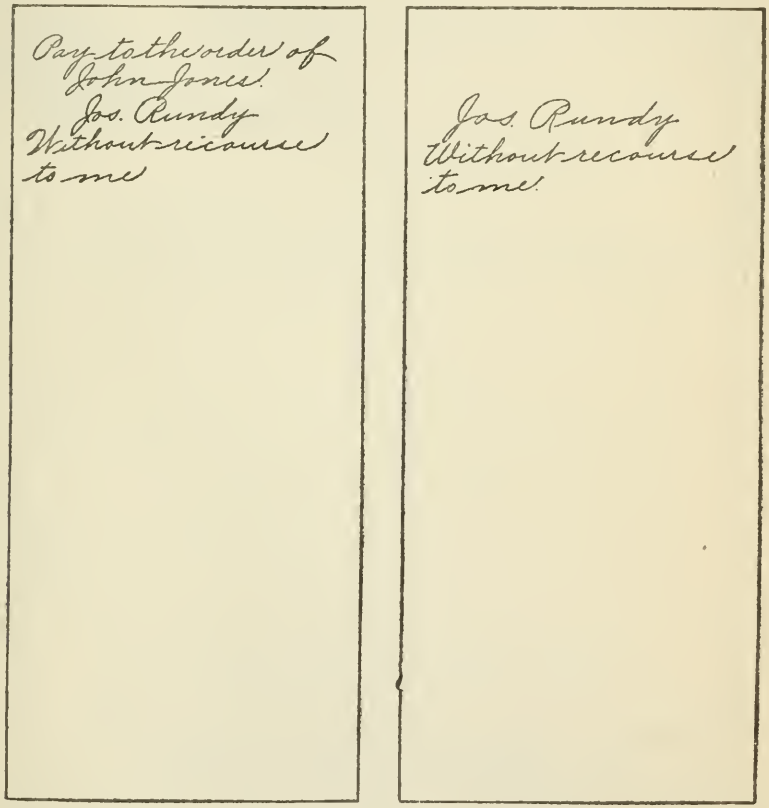


Fig. 8. Indorsement without Recourse.

The face of the note, however, contains the words "or order," which makes the note negotiable. X. X. Crumby's indorsement to John Jones, although not containing words of negotiability, does

not destroy the negotiability of the note. John Jones may indorse the note in blank, or in full. The only effect of X. X. Crumby's omitting words of negotiability from his indorsement is to limit his primary liability as an indorser to John Jones.

138. Indorsement without Recourse. Frequently, the holder of a negotiable instrument is unwilling to assume any primary liability by transferring a negotiable instrument which he possesses.

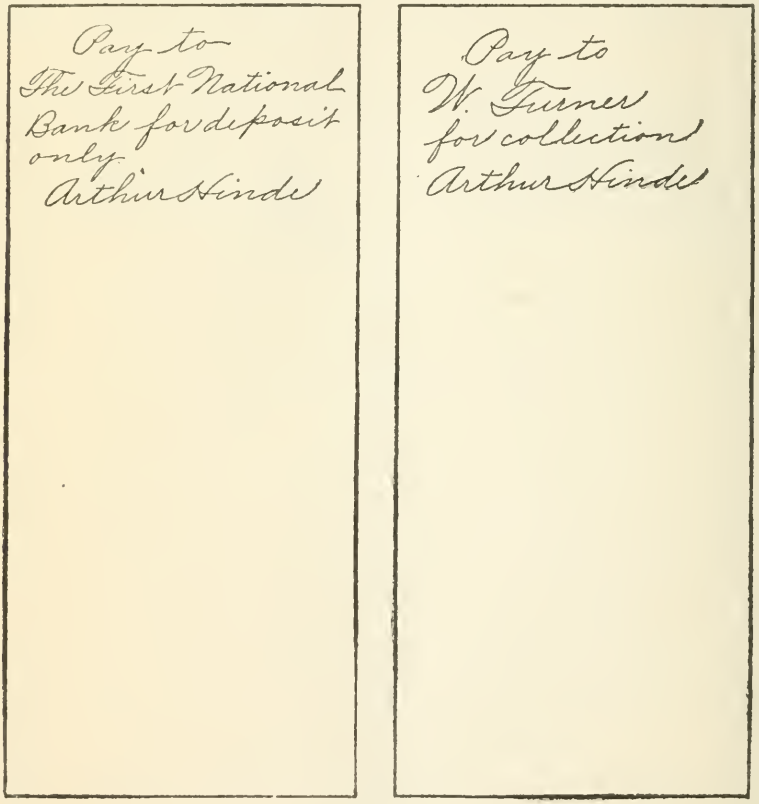


Fig. 9. Indorsement for Collection and for Deposit.

He may desire to transfer the right he has in the instrument, without becoming liable thereon. He may do this by indorsing it without recourse.

By either of the indorsements, (Fig. 8) the one in blank, or the one in full, Jos. Rundy, transfers his interest in the note to John Jones,

and does not become liable thereon as an indorser. It is not quite accurate to say that an indorser without recourse has *no liability* as an indorser. He *impliedly warrants* the signatures preceding his own to be *genuine*, and that the parties making them had legal capacity to sign. The implied liabilities of an indorser are discussed under a separate section.

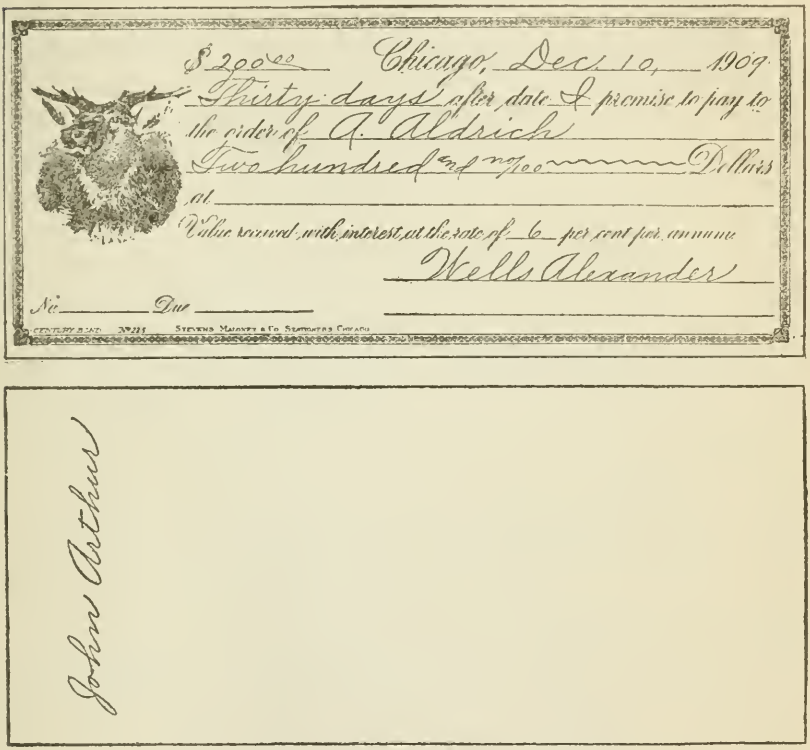


Fig. 10. Promissory Note with Anomalous Indorser.

139. Indorsement for Collection or Deposit. A holder of a negotiable instrument may transfer it for the purpose of collection, thereby making the transferee his agent, for the purpose of carrying out his will, and thereby destroying the negotiability of the instrument. This prevents another from taking the note free from the claim of the original indorser.

Either of the indorsements in Fig. 9 destroys the further negotia-

bility of the note. The indorsers are authorized to collect the note for Arthur Hinde. They are not authorized to transfer the note, except for the purpose of collecting it for Arthur Hinde.

140. Anomalous Indorser. Sometimes, a party writes his name upon the back of a negotiable instrument outside the chain of title. That is, he writes his name thereon, before the payee indorses it. This is for the purpose of adding security to the note.

In this case, Fig. 10, John Arthur signs the note outside the chain of title. He places his name thereon for the purpose of adding security thereto. He is liable on his indorsement to the *payee*, A. Aldrich, and to the *indorsees* of A. Aldrich. In some jurisdictions he is liable as a guarantor, in some as a surety, but in most as an ordinary indorser. The liability of a surety and guarantor is discussed in the section on Suretyship.

141. Liability of an Indorser. By placing his name on the back of a negotiable instrument for the purpose of passing title, a person becomes liable on an implied contract. If his indorsement is in blank, or payable to the order of the indorsee, he is liable to any innocent purchaser for the value, without notice. If made payable to a particular person, he is liable only to that person. The implied liability of an indorser has been said to be as follows: "I hereby agree by the acceptance by you of title to this paper, and the value you confer upon me in exchange, to pay you, or any of your successors in title, the amount of this instrument, providing you, or any of your successors in title, present this note to the maker on the date of maturity, and notify me without delay of his refusal to pay. And I warrant that all the parties had proper capacity and authority to sign, and that the obligation is binding upon each of them. And I will respond to the obligations created by these warranties, even though you do not demand payment of the maker at maturity or notify me of default."

142. Forgery and Alteration of Negotiable Instruments. An act by which a negotiable instrument is materially and fraudulently changed and passed or attempted to be passed, is a forgery. The act may consist of fraudulently writing another's name on a negotiable instrument, or changing a name already on a negotiable instrument, or changing the figures, date, rate of interest, or in fact any act of counterfeiting or materially altering a negotiable instrument. Forgery

makes the instrument void. The forger, or those who purchase from him, obtain no rights against the party wronged. As to the party whose name or whose instrument is forged, the instrument is void. For example, *A* has *B's* valid note for one hundred dollars ($100.00) and changes the note by erasing one hundred dollars ($100.00) and substituting five hundred dollars ($500.00) and sells the note to *C*. *C* can recover nothing from *B*. *A*, by indorsing the note to *C*, warrants the genuineness of the note and is liable on his indorsement to *C*. Neither *A* nor *C* can recover even one hundred dollars ($100.00) from *B*. The instrument has been rendered void by the forgery, and courts will recognize no liability of *B* thereon.

A negotiable instrument altered in any material respect is void. If *fraudulently* made, it is regarded as a forgery. If *innocently* made, the instrument is still void, but the wronged person is liable for the original consideration. If *A* gives *B* his promissory note for one hundred dollars ($100.00) with interest at 6%, and *B* carelessly, but not fraudulently, writes 8% thereon instead of 6%, *B* cannot recover on the note at all. But he can recover from *A* one hundred dollars ($100.00) with interest at 6% on the debt for which the note was given. Any alteration of a negotiable instrument which changes the liability of the parties thereto, amounts to a material alteration. Changes in the rate of interest, the name of an indorser, the date, the place, time or manner of payment is a material alteration and renders the instrument void. If the alteration is made by a stranger, a person not a party to the instrument, it does not constitute a material alteration. The instrument may be restored to its proper form and recovery be had thereon.

143. Fraud and Duress. Fraud has been defined to be "a false representation of a material fact, made with knowledge of its falsity or in reckless disregard whether it be true or false, with the intention that it should be relied upon by the complaining party, and actually inducing him to rely and act upon it." Fraud is a defense to a party to a negotiable instrument as against the person inducing it, but not as against subsequent innocent purchasers. *A* offers to sell *B* a diamond ring for five hundred dollars ($500.00) assuring him that the diamond is genuine. Relying upon this false statement of *A*, *B* takes the ring and gives *A* his promissory note for five hundred dollars ($500.00) payable to *A's* order. The ring proves

to be paste. *A* cannot recover on the note from *B*. If, however, before it is due, *A* sells the note to *C*, who pays value for it without notice of the fraud, *C* can force *B* to pay the note.

Duress is actual or threatened violence sufficient under the circumstances to compel a person to act against his wishes. In connection with negotiable instruments, duress is treated as the same kind of a defense as fraud. It is a complete defense as against the guilty party, but is not available as against an innocent purchaser.

144. **Lost or Stolen Negotiable Instruments.** The primary function of negotiable instruments is to circulate like money. If a negotiable instrument is indorsed in blank, or made payable to bearer, it may circulate without further indorsement. If such a negotiable instrument is lost or stolen, and purchased before maturity by an innocent party, the maker is liable thereon. For example, if *A* makes a promissory note payable to bearer, and it is stolen by *B* from *A's* possession, and sold for value to *C*, an innocent party, *C* may collect the note from *A*. If *A* makes a promissory note payable to the order of *B*, and *B* indorses it in blank, that is, writes his name only, on the back thereof, and it is stolen from *B's* possession by *C* and sold by *C* to *D*, who purchases it innocently and for value, *D* may collect the note from *A*. This is the principal distinction between negotiable instruments and ordinary contracts. If the thief changes the instrument in any material way, or is obliged to forge someone's name to pass it, this constitutes a forgery and no recovery can be had thereon.

145. **Real and Personal Defenses to Negotiable Instruments.** Defenses to negotiable instruments are usually classified as *real* and *personal*. If they are good only against a particular person, they are said to be personal. If they are good as against everyone, they are said to be real. If the instrument is forged, given by an infant, a person under legal age, is illegal—for example given for a gambling contract made illegal by statute—or has been materially altered, it is void, regardless of who holds it. These defenses are called real defenses. If the instrument is lost or stolen, and purchased by an innocent party, if given by reason of duress or fraud, or if there is no consideration, the defense is good only as against the guilty party. These defenses are called personal defenses.

146. **Consideration.** A consideration is usually defined to be something beneficial to the party making a promise, or something

detrimental to the party to whom a promise is made. Every ordinary contract must be supported by a consideration. Negotiable instruments differ from ordinary contracts in that they are made to circulate like money. In order that they may circulate like money the maker is not permitted in some instances, to assert that the instrument lacks consideration. As between the immediate parties to a negotiable instrument, there must be a consideration. The maker may successfully defend against an action based thereon for this reason. If, however, the instrument has passed before due, to an innocent purchaser for value, the maker cannot refuse payment on the ground of no consideration. In case of a negotiable instrument, consideration is presumed. Consideration need not be stated in the instrument. It amounts to a defense, only as between immediate parties. If *A* gives *B* his promissory note payable to *B's* order, with the understanding that *B* is not to use the note, but is to show it to *C*, his grocer, for the purpose of obtaining credit, and *B* endeavors to collect the note from *A*, *A* may successfully defend on the ground of no consideration. If, however, *B* sells the note to *D* before it is due, and for value, *D*, not knowing there is no consideration, can collect the note from *A*.

147. **Presentment and Acceptance of Drafts.** Drafts payable at sight, or after sight, must be presented to the drawee for acceptance. This is for the reason that the time of payment of such drafts is uncertain. If a draft of which presentment is necessary, is not presented for acceptance, the drawer and indorsers are discharged. Presentment for acceptance must be made to the acceptor within a reasonable time after receipt by the payee or indorsee. What consitutes reasonable time for presentment depends upon the circumstances connected with each particular case. Presentment for acceptance is made by exhibiting the bill for acceptance to the person upon whom it is drawn. Presentment for acceptance may be made by the payee, or his indorsee, and may be made to the drawee, his authorized agent or legal representative. Presentment may be made either at the person's place of business, or at his residence. If made at his place of business, it must be made during business hours. It cannot lawfully be made after noon on Saturdays, nor can it be made on Sundays or legal holidays. Acceptance may be indicated by writing *accepted* or words to that effect on the bill, by a separate writing to that effect, or by oral agreement of the drawee. If the bill

contains a stipulation not requiring acceptance, this is called *waiver of acceptance*, and the bill need not be presented for acceptance. If acceptance is refused, or not made for any reason, anyone may accept the bill. This is called acceptance for honor, or acceptance *supra protest*. The liability of an acceptor for honor is that if the bill is presented to the drawee at maturity for payment and refused, and notice thereof given the acceptor for honor, the latter will pay it.

A bill or draft payable at a definite time or date need not be presented for acceptance. For example, if a bill is drawn payable December 23, 1909, it need not be presented for acceptance. The time of payment is certain, and if presented for payment on December 23, and dishonored, notice of non-payment to the drawer and prior indorsers is sufficient to enable the payee to hold them liable. If, however, the bill is payable at sight, or three days after sight, or any time after sight, it must be presented for acceptance to fix the date of maturity, If a bill is not paid by the acceptor after acceptance, notice must be given the drawer and prior indorsers by the holder, to enable him to hold the drawer and prior indorsers liable. This is sufficient in case of an inland bill. In case of a foreign bill, one drawn on a person, or made payable to a person in another state or country from the drawee, formal protest must he made in case of non-payment or non-acceptance. Protest is a formal act of a notary public. This is explained under a separate section.

148. Time of Payment and Days of Grace. A negotiable instrument is payable at the time mentioned in the instrument. If a negotiable instrument is payable a stipulated time after date, and the instrument bears no date, its date is the time it was delivered. The term month, is held to mean calendar month, and not a certain number of days. If a note is dated February 6th, and is payable one month after date, it matures March 6th. When a negotiable instrument is payable a specified number of days after date, the time is counted by excluding the day on which the instrument is given, and including the final day stipulated. Negotiable instruments may be made payable on demand of the payee or holder. Such paper is payable at the option of the holder. It is sometimes called paper payable *on call*. Negotiable instruments may be made payable on or before a certain day. These instruments are valid negotiable instruments. They really mature at the day fixed in the instrument,

but may be paid at any time after delivery at the option of the payee or holder. According to the Law Merchant, three days were allowed the party liable on a bill or note to make payment, in addition to the time fixed for payment. These were called *days of grace*. In the majority of the states, days of grace have been abolished by statute. When not abolished by statute, days of grace are still allowed.

149. Innocent Purchaser for Value Without Notice. The feature that distinguishes negotiable instruments from ordinary contracts is that negotiable instruments may be transferred in such a manner that the transferee receives the instrument free from certain defenses which are good against the transferror. For example, one who purchases another's rights under an ordinary contract takes the exact position of the transferror. Any defenses good against the seller are good against the purchaser. However, a purchaser for value before maturity of negotiable instrument, who has no notice of any defenses to the instrument, takes it free from all but real defenses. Real defenses are *infancy of the maker, forgery, material alteration*, and *illegality*. But such a defense as fraud, want of consideration, duress, or any except a real defense is not available against an innocent purchaser for value without notice. An innocent purchaser for value without notice, of a negotiable instrument, is also called a *bona fide* holder, or a holder in due course. A person who purchases a negotiable instrument showing defects or defenses on its face, cannot claim to be a *bona fide* holder. A person who purchases negotiable instruments after maturity, takes them subject to all defenses good against the seller. Such a purchaser is not a *bona fide* holder.

150. Presentment for Payment of Negotiable Instruments. So far as the maker or acceptor of negotiable instruments is concerned, in the absence of a place for payment stipulated in the instrument, a negotiable instrument does not have to be presented for payment. As a matter of practice, however, negotiableinst ruments are presented to the maker and acceptor at their places of business or at their residences for payment at maturity. In order to hold indorsers, however, a negotiable instrument must be presented to the maker or acceptor at maturity, and, in case of failure to pay, notice must be given indorsers, else they are relieved from liability. When a place for payment is specified in a negotiable instrument, presentment at

that place is sufficient. When no place of payment is designated in the instrument, presentment to the maker or acceptor personally, wherever he may be found, or at his residence or place of business is sufficient.

151. Notice of Dishonor and Protest. When a negotiable instrument has been presented to a maker or acceptor for payment, and payment has been refused, the holder should notify the drawer, if the instrument is a bill of exchange or draft, and the indorsers, no matter what the form of the negotiable instrument, of the fact of dishonor. If such notice is not given, the acceptor or indorsers are discharged from liabilty. This notice should be given by the holder of the paper, or his agent, within a reasonable length of time after dishonor. The notice may be given by a verbal notification, by the delivery of written message, or by mailing notice to the residence or place of business of the indorsers or drawer. Everyone whom a holder desires to hold liable, must be notified in case of dishonor. If a drawer of a bill or an indorser of a note waives notice of dishonor by so stipulating in the instrument, notice as to them is unnecessary. In case of an inland bill, mere notice in writing mailed to their usual address, or actual notice is sufficient. By inland bill is meant one made payable, or to be accepted in the same state or country where drawn. In case of a foreign bill of exchange, or one made payable, or to be accepted, in a state or country other than where made or drawn, notice of dishonor must be by protest. This is true of notice to the drawer for failure of a drawee to accept, as well as for failure of an acceptor to pay. Protest is a formal declaration of a notary public, an officer recognized by all countries as authorized to administer oaths. Technically, only bills of exchange need be protested. By practice, however, promissory notes and checks are protested as well.

152. Certificate of Protest. The following is a common form of protest:

State of Ohio }
Cuyahoga Co. } ss

I, John Arthur, a notary public, having been duly appointed and sworn, and residing at Cleveland, Cuyahoga Co., Ohio, do certify that on the 10th day of December 1909, I presented the annexed promissory note for payment at the City Trust Co., where same is made payable, and that I did this at the request of the State Trust Co., and that payment was refused.

I further certify that I did protest, and I do now publicly protest against the maker, indorsers, and all others concerned, for all costs and damages connected with the failure to pay this instrument. I certify that I am not interested in any way in this instrument. I further certify that I have this day deposited in the Post Office at Cleveland, Ohio, notices of this protest, signed by me as notary public, and addressed to the following persons. (Names and addresses of persons connected with the instrument.) In testimony whereof I have hereto affixed my signature and seal of my office, this 10th day of Dec., 1909.

John Arthur,
Notary Public.

Notary
Seal.

QUIZ QUESTIONS

PARTNERSHIPS

1. May a party do business under a name other than his own?
2. If a party uses a trade name does this constitute a partnership?
3. Define partnership, and give an example of an agreement constituting a partnership.
4. How many persons may engage in a single partnership enterprise?
5. Give the principal features of the partnership relation.
6. How is a partnership created?
7. May partnerships be created by oral agreement? If so, give an example of an oral partnership agreement.
8. Must any kind of partnership agreement be in writing? If so, give an example.
9. What is meant by partnership by estoppel?
10. Give an example of an executory partnership agreement.
11. What classes of persons may legally become partners?
12. May an infant become a partner?
13. *A*, aged twenty-two years, enters into a partnership with *B*, aged seventeen. May *A* avoid a contract of the partnership made with *C*, a third person, on account of the infancy of *B*?
14. Give an example of an infant ratifying a partnership agreement.
15. Can drunken or insane persons enter into partnerships?

16. What names are partners entitled to take as partnership names?

17. Can a partnership take the name of another partnership? If not, why not?

18. Can a partnership take a name which does not suggest the name of any of the partners interested?

19. Can a partnership ever have more than one name? If so, under what circumstances?

20. Give, and define the names applied to different kinds of partners.

21. Distinguish *silent partners* and *secret partners.*

22. May a partnership exist as between the partners, and not exist as to third persons trading with the partnership?

23. May a partnership exist as to third persons dealing with an apparent partnership, while none exists between the apparent partners themselves? If so, give an example.

24. State what constitutes a partnership as to third persons dealing with a partnership.

25. What are the powers of a partnership?

26. Of what may the property of a partnership consist?

27. May a partnership make and own promissory notes?

28. What constitutes holding a person out as a partner?

29. What is the liability of a person held out as a partner?

30. Can a person be liable as a partner who is held out as a partner without his knowledge or consent?

31. What are the duties of partners to each other?

32. Can one partner sue his partner at law?

33. If one partner dishonestly takes possession of partnership assets, how may his partner get legal relief?

34. What is meant by *joint liability* of partners?

35. What is meant by *liability in solido?*

36. What is partnership liability to third persons?

37. Is the individual property of members of the partnership liable to be subjected to the payment of partnership claims?

38. When, if at all, can the property of individual partners be subjected to the payment of judgments against the partnership before the property of the partnership has been exhausted?

39. What is the individual liability of the members of a partnership for the partnership debts?

40. What effect, if any, does change of membership have upon a partnership?

41. Does the addition of a new member dissolve a partnership?

42. Does withdrawal of a member discharge a partnership?

43. What effect, if any, does death of a partner have upon a partnership?

44. Define *survivorship.*

45. What are the rights and duties of survivors of a partnership?

46. In what ways may a partnership be dissolved?

47. In what cases must notice of dissolution of partnership be given?

48. How, and to whom must notice of dissolution of partnership be given?

49. Upon dissolution of a partnership what part of the firm assets belongs to firm creditors, and what part of individual assets belongs to individual creditors?

50. In case a partnership is insolvent, and there is no living solvent partner, what rights have firm creditors in the assets of the individual partners as compared with individual creditors?

51. Define and describe *limited partnership.*

52. What is the principal distinction between limited and general partnership?

53. Define *special partner* as used in connection with limited partnerships.

CORPORATIONS

1. Define *corporation.*

2. May an association of persons create a corporation by agreement?

3. Is a corporation a natural person?

4. How were corporations originally created?

5. How are corporations created at the present time?

6. Distinguish the creation of a corporation and the creation of a partnership.

7. For what purpose may a corporation be created?
8. What is the franchise of a corporation?
9. Is a partnership distinct from the members composing it?
10. Is a corporation dissolved by a change of membership?
11. When does a partnership cease to exist?
12. Are the members of a corporation agents of the corporation?
13. Who are the authorized agents of a partnership?
14. What are the powers of a corporation?
15. Enumerate the ordinary powers of a corporation.
16. Is the charter of a corporation a contract?
17. May a charter of a corporation be revoked at the will of the legislature that granted it?
18. How are corporations created?
19. What is meant by a *corporation's charter?*
20. What kinds of corporations, if any, may be organized under United States laws?
21. By what authority are national banks organized?
22. Under what provisions are most corporations organized?
23. Under what conditions may corporate charters be revoked?
24. State briefly the necessary steps in organizing a corporation.
25. Must a corporation have a corporate name?
26. May a corporation change its name?
27. May two corporations use the same name?
28. May a corporation appropriate a name descriptive of an article manufactured?
29. Give an example of a name a corporation is not permitted to appropriate.
30. Classify corporations.
31. Define and distinguish *private corporations* and *public corporations.*
32. Give an example of a public corporation; a private corporation.
33. Is a street railway company a private or public corporation?
34. When does a corporation's existence commence?
35. What determines when a corporation's existence commences?
36. Define *estoppel.*

37. Give an example of a corporation estoppel from denying its corporate existence.

38. Are third persons ever estopped from denying a corporation's legal existence? If so, give an example.

39. Is a corporation's charter a contract?

40. If a corporation's charter is a contract, who are the contracting parties?

41. At the present time can a corporation obtain an irrevocable charter?

42. Define *de facto corporation.*

43. Define *de jure corporation.*

44. Can a *de facto* corporation avoid its liabilities on the ground of incomplete organization?

45. Who can object to a *de facto* corporation being incompletely organized?

46. What is necessary to creat a *de facto* corporation?

47. Define *promoter.*

48. Is a promoter personally liable for the obligations made by himself in connection with organizing a corporation?

49. Is a corporation responsible for the obligations created by its promoter?

50. How, if at all, may a corporation adopt the obligations of its promoters?

51. May a corporation be reorganized by consent of its members?

52. Is a reorganized corporation a new corporation, or a continuation of the old corporation?

53. Is a reorganized corporation ever liable for the obligations of the old corporation?

54. May a reorganized corporation ever escape the obligations of the old corporation?

55. How, if at all, may corporations consolidate?

56. Is a consolidated corporation distinct from the corporation from which it is formed?

57. May corporations consolidate by consent of the members of each?

58. Is a consolidated corporation liable for the debts of its component corporations?

59. What is the *governing board* of a corporation for profit called?

60. How are directors elected?

61. How, and under what circumstances and conditions may corporate meetings be held?

62. Who are entitled to vote at corporate meetings?

63. May a member of a corporation ever have more than one vote?

64. What is meant by *cumulative voting?*

65. What is meant by *ticket voting?*

66. Define *quorum.*

67. What constitutes a quorum?

68. Must a member of a corporation be present to have his shares of stock voted?

69. How, if at all, may a shareholder vote by proxy?

70. Who are members of a corporation?

71. Is a stockholder personally liable for the debts of the corporation?

72. What is the liability of a shareholder in a national bank?

73. What is meant by stockholder's double liability?

74. How may a person become a stockholder in a corporation?

75. What is a certificate of stock?

76. May a person become a stockholder without having a certificate of stock?

77. May a person hold a certificate of stock and not be a stockholder?

78. Must directors of a corporation be stockholders?

79. How, if at all, is the authority of the board of directors limited?

80. What are the principal duties of directors?

81. May a board of directors dispose of the entire assets of the corporation?

82. May directors act for their own private interests in dealing with the corporation?

83. May a director ever contract with the corporation?

84. Define *by-laws, rules,* and *regulations.*

85. Distinguish by-laws and resolutions.

86. Define *capitalization.*

87. Distinguish capitalization from assets of a corporation.

88. Define *capital stock*.

89. May a corporation sell its shares for less than par?

90. Distinguish par value and face value of stock.

91. If a corporation sells a shareholder stock at 5% of its par value, and the corporation is solvent, who, if any one, may object?

92. Must shares be paid for in money?

93. If a person purchases shares from a stockholder at less than par, not knowing that the shares have not been paid for in full, is he liable to the corporation for the balance of their par value?

94. Define *call* and *assessment*.

95. May an assessment be made before a call?

96. May an assessment be made on stock paid for at par?

97. Define and give an example of *watered stock*.

98. Upon what authority may the capital stock of a corporation be increased or decreased?

99. What is a *stock dividend?*

100. How many kinds of stock are there?

101. Define preferred stock, and distinguish it from common stock.

102. Do preferred stockholders have any advantage over common stockholders when the affairs of the corporation are wound up, and its assets distributed?

103. How may dividends be paid?

104. May a stockholder force the corporation to pay a dividend?

105. When, if at all, are dividends debts of the corporation?

106. Are certificates of stock negotiable instruments?

107. Distinguish certificates of stock from regular negotiable instruments.

108. How are transfers of stock made by the corporation?

109. What, if any, is the individual liability of a stockholder for the debts of the company?

110. What ownership, if any, does a stockholder have in the property of the corporation?

111. Can a corporation transact business without the aid of officers and agents?

112. How are the officers of a corporation appointed?

113. What are the usual officers of a corporation?

114. What are the duties of the president of a corporation?

115. May the officers of a corporation ever act without the express authority of the board of directors?

116. What is the proper corporate signature to a contract?

117. What is the proper corporate signature to a negotiable instrument?

118. Can a corporation legally sign a contract without using its seal?

119. Define *ultra vires.*

120. Give an example of an *ultra vires act.*

121. Are third persons deemed to have notice of the powers and limitations of a corporation.

122. Does a corporation have any rights outside the state of its creator?

123. What kind of corporations, if any, are authorized by the United States Constitution to transact business in any state?

124. What are the general provisions of the states regulating foreign corporations?

125. Explain the meaning of the term *doing business* as applied to foreign corporations.

126. Is a corporation liable for its torts and crimes.

127. How, if at all, can a corporation be punished?

128. What is meant by *dissolution of a corporation?*

129. How can a corporation be dissolved?

130. Can a corporation be dissolved by consent of its members?

NEGOTIABLE INSTRUMENTS

1. Name some of the most common forms of negotiable instruments.

2. What is a *negotiable instrument?*

3. What advantages do negotiable instruments have over money for commercial uses?

4. Define *negotiability.*

5. Are all promissory notes negotiable instruments?

6. What words are necessary to make an instrument negotiable?

7. May an instrument be negotiable without containing the words *or order,* or *or bearer?*

8. What kind of negotiable instrument, if any, can be transferred without indorsement?

9. Define *assignment.*

10 Can negotiable instruments be assigned?

11. Distinguish assignability from negotiability.

12. What is meant by the *law merchant?*

13. How do we happen to recognize the rules of the law merchant?

14. When was the law merchant first recognized in England?

15 To what classes of negotiable instruments were the rules of the law merchant originally applied?

16. To what classes of negotiable instruments are the rules of the law merchant now applied?

17 Define *promissory note.*

18. Name the parties to a promissory note.

19. Give the essential features of a promissory note.

20. Must a promissory note be dated?

21. Distinguish drafts and bills of exchange.

22. Give the names of the parties to a bill of exchange.

23. How is a bill of exchange accepted?

24. What is a *check?*

25. How does a check differ from a bill of exchange?

26. Are days of grace allowed in the payment of checks?

27. What is certification of a check?

28. What effect does certification of a check at the request of the payee have upon the maker?

29. Are bonds negotiable instruments?

30. What are *registered bonds?*

31. What are *coupon bonds?*

32. What are *trust deeds?*

33. What are *collateral notes?*

34. Are collateral notes negotiable?

35. By whom are collateral notes commonly used?

36. What is a *cognovit note?*

37. How does a cognovit note differ from an ordinary note?

38. Define *certificate of deposit.*

39. How does a certificate of deposit differ from a check?

40. Is a bank liable upon its certificates of deposit?

41. Give the requisites of a negotiable instrument.

42. Does every negotiable instrument require a payee?

43. May a negotiable instrument be signed by mark?

44. Is an "I. O. U." a negotiable instrument?

45. Name the necessary parties to a negotiable instrument.

46. How does a second indorser differ from a first indorser?

47. What is the liability of a drawer of a bill of exchange?

48. Distinguish *foreign bills of exchange* and *inland bills of exchange.*

49. What kinds of bills of exchange must be protested?

50. Distinguish between *drawee* and *acceptor.*

51. What is the liability of an acceptor?

52. How may a bill of exchange be accepted?

53. What is a qualified acceptance?

54. In case of a qualified acceptance, if the acceptor fails to pay the draft at maturity is the drawer liable?

55. What is the liability of a maker of a promissory note?

56. If a note is made payable at a bank, and is not presented at the bank at maturity, is the maker discharged?

57. Define *indorsement.*

58. Define *blank indorsement.*

59. What is the difference as to transferability between a note payable to bearer and one indorsed in blank?

60. Define *allonge.*

61. Define *indorsement* in full.

62. Distinguish between the liability of one who indorses in blank and one who indorses in full.

63. If a note indorsed in blank, is subsequently indorsed in full, can it be transferred by delivery without the indorsement of the indorsee in full?

64. Define and explain indorsement without recourse.

65. What is the liability, if any, of an indorser in full?

66. Does an indorsement for collection destroy the negotiability of a note?

67. What is the purpose of an indorsement for collection?

68. Give an example of an anomalous indorser.

69. What is the difference between an anomalous indorser and an indorser outside the chain of title.

70. In most jurisdictions what is the liability of an anomalous indorser?

71. In general, what is the liability of an indorser?

72. Define *indorser.*

73. What are the warranties of an indorser?

74. Are the warranties of an indorser express or implied?

75. Define *forgery.*

76. Does forgery render a negotiable instrument void or voidable?

77. Distinguish between forgery and material alteration.

78. If a note is materially altered by a stranger is it void?

79. Define *fraud.*

80. Distinguish fraud and duress.

81. Are fraud and duress good defenses as against a *bonâ fide* holder.

82. If a forged note is lost or stolen can it be collected?

83. If a note procured through fraud is lost or stolen can it be collected by an innocent holder?

84. Define *real defense* to a negotiable instrument.

85. What is meant by *personal defense?*

86. Enumerate the real defenses to a negotiable instrument.

87. Enumerate the personal defenses to a negotiable instrument.

88. Define *consideration.*

89. Must consideration be stated in a negotiable instrument?

90. What kind of drafts must be presented for acceptance?

91. How are drafts presented for acceptance?

92. What must a holder do if a draft is dishonored?

93. Define *protest.*

94. When must negotiable instruments be paid?

95. What are days of grace?

96. Do most jurisdictions recognize days of grace at the present time?

97. Define *innocent purchaser for value without notice.*

98. Define *bonâ fide holder.*

99. Define *holder in due course.*

100 Distinguish *bonâ fide* holder and assignee of a negotiable instrument.

101. Can a person be a *bonâ fide* holder of a note who purchases it after it is due?

102. For what purpose must a negotiable instrument be presented for payment?

103. Can indorsers of a negotiable instrument be held if the note is not presented for payment?

104. How is a negotiable instrument presented for payment?

105. Explain notice of dishonor.

106. What is the necessity of giving notice of dishonor?

107. How is notice of dishonor given?

108. What is a certificate of protest?

COMMERCIAL LAW

PART III

BANKING, LOANS, MONEY AND CREDITS

153. Banks Defined and Classified. A bank may be defined to be an institution authorized to receive money for deposit, to make loans, and to issue its promissory notes payable to bearer. A bank may have any one, or all of the above enumerated powers. Some banks have powers in addition to those above enumerated. In the absence of prohibiting statute, any person may operate a private bank. The states generally have statutes authorizing the creation and regulation of banks. At the present time, most banks are incorporated companies.

As to the source of their existence, banks may be said to be *national* and *state*. National banks are organized under United States statutes regulating their creation and existence. National banks are discussed more at length under a separate section. All banks other than national are created under state laws, and are called state banks.

As to their nature, banks are generally divided into three kinds, *banks of deposit, banks of circulation* and *banks of discount*. Banks authorized to receive money for safe keeping are banks of deposit. Banks authorized to purchase commercial paper by charging interest in advance are banks of discount. Banks authorized to issue their own promissory notes payable to bearer, and actually issuing such notes, are banks of circulation. A single bank may be a bank of discount, of circulation, and of deposit, or it may be a bank of discount, of circulation or of deposit. The ordinary savings bank is a common example of a bank of deposit. A national bank issuing its notes is a common example of a bank of circulation. A national bank usually purchases notes for less than their face value, or makes loans upon notes deducting its interest in advance, making it also a bank of discount.

154 Functions and Powers of Banks. At the present time most banks are incorporated companies. Their authority to exist is given them by the state. Their powers are limited by the provisions of their charter. This question is discussed at length in the section on *corporations*. A bank cannot engage in business outside the provisions of its charter. Incorporated banks are permitted to pass by-laws by which their functions may the more readily be carried out, and by which the duties of their agents are restricted or defined. Reasonable by-laws, if brought to the notice of third persons, also well recognized customs and usages, bind third persons in their dealing with banks. Ordinarily, banks have the power to borrow money, but do not have the power to deal in real estate. National banks have no power to loan money on real estate, but they are permitted to take real estate mortgages to prevent losses on loans already made. A bank may also purchase real estate sufficient for the construction of a banking building. Banks have the power to collect their own paper, and to act as agents for persons and banks in collecting their paper. The ordinary functions and powers of banks are discussed under separate sections.

155. Deposits. The primary function of a bank is to receive money from third persons and to loan money to third persons. Money received from third persons is money received on deposit. Banks cannot be compelled to receive money for deposit from anyone. They are permitted to exercise their discretion and reject such deposits as they choose. The ordinary method of making deposits is by delivery of currency consisting of gold, silver, copper, and nickel coin, bank notes and checks to an agent of the bank. The agent authorized to receive deposits is usually called the *receiving teller*. Deposits are usually entered by the receiving teller in the customer's pass book. In commercial banks, deposits are ordinarily withdrawn by check, without presenting the pass book. Savings banks ordinarily do not permit their customers to use checks, but require them to present their pass books when drawing money. The amount withdrawn is entered in the pass book, and the balance brought down. When money is deposited generally, the bank has the right to mingle it with its own funds. It then becomes the debtor of the depositor in the amount of the deposit. If a fund is deposited with a bank for a special purpose, and the bank is so notified, or if papers, such as securities,

bonds and certificates of stock are deposited for safe keeping only, they are known as *special deposits* and are not mingled with the general funds. Subject to the reasonable rules of the bank, a general deposit is subject to withdrawal at the will of the depositor.

156. Checks. A check is a written order upon a bank for the payment of a specified sum of money payable upon demand. Commercial banks generally do a checking business. Some banks, such as savings banks, do not permit depositors to draw checks against their deposits. Savings banks not doing a checking business, usually require their depositors to present their pass books when drawing money. Even though written orders are given to third persons, the pass book must be presented by the third person to enable him to obtain the money on the order. In case of banks which do a checking business, the depositor is permitted to draw checks in any amount, payable to any person. The bank must honor these checks so long as the maker's deposit is sufficient to pay them, and the person presenting them is properly identified. Upon payment of a check, the bank keeps it and deducts the amount from the maker's deposit. These paid checks, or vouchers, are usually returned by the bank to the customer, every thirty days, with a statement of his account. The customer then examines these checks and compares them with his books, and the bank's balance with his balance, for the purpose of discovering errors.

A check is payable on demand and should be presented for payment within a reasonable time after receipt. If the receiver lives in the same place as the maker, the check should be presented during the business hours of that day. If the receiver resides in a distant place, the check should be presented as soon as possible under the circumstances. As long as the bank has funds of the maker, it must honor his checks. If the bank has some funds of the maker, but not sufficient to pay the check presented, it should refuse to pay anything thereon. If the bank refuses to honor a check when the maker has sufficient funds to meet it, the bank is liable at the suit of the depositor, for any damages suffered.

Receiving a check does not of itself extinguish the debt. The taker of the check may present it for payment, and if payment is refused by the bank, and the maker is notified promptly, the taker may sue the maker on the check, or on the debt for which the check

was given. Certified checks are discussed under the section on *negotiable instruments.*

157. Loans and Credits. One of the primary functions of banks is to make loans. Different kinds of banks are authorized to make different kinds of loans. Savings banks generally are authorized to make loans on real estate. National banks are not permitted to loan on real estate. Banks ordinarily are permitted to discount notes. By discounting promissory notes is meant purchasing them at a sum less than their face value, partially, at least, on the credit of the seller. Banks are not permitted to discount notes at usurious rates of interest. Banks are restricted by their corporate charters as to the nature of the loans they can make.

Credit is the term applied to a present benefit obtained for an agreement to do something in the future. A person's credit depends largely upon his business reputation and assets. Companies called mercantile agencies are organized for the sole purpose of furnishing credit information. These companies publish books giving the trade records and estimated assets of business men in the various cities and towns of the different states. These books are sold to wholesalers, or to anyone desiring credit information. Companies also employ men to obtain and furnish special reports on people's assets and business reputation. The bulk of business is done on credit. Compared with the total business transacted, a small amount is done for cash. Credit is an important part of a business man's capital.

158. Rights and Obligations of Banks in Case of Forged, Lost, or Stolen Checks. Forgery or material alteration of a negotiable instrument renders it void. Banks are authorized by depositors drawing checks to pay valid checks, but not forged ones. Ordinarily, a bank must stand the loss if it pays a forged check. The only exception is in case the depositor has so carelessly drawn the check that it can be forged without the bank being able to discover the forgery by the exercise of due care. Most jurisdictions also hold that a depositor must examine his returned checks within a reasonable time after their return by the bank. If a forgery is not reported within a reasonable time after the return of the check by the bank, the check is presumed to be genuine, and the depositor cannot thereafter complain. Where a check is payable to bearer, or payable to order, and indorsed in blank by the payee, making it payable to bearer, and is lost or stolen,

an innocent party purchasing it from the finder or thief gets good title to it. Such paper circulates like money without further indorsement. A bank in paying such a check to a *bona fide* holder who takes it from a thief or finder without notice of its having been lost or stolen, is not liable to the maker for the loss.

159. National Banks. The constitution of the United States does not expressly give Congress the power to create national banks but it gives Congress the power to collect taxes, duties and imports, to borrow and coin money and to make all loans necessary to carry into execution the powers expressly given. To carry into effect the powers given relating to money, Congress is deemed to have the power to create national banks. Congress has passed laws under which national banks may be organized by associations consisting of not less than five natural persons who are required to sign and file articles with the comptroller of currency at Washington, D. C., which articles shall specify the name of the proposed bank, its place of operation, its capital, the names and residences of its shareholders, and the number of shares held by each. National banks may be organized with a capital of not less than twenty-five thousand dollars ($25,000.00) in cities whose population does not exceed three thousand, and with a capital of not less than fifty thousand dollars ($50,000.00) in places whose population does not exceed six thousand inhabitants, and with a capital of one hundred thousand dollars ($100,000.00) in places whose population does not exceed fifty thousand inhabitants, and with a capital of not less than two hundred and fifty thousand dollars ($250,000.00) in places exceeding fifty thousand inhabitants.

Before commencing business, national banks are required to transfer and deliver to the treasurer of the United States, United States registered bonds*, in amount not less than thirty thousand dollars ($30,000.00), and not less than one third the paid-in capital stock. Upon making such a deposit of bonds, the comptroller of currency is authorized to issue to the bank, notes of the bank in different denominations, equal to the par value of the bonds deposited. These are the only circulating notes national banks are authorized to use. The comptroller of currency is authorized to replace worn notes or returned notes, proof of the destruction of which is furnished. National banks in the seventeen largest cities of the United States are

*By the Federal Reserve Act of December 23, 1913, this regulation has been made optional.

required to keep on hand, money equal to 25% of their circulating notes and deposits. National banks of all other places are required to keep on hand, money equal to 15% of their circulating notes and deposits. National banks are not permitted to make loans on real estate or on their own stock, except to protect loans already made. In case of insolvency of a national bank, the stockholders are liable in an amount equal to the par value of their stock, in addition to their liability to pay the par value of their stock subscriptions. The shareholders having legal title to the stock at the time of insolvency of the bank are the ones liable for the additional liability. National banks may charge the rate of interest authorized by statute of the state where the bank is located. If unlawful interest, called *usury,* is charged, the bank forfeits the entire interest. If the usurious interest has been paid by the borrower, double the amount of the usury may be recovered from the bank by the borrower.

National banks are authorized to buy drafts and notes, to discount commercial paper, to borrow and loan money, to deal in government bonds, to loan money on collateral, but not to guarantee or indorse commercial paper, except in the transaction of their legitimate business. They are permitted to discount or purchase bills and notes, but not to charge more than the legal rate of interest, even though the paper is purchased. They may charge reasonable rates for exchange in addition to interest.

160. Savings Bank and Trust Companies. All banks other than national are organized under state laws, and are known as *state banks.* The most common kinds of state banks are savings banks and trust companies. Savings banks ordinarily receive money for safe keeping, acknowledging receipt by entering deposits in a pass book which the depositor presents upon making deposits, and upon withdrawal of funds. Upon drawing funds, the amount is deducted from the balance shown in the pass book and the balance brought down. Savings banks ordinarily do not permit depositors to draw checks against their accounts. They are required to present their pass books in person, or to give them to an agent or payee designated in a written order to be presented in withdrawing deposits. If pass books are lost, savings banks are not obliged to pay deposits unless indemnified against loss by the depositor. Savings banks are permitted to make loans on real estate.

Trust companies usually have all the power of savings banks with the added power to act in trust capacities as trustees of estates and for bond holders, as executors, etc. They usually do a checking business for the accommodation of their depositors.

161. Clearing Houses. A clearing house is an association of banks of a certain locality, usually of a city, organized for the convenience of its members in making settlements with each other. As a matter of practice, holders of checks do not personally present them for payment at the banks on which they are drawn, but deposit them with the bank with which they do business. These banks collect them from the banks on which they are drawn. Each day, a city bank has deposited with it a large number of checks drawn on other banks of the same city. It would involve much labor to present these checks for payment on the banks on which they are drawn, and secure currency or checks therefor. For convenience, banks organize clearing houses for the purpose of making daily exchanges, with each other, of checks. If *Bank A* has deposited with it $1,000.00 of checks on *Bank B*, and *Bank B* has deposited with it $1,100.00 of checks on *Bank A*, the agents of the two banks meet at the clearing house, and exchange checks and *Bank A* pays *Bank B* the difference between the total amount of checks exchanged, or $100.00. If the membership of the association consists of twenty-five banks, the principle is the same, the members exchange checks and pay each other the difference in amount. Clearing houses have rules by which members are required to return checks not properly drawn, over-drafts, forged paper, etc. within a certain time to the paying bank, or be precluded from raising objections to the clearing house balance.

162. Money. Ordinarily the term, *money*, is used to designate any medium accepted by a seller from a purchaser in the sale of property. It is the thing that passes current among business men in their dealings with each other. Bank notes, checks, gold and silver, nickel and copper coin, as well as United States certificates, are money. Money is sometimes used to designate legal tender. *Legal tender* is the medium of exchange which creditors are obliged by law to accept in payment of debts. United States notes, except for duties and interest on public debts, and gold certificates are legal tender. Gold coin and silver dollars are legal tender. Subsidiary silver coin, or half dollars, quarters and dimes, in amount not exceeding ten dollars

are legal tender. Nickels and pennies are legal tender in amount not exceeding twenty-five cents. Silver certificates and national bank notes are not legal tender.

163. Discount. *Discount* is money paid in advance for the use of money. It is interest paid in advance. One of the primary functions of banks is to discount negotiable paper. The states generally have laws fixing the legal and maximum rates of interest. If banks or individuals charge interest in excess of these rules, they subject themselves to the fixed penalties. In connection with usury laws, some confusion has arisen as to what constitutes a purchase and what constitutes a discount. A person is permitted to make contracts and make as large a profit as possible, if no fraud is used. If the contract involves the purchase of a negotiable instrument, as distinguished from a loan of money, he may make as large a profit as he is able. If *X* desires to borrow $100.00 of *Y* and *Y* gives him the money and takes *X*'s promissory note, *Y* can deduct only the lawful rate of interest. If, however, *X* holds *Z's* promissory note indorsed in blank, or payable to bearer, *Y* may purchase the note from *X* for any price he is able, and if he makes half the face value of it by the transaction, it is regarded as a sale, and not as a loan. This transaction does not come within the usury laws. A bank, however, by the weight of authority is not permitted to make purchases of notes in this sense The purchase above described, if made by a bank, would be regarded as usurious. Banks may purchase notes if so authorized by their charter, but may not charge more than the lawful rate of interest as profit.

164. Exchange. *Exchange* is the term applied to methods of cancelling debts and credits between persons of different places. If *X*, in Cleveland, owes *Y*, in New York, $100.00, and *Z*, in New York, owes *X*, in Cleveland, $100.00, it is cheaper and safer for *X* to send *Y* an order on *Z* for $100.00 than to send legal tender from Cleveland to New York. This transaction is called *exchange*. If made between persons of the same country, it is called *domestic* exchange; if between persons of different countries, it is called *foreign* exchange. Banks of one city keep deposits in other cities for the purpose of selling drafts thereon to customers.

165. Interest. *Interest* is the money paid for the use of money. Most states have statutes fixing the rate of interest in transactions

where no rate is specified, and fixing the highest rate that may be agreed upon. The following are the rates of interest in the different states:

States.	Where no rate is agreed upon.	Highest rate that may be agreed upon.
Alabama	8%	8%
Alaska	8%	12%
Arizona	6%	any rate
Arkansas	6%	10%
California	7%	any rate
Colorado	8%	any rate
Connecticut	6%	15%
Delaware	6%	6%
District of Columbia	6%	10%
Florida	8%	10%
Georgia	7%	8%
Idaho	7%	12%
Illinois	5%	7%
Indiana	6%	8%
Iowa	6%	8%
Kansas	6%	10%
Kentucky	6%	6%
Louisiana	5%	8%
Maine	6%	any rate
Maryland	6%	6%
Massachusetts	6%	any rate
Michigan	5%	7%
Minnesota	6%	10%
Mississippi	6%	10%
Missouri	6%	8%
Montana	8%	any rate
Nebraska	7%	10%
Nevada	7%	any rate
New Hampshire	6%	6%
New Jersey	6%	6%
New Mexico	6%	12%
New York	6%	6%
North Carolina	6%	6%
North Dakota	7%	12%
Ohio	6%	8%
Oklahoma	6%	10%
Oregon	6%	10%
Pennsylvania	6%	any rate
Rhode Island	6%	any rate
South Carolina	7%	8%
South Dakota	7%	12%
Tennessee	6%	6%
Texas	6%	10%
Utah	8%	12%
Vermont	6%	6%

States.	Where no rate is agreed upon.	Highest rate that may be agreed upon.
Virginia	6%	6%
Washington	6%	12%
West Virginia	6%	6%
Wisconsin	6%	10%
Wyoming	8%	12%

166. Usury. *Usury* is the term applied to interest charged in excess of the rate allowed by law. The states differ in the rate fixed by statute as the legal rate. The most common penalty fixed by statute of the different states, is forfeiture of all interest.

INSURANCE

167. Insurance Defined. *Insurance* is the name applied to a contract, by the terms of which one party, in consideration of a certain sum of money, agrees to protect another to a certain specified degree against injuries or losses arising from certain perils. The kinds of insurance are almost as numerous as the kinds of perils to which persons or property may be subjected. The nature of insurance contracts are such that legislatures of the states have the power to define what classes of persons may engage in the insurance business. Some states provide by statute that only incorporated companies shall transact the business of writing insurance policies, and that these companies shall be subject to stringent state supervision and inspection. States have the right to stipulate upon what terms foreign insurance companies shall have the right to transact business within their borders, and may exclude them from transacting business if they refuse to comply with such provisions. The United States Constitution provides that interstate commerce shall be under the control of United States Congress. The Supreme Court of the United States has decided that insurance business is not interstate commerce. Therefore the states may determine upon what terms insurance companies may transact business within their territory. Unincorporated companies as well as individuals may engage in the business of writing insurance, if it is not provided otherwise by statute.

168. Nature of Insurance Contract. An insurance policy is a contract requiring competent parties, mutuality, consideration and all the elements necessary to make any kind of a contract. An insurance contract is peculiar in that it binds the insurer to pay damages for losses or injuries arising out of uncertain perils or hazards. It is

in the nature of a gambling transaction. A large number of persons pool a portion of their assets, in order to pay losses of a certain character likely to befall only a small portion of the persons entering into the pool. For example, if ten thousand persons pay one dollar each to establish a common fund to protect the members against losses from fire, they do so under the belief and expectation that but few of the number ever will sustain loss from the peril of fire. An insurance contract is so closely akin to a gambling contract that persons are not permitted to take insurance on property, or upon the lives of persons, unless they have an individual interest, which they should have a purpose or interest in protecting outside of a mere disposition to wager. This interest is called *insurable interest* and is discussed under a separate section. It is true that many kinds of life insurance policies protect against death, and that death is an event certain to occur to the insured, but the real purpose of the policy is to give protection against the uncertainty of the time of death. The uncertainty of the thing sought to be protected against is as great in life insurance as in any kind of insurance.

169. **Parties to Insurance Contracts.** Primarily there are only two parties to an insurance contract, the party to be paid for the loss, in case the event insured against occurs, who is called the *insured*, and the party, who for a consideration agrees to pay an amount certain, or to be determined upon the happening of the uncertain event. This party is called the *insurer* or *underwriter*. In many insurance contracts, a third party is interested. For example, *A* may insure his life in *B Co.*, for the benefit of his wife, *C*. *C* may have nothing to do with the contract except being named as beneficiary thereunder. She pays nothing for this benefit. It is a contract made for her benefit. After she has been made beneficiary, *A* cannot change beneficiaries without the consent of *C*. In case of *C's* death, *A* may voluntarily name another beneficiary. If *A* is indebted to *B*, and *B*, considering *A* insolvent, desires to secure the debt by taking out a policy of insurance on *A's* life in the *C* company, he cannot take out such a policy without the consent of *A*. While a third person may be interested in an insurance contract, or his consent may be necessary before the contract can be made, there are primarily only two parties to the contract, the *insured* and the *insurer*.

170. Kinds of Insurance. Probably the first kind of insurance written was marine. The next kind was fire; this was followed by life insurance, and this in turn, by the many varieties of modern insurance covering almost all kinds of hazards imaginable. The following kinds of insurance are in common use: marine, fire, life, accident, tornado, graveyard, fraternal, fidelity, boiler, credit, guaranty title, plate glass, mutual benefit, employer's liability, hail, hurricane and health. No attempt is here made to discuss all the different kinds of insurance. An endeavor is made to discuss some of the fundamental legal principles connected with the most common kinds of insurance. These principles apply to all kinds of insurance.

171. Insurable Interest. Courts refuse to recognize the validity of insurance contracts, unless the party taking the insurance has a pecuniary interest, present or reasonably expected, in the life or property insured. Such an interest is known in law as an *insurable interest.* Insurable interest cannot be exactly defined. It depends upon the circumstances surrounding each particular case. Some things have been decided by the courts to constitute an insurable interest. Cases are continually arising, however, which present new features which must be decided upon their merits. Insurable interest can only be described, it cannot exactly be defined. It is sometimes said to be a money or pecuniary interest possessed, or reasonably expected, by the party entering into the insurance contract. A father may insure the life of his child, of his wife, or his servant under contract for a period of service. A party cannot, however, insure the life of a person with whom he is in no way connected by close blood relationship, or upon whom he does not depend for present or future support. Such a contract is regarded as a mere wager, which a sound public policy refuses to enforce, or even to recognize as valid. A person may insure a growing crop, and the life of animals owned by him. A mortgagee, mortgager or pledgee of property may insure the property. A creditor may insure the life of his debtor; a person may insure his property against robbery. In fact a person may insure the life of a person or any property belonging to him or to another, the loss of which will cause him a pecuniary loss.

In case of life insurance policies, if there is an insurable interest at the time the insurance contract is made, the policy is valid, even though the insurable interest afterwards ceases. Any relationship,

either by blood or marriage, close enough to make it of pecuniary advantage to the party taking the insurance to have the insured continue to live, is regarded sufficient to constitute an insurable interest. It has been held that a brother has no insurable interest in the life of his brother, nor a granddaughter in the life of her grandfather, nor a son-in-law in the life of his mother-in-law. A parent, however, has an insurable interest in the life of his child or wife; or a granddaughter in the life of her grandfather if she depends upon him for her support. A person may insure his own life or property in favor of any one else. The question of insurable interest arises only in case one endeavors to insure the life of another, or the property of another in which one has only a slight interest.

172. Forms of Insurance Contract. The states generally provide by statute, that to be enforceable, contracts to answer for the debt, default or obligation of another, shall be in writing (See *Statute of Frauds,* chapter on Contracts.) The courts have decided that an insurance contract is not a contract to answer for the debt, default or obligation of another, but a direct contract by which the insurance company for a consideration agrees to pay its own debt in case of loss on the part of the insured. Insurance contracts need not be in writing. Oral contracts of insurance like other simple contracts are binding upon the parties thereto. For example, *A*, representing an insurance company, meets *B*, and agrees orally to insure *B's* house from twelve o'clock of a certain day, and accepts the premium for one year's insurance. The house burns the evening of the day after the insurance is to become effective. *A's* insurance company is bound by the oral contract of insurance. If *A* is not permitted by his company to make oral contracts of insurance, and *A* so tells *B*, or if *B* knows of this fact, the contract is not binding, since *A* acts without authority. If *A* meets *B* on Monday, and orally agrees to procure for him a written policy of insurance on *B's* house to take effect from Monday noon, and *B's* house burns Tuesday morning, *A* having failed to procure the written policy of insurance for *B*, the insurance company is not liable to *B* for the loss. *B* had a contract with *A* by the terms of which *A* promised to procure a policy of insurance for *B*. *A* did not orally promise to insure the house for *B*. *B* has an action for damages against *A*, but not an action on a contract of insurance against the company.

Insurance agents are often authorized to issue receipts, called *binders,* to the effect that insurance has been contracted by a party from a certain time. These binders constitute sufficient evidence to enable the insured to enforce his contract of insurance. Agents are sometimes authorized to enter a memorandum in their books of insurance, called *entries* in their binding books. These constitute sufficient evidence of the formation of a contract between insurer and insured, to enable the latter to enforce his contract in case of loss.

173. Warranties and Representations in Insurance Contracts. The term, *warranty* is commonly used in connection with contracts of sales of personal property, where it is used to designate a collateral contract connected with the principal contract in question. In connection with insurance contracts, it means a statement or stipulation which, by reference or express term, is itself made a part of the contract of insurance. The principal distinction between a warranty in connection with sale of personal property, and in connection with contracts of insurance, is that in the former case, breach of warranty usually does not discharge the contract, but simply gives rise to an action for damages, while in case of contracts of insurance, breach of warranty discharges the contract itself. Life insurance companies generally require formal written application by which the applicant for insurance is required to answer questions. These questions and answers are made a part of the policy or contract of insurance, either by reference, or by incorporation, and become warranties. If they are not true, the policy may be avoided by reason thereof. To constitute a warranty, a stipulation must be made a part of the insurance contract either by direct reference, or by express incorporation therein. To constitute a warranty, the contract of insurance must contain a stipulation that the statement or assertion in question is a warranty. If a warranty proves false, no matter if innocently made, the contract is discharged thereby. Warranties are strictly construed. Much injustice has been done by reason of warranties in insurance contracts.

Some states provide by statute, that neither the application for insurance, nor the rules and regulations of the company shall be considered as warranties unless expressly incorporated in the policy as warranties. A distinction is made between representations and warranties. A representation is a statement made as an inducement to enter into a contract of insurance. It is regarded as one of the pre-

liminaries to the contract of insurance and not as a vital part of the contract itself. If a representation proves not to be true in some particular, the contract of insurance is not discharged by reason thereof. To constitute a ground for avoiding a contract, a representation must be false, fraudulent, and material to the contract. It is sometimes said that a warranty is a stipulation in the contract of insurance itself, and must be complied with whether true or not, while a representation is usually given verbally, or in a separate document, and need only be substantially complied with.

In case of doubt as to whether statements are representations or warranties, courts incline toward treating them as representations. Answers to questions were made in an application for insurance followed by the statement, "The above are true and fair answers to the foregoing questions in which there are no misrepresentations or suppression of facts, and I acknowledge and agree that the above statement shall form the basis of the agreement with the insurance company." The policy of insurance did not state that these questions were incorporated as warranties. In a suit on the policy, the court held the answers to be representations and not warranties.

174. Life, Term, and Tontine Policies. *Life policy* is the term applied to a contract of insurance payable only at the death of the insured. *Term* or *endowment policy* is the term applied to insurance payable at the death of the insured, or at the expiration of a certain term or period of years, if the insured survives such period. The term, *tontine* insurance, is the name applied to insurance paid out of the proceeds of unpaid policies during a certain period or term. If the insured survives the term, and pays the premium he benefits by receiving a share of the proceeds received from the policies of those members who do not survive the period, or who let their policies lapse for other reasons. The term is taken from the name of the person who devised the plan. It is sometimes called *cumulative dividend* insurance. It is written in many different forms.

175. Marine Insurance. Contracts of insurance against injuries to a ship or cargo at sea are called *marine* insurance contracts. This is the oldest form of insurance. In securing insurance of this character, the insured impliedly warrants that the vessel is seaworthy. This is the only kind of insurance in which there is an implied warranty. The term *general average* is used in connection with marine

insurance. If it becomes necessary to sacrifice a part of a cargo to save the balance, the owners of part of the cargo saved, together with the owners of the boat, must contribute *pro rata* toward the loss of the party whose goods are sacrificed. That is, all owners of cargo and boat must stand the loss in proportion to their holdings. The one whose goods are sacrificed is placed in no better or worse situation than the others.

176. Standard Policies. Some states require by statute, that insurance companies issue policies, the terms of which are fixed by statute. This gives the insured the benefit of a uniform policy, the terms of which are easily comprehended, and which are the same in all cases. These statutory policies are known as standard policies.

177. Suicide Clauses. Contracts of insurance frequently contain the stipulation that the contract shall be void if the insured suicides. This stipulation is enforceable if it can be proven that the insured suicided while sane. It is generally held to be unenforceable if the insured suicided while insane. An insurance company may stipulate that the contract shall be void if the insured suicides when either sane or insane. Such a stipulation is enforceable. The ordinary insurance contract, however, which contains any suicide clause provides against suicide only, and does not contain any stipulation as to the sanity of the insured at the time he commits the act. It is usually held that the burden is upon the insurance company to prove that the insured was sane at the time he committed suicide. If a policy contains no suicide clause whatever, suicide will not avoid the policy unless it is proven that the purpose of the suicide was to defraud the insurance company. If it is proven that one takes out a policy of insurance with the intent to commit suicide, the policy is not enforceable in case of suicide.

178. Fidelity and Casuality Insurance. Contracts of insurance by which the honesty and faithfulness of agents and employees are insured are termed fidelity insurance contracts. *A*, a bank, employs *B* as clerk. *A* requires *B* to furnish a bond, by the terms of which the signers of the bond agree to pay *A* for any losses arising from *B's* dishonesty or carelessness. This bond or contract is known as a *fidelity insurance* contract.

Insurance contracts providing against losses arising out of accidents to property are termed *casualty insurance*. Losses by theft or burglary, or from steam boiler explosions are common examples.

179. Re-insurance. One insurance company may insure its own liability upon policies issued, by entering into separate contracts covering the same risks with other insurance companies. For example, *A*, an insurance company, insures *B's* factory for $1,000.00. *A* may in turn insure its liability to *B*, by entering into a contract with *C*, another insurance company, by the terms of which *C* agrees to insure *A* against loss upon *A's* contract with *B*. *A* is not permitted to bind *C* by a greater responsibility than *A* is bound to *B*. In case *B's* factory is burned, in the absence of express stipulation to the contrary, *A* may recover from *C* regardless of whether he has first paid *B*. Even though *A* is insolvent and unable to pay *B*, this is no defense to *C* on his contract with *A*. *C* must pay *A* regardless of the insolvency of *A*. In case *B* has a fire and *A* settles with him for $500.00, *C* is liable to *A* for only $500.00. That is *C's* liability to *A* is the same as *A's* liability to *B*, unless by the terms of the re-insurance, *C* assumes only a portion of *A's* liability to *B*. In this event *C* must pay *A* the *pro rata* share of *A's* liability to *B*. *B* in no event has any rights against *C*. *B's* contract is with *A*, and the fact that *A* has entered into a contract with *C* involving the same subject matter, gives *B* no rights against *C*.

180. Assignment of Insurance Policies. By *assignment,* is meant a sale or transfer of some intangible interest by one person to another for a valuable consideration. In case of insurance contracts other than life, no real assignment can be made. The person whose property is insured is the one who really benefits by the contracts of insurance. Before loss, an attempted assignment of the insurance policy amounts merely to a designation of the person to whom the insurance is to be paid. In case of loss, the original party insured still holds the property insured or the insurable interest, and any breach of the insurance contract on his part avoids the contract. A policy of insurance cannot be assigned without the consent of the insurance company. If an attempt is made to transfer an insurance policy other than life, before loss, without the transfer of the property itself, the transaction does not amount to an assignment, but amounts to a contract between the seller and buyer, by which the latter is entitled to receive the proceeds of the policy if any ever arises. So far as the insurance company is concerned, acts of the seller after the attempted assignment are as complete a defense as before. If the property

insured as well as the insurance policy is transferred to another, with consent of the insurance company, this is not an assignment, but amounts to a new contract between the insurance company and the purchaser. After a loss has occurred, the right of the insured against the insurance company amounts to a debt, which may be assigned the same as an ordinary debt.

In case of life insurance, if a third party has been named as beneficiary, he is supposed to have such an interest in the policy that a change of beneficiary cannot be made nor can an assignment of the policy be made without his consent. In case the proceeds of a life insurance policy are payable to the insured himself, or to his estate, the policy may be assigned at the will of the insured. If the policy provides against assignment, it cannot be assigned. Otherwise, it may be transferred as collateral security, or sold outright at the will of the insured.

181. Open and Valued Policies, and Other Insurance. Policies or contracts of insurance are said to be *valued* or *open,* depending upon whether the amount to be paid in case of loss is agreed upon in advance. Life insurance policies are examples of valued policies. The insurance company agrees to pay a certain fixed amount in case of death of the insured, or at a certain time. Fire insurance policies usually are open policies. The insurance company agrees to pay the amount the insured loses by fire which destroys or injures certain specified property. The fact that a limit is placed upon the liability of the insurance company does not make the policy valued. If, however, the insurance company agrees to pay a certain fixed amount in case of loss by fire the policy is valued.

A person may take as much insurance upon his life as he pleases, so long as he reveals the facts to the companies with whom he contracts. In case of insuring property, the insurer is not permitted to recover in excess of the value of the property, regardless of the amount of insurance he carries. If an insurer takes out a policy of insurance upon property already insured, he must not conceal this fact from the subsequent insurer. The second policy will provide for payment, in case of loss in excess of the first insurer's liability, but not in excess of the value of the property. Or it will provide that in case of loss each policy shall share the loss in the proportion that the amounts of the policies bear to the loss.

SURETYSHIP

182. Nature of Contracts to Answer for the Debt of Another. In the transaction of business, many contracts are made to answer for the debt or obligation of another, as distinguished from the direct debt or obligation of the person entering into the contract. These contracts are made for the purpose of adding security to the original contract, or for the purpose of enabling the original obligor to obtain credit. The general term applied to contracts to answer for the debts of another is *suretyship*. The arrangement by which one party agrees to answer for the debt or obligation of another is a contract. This kind of a contract requires all the elements of any contract. There must be a meeting of the minds of the contracting parties, consideration, etc. If *A* purchases goods from *B*, agreeing to pay $100.00 for them, *A's* obligation to pay *B* $100.00 is a primary one arising out of a simple contract. If *A* purchases goods from *B* agreeing to pay $100.00 therefor, and *C*, as a part of the same transaction, makes a promise in writing to *B*, to pay the $100.00 if *A* does not pay, *C's* obligation is one of suretyship. He is known in law as a *guarantor*. His contract is to pay the debt of another. He has agreed to pay *A's* debt if *A* fails to pay it. Any contract by which a person agrees to answer for the debt or default of another, no matter what its form may be, or by what technical name it may be known, is a contract of suretyship.

183. Kinds of Suretyship Contracts and Names of Parties Thereto. The term, *suretyship,* is the general or descriptive term applied to all contracts by which one person agrees to answer for the debt or obligation of another. It may be in the form of a contract of a surety, a contract of a guarantor, or a contract of an indorser. There are at least three parties to all suretyship contracts; the party whose debt is secured, called the *principal;* the one to whom the debt is owed, called the *creditor;* and the one promising to pay the debt of another, called the *promisor*. For example, if *A*, orders one thousand dollars' worth of merchandise from *B*, and, as a part of the transaction, *C* promises to pay the amount for *A*, when due, if *A* fails to pay it, the transaction is one of suretyship in which *A* is *principal*, *B*, *creditor*, and *C*, *promisor*. A promisor may be a surety, a guarantor, or an indorser of a negotiable instrument. Whether a promisor is a surety, a guarantor, or an indorser depends upon the particular kind of a

contract made. In any event it is a promise to pay the debt of another. But the conditions and terms of the agreement may make it that of a *surety*, a *guarantor* or an *indorser*. The distinguishing features of the different kinds of promisors are discussed under separate sections.

184. **Contract of a Surety.** A surety is one who unconditionally promises to answer for the debt or obligation of another. For example, *A* gives the following promissory note to *B:*

> Chicago, Ill., Jan. 2, 1908.
> Thirty days after date I promise to pay to the order of *B*—Five Hundred Dollars.
> Signed—*A*.
> Signed—*C*, Surety.

This note constitutes an obligation of suretyship in which *B* is creditor, *A* is principal, and *C* is surety. *C's* obligation is the same as that of *A*, his principal. By signing this note as surety, *C* binds himself to pay the note when due. He does not bind himself to pay on condition that *A* does not, or cannot pay the note when due, but binds himself to pay the note when due. His obligation is the same as the obligation of *A*. His obligation is not conditioned upon *A's* failure or inability to pay. When the note is due, *B*, the creditor, may bring suit against *C*, the surety, disregarding the principal, *A*. *B* may bring suit against *C*, the surety, without making any demand of payment of *A*, or without receiving *A's* refusal to pay. If the note is signed by *C* as above, without using the word, *surety* after his name, it may be shown by oral testimony that *C* signed as surety, if such is the fact. A surety may sign any kind of a contract as surety for another. In this event, his obligation is to do the same thing that his principal contracts to do. If the obligation of the one signing as security is conditioned upon anything, it is not the obligation of a surety, but that of a guarantor, no matter by what term designated in the contract. It has been said by some writers that a surety promises to pay the debt of another if the other does not, and a guarantor promises to pay the debt of another if the other cannot. This definition is not correct and is not supported by the cases. This definition applies only to guarantors, since it is a conditional promise to pay the debt or obligation of another. A surety's obligation is absolute, and not conditional in any way upon the failure or inability of the principal debtor to pay. In commercial practice, the contract

of a surety is infrequently used as compared with the obligation of a guarantor.

185. Contract of a Guarantor. Anyone who agrees to answer for the debt, default, or obligation of another upon condition that the other does not or cannot pay the debt, or upon any condition whatever, is a guarantor. For example, *A* gives *B* the following promissory note:

> Cleveland, Ohio, Nov. 27, 1909.
>
> Sixty days after date, I promise to pay *B*, or order, One Hundred Dollars.
>
> Signed—*A*.

The back of the note contains the following statement:

> I guarantee the payment of this note when due.
>
> Signed—*C*.

The contract of *C* is that of a guarantor. If *A* fails to pay the note when due, and *B* demands payment of *A*, and promptly notifies *C* of *A's* failure to pay, *C* is liable. Technically, *C* need not be notified, but it is good business practice to give him notice. *C's* liability depends upon *A's* failure to pay the note when due. *C's* liability is a conditional one as distinguished from the liability of a surety, which is absolute.

Contracts of guaranty are commonly used in commercial affairs. In obtaining credit, contracts of guaranty are common. They may be used apart from promissory notes or negotiable instruments. Any kind of an obligation or contract of another may be guaranteed. A retail dry goods merchant desires to purchase $2,000.00 worth of goods from *B*, a wholesaler. *B* does not know *A*, but knows *C*, a friend of *A*. *B* offers to sell *A* the goods on credit, on condition that *A* furnish him a letter of guaranty signed by *C*. *A* furnishes *B* the following guaranty, signed by *C*:

> Mr. B.,
> New York City.
>
> On condition that you sell *A* an order of goods which he may select, I hereby guarantee the payment of the amount thereof, not to exceed $2,000.00 in amount.
>
> Signed *C*.

By this contract, *C* binds himself to pay *B* the purchase price of the goods, not exceeding $2,000.00, if *A* fails to pay same.

Contracts of guaranty are of many kinds. They are frequently

given to secure contracts of personal service, for the construction of buildings, for mercantile transactions, or in fact for any kind of business transaction. They are contracts, and must contain all the elements of a simple contract, such as consideration, mutuality, competent parties, etc. If a contract of guaranty is given at the time the original contract is made, and is a part of the same transaction, the consideration which supports the original contract supports the contract of guaranty. Otherwise, the contract of guaranty must be supported by a separate consideration.

186. Contract of an Indorser. One form of suretyship obligation, or obligations, to answer for the debt or default of another, is that of an indorser to a negotiable instrument. The contract of an indorser differs from that of a guarantor, and from that of a surety. For example, *A* gives the following promissory note to *B*:

> Chicago, Ill., Jan. 4, 1909.
>
> Ninety days after date I promise to pay to the order of *B*, one thousand dollars.
>
> Signed *A*.

B indorses the note by writing his name across the back thereof, and delivers it to *C* for $985.00. The contract now existing between *A*, *B* and *C*, is one of suretyship, in which *A* is principal, *C* creditor, and *B* promisor. A promisor in suretyship may be either a surety, a guarantor, or an indorser. In this particular case the obligation of *B*, the promisor, is that of an indorser. The principal obligation of *B* to *C* is that if the note is presented for payment to *A* at maturity, and upon *A's* failure to pay; due notice is promptly given to *B*, *B* will be responsible to *C* for the amount due on the note. An indorser is also liable upon certain implied warranties in addition to his primary liability as above set forth. In the language of the courts, the technical liability of an indorser is as follows:

> "I hereby agree by the acceptance by you of title of this paper, and the value you confer upon me in exchange, to pay you, or any of your successors in title, the amount of this instrument, providing you or any of your successors in title present this note to the maker on the date of maturity, and notify me without delay of his failure or refusal to pay. And I warrant that all the parties had capacity and authority to sign, and that the obligation is binding upon each of them. And I will respond to the obligation created by these warranties even though you do not demand payment of the maker at maturity, or notify me of default."

An indorser is usually defined to be one who writes his name on a negotiable instrument for the purpose of passing title. By so doing, he agrees to answer for the debt of another. That is, he agrees conditionally to pay the obligation of the maker of the instrument if the maker does not, and if the indorser is promptly notified of the failure of the maker to pay.

Irregular indorser is the term applied to persons who sign negotiable instruments outside the chain of title. For example, if *A* is the maker of a promissory note and *B* is the payee, and *C* places his signature on the back of the note, *C* is an irregular indorser. He signs outside the chain of title. *B* is the one who must first place his signature on the back of the note to transfer title. The courts of the different states have not been in harmony in fixing the liability of an irregular indorser. Some make his liability that of a surety, some that of a guarantor, and others that of an indorser. Many of the states at the present time have statutes regulating the making and transfer of negotiable instrument. The codes generally fix the liability of an irregular indorser to be that of an indorser.

187. Consideration to Contracts of Suretyship. An agreement to answer for the debt, default, or obligation of another, to be binding, must constitute a contract. It must contain all the elements of a simple contract, including a valuable consideration. A valuable consideration may be defined to be anything of benefit to the one making the promise, or anything of detriment to the one to whom the promise is made. A promise made in return for a promise, usually termed "a promise for a promise," is considered a valuable consideration as well as something of value actually given to the one making the promise. A consideration need not be adequate. It need not be commensurate with the obligation entered into. In the absence of fraud, a consideration of one dollar will support a contract for $10,000.00 as well as an actual consideration of $10,000.00. In a suretyship contract, three persons are concerned; the party owing the original debt, the one to whom the debt is payable, and the one promising to answer for another's debt. By reason of the third party to a suretyship contract, the question of consideration is sometimes confusing. If the obligation of the promisor, or the party agreeing to answer for the debt of another, is made at the same time, and is a part of the same transaction as the contract between the original

debtor and his creditor, the consideration supporting the contract between the original debtor and the creditor supports the contract of the promisor. For example, if *A* endeavors to purchase $100.00 worth of goods of *B*, and *B* refuses to make the sale unless *C* signs a contract of guaranty for the value of the goods, and *C* signs such a contract of guaranty which is delivered to *B* before the goods are delivered, the consideration, namely the receipt of $100.00 worth of goods delivered to *A* which supports *A's* promise to *B*, will support *C's* promise to *B* to pay the $100.00, if *A* fails to pay it. If the suretyship contract is entered into after the original obligation is incurred, and independently of it, there must be a separate and independent consideration to support it. For example, if *A* purchases $100.00 worth of goods from *B*, agreeing to pay for them in thirty days, and after fifteen days have elapsed after delivery of the goods, *B*, fearing *A* is insolvent, asks him to furnish a guaranty of *C*, *C* must receive a valuable consideration to support his contract of guaranty, separate and distinct from the consideration which supports *A's* obligation to *B*.

188. Contract of Suretyship Must be in Writing. About 1676, the English Parliament passed a statute known as the Statute of Frauds. Among other things this statute required contracts of suretyship to be in writing to be enforceable. The statute was in part as follows, "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person unless the agreement upon which action shall be brought or some memorandum or note thereof shall be in writing, signed by the party to be charged therewith or some person thereunto by him lawfully authorized."

The states of this country generally have re-enacted this statute. An oral contract of suretyship is not void. The parties may voluntarily carry it out if they choose. The law does not make it illegal. The law simply says that it is not enforceable. If an action is brought by a party on an oral contract of suretyship and the other party objects for that reason, the court will not enforce the contract. To satisfy the Statute of Frauds it is not necessary that the entire contract be in writing, but the substance must be stated, and the writing must be signed by the one promising to answer for the other's obligation.

A promise to pay one's own debt is not within the Statute of

Frauds, and need not be in writing to be enforceable. If a promise is made for the primary purpose of benefiting the promisor, even though it takes care of the debt of another, it is regarded as an original promise of the promisor, and need not be in writing.

189. General, Special, Limited and Continuing Guaranties. Guaranties may be directed to some particular person or firm, or may be addressed to anyone who desires to accept them. An open guaranty, or one addressed to anyone is called a *general* guaranty. A guaranty addressed to a particular person or firm is called *special* guaranty. In case of a special guaranty, only the person to whom it is addressed can accept it. Anyone can accept a general guaranty. A letter of guaranty addressed, "to whom it may concern," is a general guaranty, while one addressed to "The *A. B.* Co.," is a special guaranty.

A guaranty limited as to time, either by specifying the date on which it is to expire, or by specifying the number of transactions or the transactions it is to embrace, is a *limited* guaranty. If no limit of time or of number of transactions is placed therein, it continues until withdrawn by the guarantor. This is called a *continuing* guaranty.

190. Notice to Guarantors. A guarantor may be entitled to two kinds of notice. He may be entitled to notice of acceptance of the guaranty, and he may be entitled to notice of default of his principal. The first is called notice of acceptance of a guaranty, the second, notice of default of a guaranty. If a person stipulates in his letter of guaranty that he requires notice of acceptance of his guaranty, the creditor must give him such notice to hold him. Without such stipulation he is not, in most jurisdictions, entitled to notice. *A* addresses the following letter of credit to *B*:

Cleveland, O., Jan. 4, 1909.

Mr. B.

Give A credit at your store to the amount of $25.00. I will pay you if he does not.

Signed—*C.*

The letter of guaranty does not require *B* to notify *C* of its acceptance. In the Federal Courts, the rule requires notice of acceptance of guaranties. It is sound business practice always to notify a creditor of acceptance of a guaranty. If a letter of guaranty contains a stipulation that the guarantor is to receive notice of default of his principal, such notice must be given, or the guarantor will be discharged to the amount of his damage resulting from failure to receive this notice.

In case of guaranties involving the payment of a definite amount at a definite time.

For example, in case of guaranty of payment of a promissory note, no notice is necessary on the part of the creditor to the guarantor of the failure of the principal to pay. In other cases it may be stated as a general rule that notice should be given the guarantor of default of his principal. It is safe business policy for a creditor to give notice to a guarantor of default of payment on the part of his principal.

191. Defense of Payment. Suretyship obligations are obligations to answer for the debts or default of another. They may be in the form of a contract of a surety, of a guarantor, or of an indorser. Certain things constitute suretyship defenses. They apply equally to a surety, a guarantor, and an indorser. If a principal debtor pays or settles the debt which another promises to pay, the promisor is thereby discharged. Payment by a principal is a complete suretyship defense.

For example, *A* owes *B* $100.00. *C* in writing promises to pay *A's* debt when it is due. *A* pays *B*. *C* is thereby discharged.

192. Suretyship Defense of Alteration of Principal Contract. If the contract, payment of which is secured by the contract of suretyship, is changed in any material way by the creditor or by anyone, with his consent, or by his direction, the promisor is thereby discharged. If the change increases or decreases the liability of the principal to the contract the alteration is material.

For example, *A* promises to pay *B* $200.00. *C* in writing promises to pay *B* this amount in case *A* fails to pay. If *B* changes the amount to $250.00, *C* is discharged; if *B* changes the amount to $150.00, *C* is discharged. If *B* adds the name of *D* to the original contract, *C* is discharged; if *B* changes the place of payment, *C* is thereby discharged.

193. Defense of Granting Extension of Time to Principal. If a creditor enters into a contract by which the principal is given an extension of time, the promisor is released. This does not mean mere delay in enforcing the collection of the principal debt, nor does it mean leniency of a creditor with his debtor. If, however, a creditor makes a contract based upon a valuable consideration, by which the principal debtor is granted an extension of time within which to pay his debt, the promisor is discharged.

For example, if *A* owes *B* $1,000.00 on March 1st, and *C* in writing promises *B* to pay if *A* does not, if *B* does not collect from *A* on March 1st, but lets the debt run until March 15th or indefinitely, *C* is not thereby discharged. If, however, *B* in consideration of *A's* promise to pay him interest at a certain rate after March 1st, extends the time until April 1st, *C* is discharged. To discharge

the promisor, the agreement with the principal to extend the time of payment must be based upon a valuable consideration, and must be for a definite time.

194. Defense of Fraud and Duress. Fraud practiced by the creditor upon the principal or upon the promisor is a defense to the promisor.

For example, if *A* is indebted to *B* and *C* guarantees *A's* debt, and if *B* procured the contract with *A* by fraud, or procured the guaranty from *C* by fraud, *C* can avoid the contract of guaranty by reason of the fraud.

If the fraud is practiced by the principal upon the promisor, it is no defense to the promisor as against the creditor.

For example, if *C* guarantees *A's* debt to *B* and the guaranty is procured through the fraud of *A* without *B's* knowledge or consent, the fraud will not avail *C* as a defense to an action brought by *B* upon the guaranty.

The same is true of duress. For a fuller explanation of fraud and duress see sections on *Fraud* and *Duress* under *Contracts*.

195. Surety Cannot Compel Creditor to Sue Principal. Unless so provided for by statute, a promisor to a suretyship contract cannot compel a creditor to sue a principal when the debt secured is due, or claim his discharge for failure on the part of the creditor to comply with this request. A few states provide by statute that a promisor may by notice compel a creditor to sue a principal upon a suretyship obligation when due, or be discharged for his failure so to do.

196. Surety Companies. At the present time, corporations are organized for the purpose of entering into suretyship obligations for profit. Bonds of public officials as well as of private individuals, judicial bonds given in appeal of cases at law from one court to a higher court are commonly signed by surety companies. These companies, for an agreed annual consideration called a *premium*, sign as surety these bonds for responsible individuals. Sureties were once said to be favorites of the law. This was for the reason that individual sureties signed private, official, or judicial bonds as a favor to the principal, ordinarily without receiving any compensation therefor. When a liability arose the surety escaped if possible, since it was not his obligation, but another's which he was called upon to pay. The courts favored him and technical defenses were recognized which were not recognized as a defense by persons primarily liable. In the case of surety companies, however, there is no reason for this favoritism, since the surety engages in the contract for a consideration, and not as a favor to anyone. The tendency of the courts is to hold surety companies strictly to the terms of their contracts.

197. Subrogation. By *subrogation* is meant the substitution of the promisor for the creditor in case the promisor to a suretyship obligation pays his principal's debt.

For example, if *A* signs a guaranty by the terms of which he agrees to pay *B's* debt to *C*, when the debt is due if *B* fails to pay it, and *A* pays it, *A* is placed in *C's* position and may collect the debt from *B*. Any securities of *B* that *C* held for the debt now belong to *A*. If *C* has a judgment against *B* for the debt, *A* is subrogated to the judgment and may himself enforce it.

198. Indemnity. The law implies a contract on the part of the principal to a suretyship contract to pay the promisor when the latter pays the suretyship obligation.

For example, if *A* guarantees *B's* debt to *C*, as soon as *A* is obliged to pay *C*, and does not pay *C*, *A* may sue *B* on an implied contract of indemnity for the amount he has paid *C*.

199. Contribution. *Contribution* is the term applied to the right of one of two or more co-promisors to a suretyship obligation to secure a *pro rata* share from his co-promisors of the amount he is obliged to pay the creditor on a suretyship contract.

For example, if *A*, *B*, and *C* guarantees *D's* debt of $150.00 to *E*, and when the debt is due, *E* sues *A* and collects $150.00 from him, *A* can sue *B* and *C* for $50.00 each. If *A* pays *E* only $50.00 he can collect nothing from *B* and *C*, since this is only his share of the debt. But if *A settles* the debt with *E* for $50.00, he can recover one-third the amount from both *B* and *C*. *A* can pay the debt when it is due, without waiting for suit if he so desires, and proceed to collect one-third the amount from both *B* and *C*.

PERSONAL PROPERTY

200. Personal Property in General. Personal property is the term applied to property other than real estate. It may be either tangible or intangible. Personal property is sometimes divided into *chattels real* and *chattels personal*. Chattels real are interests in real estate not amounting to ownership. Real estate mortgages and leases are common examples of chattels real. Chattels personal embrace all personal property other than chattels real. Every thing subject to ownership not connected with the land is included in the classification of chattels personal. Promisory notes, personal apparel, furniture, tools, and animals are common examples. Chattels personal are of a tangible, or of an intangible nature. They are mere rights, or they are things which may be handled and used. A promissory note, a contract, or a mortgage is a right as distinguished from a thing in possession. These rights are sometimes called *choses in action*, while tangible articles of personal property, such as watches, chairs, and horses are called *choses in possession*. The law relating

to personal property is discussed at length under the sections on *Sales of Personal Property, Pledges, Chattel Mortgages, Carriers* and *Wills.*

201. Acquisition of Title and Transfer of Personal Property. Title to personal property may be acquired in several ways, chief among them being by contract, by possession, by gift, and by operation of law. If *A* purchases a carriage from *B*, the transaction is a sale of personal property and *A* is entitled to possession of the carriage by reason of the contract. Title to the carriage is given to *A* by contract. Title to some kinds of property is acquired by possession. Title to wild animals is acquired by possession. The same is true of fish. Title to lost property, except as against the owner, is acquired by possession. Title to property is also acquired by voluntary gift on the part of the owner.

If *A* dies possessed of articles of personal property, the property passes to his personal representative to be turned into money to pay *A's* debt, or to be distributed in the form of money, or without being sold, to *A's* descendant designated by law. This is known as acquiring personal property by succession, or by operation of law. Personal property may also be transferred in specie by will.

SALES

202. Sale Defined. A transfer of title of personal property is termed a *sale.* By title is meant ownership. Mere possession of personal property does not constitute ownership, neither does right to possession constitute ownership. One may lease personal property, and by means of the lease have the right to possession, while the title or ownership is in another. One may find or borrow personal property, obtaining possession while the title or ownership remains in another. The transfer of the title or ownership of personal property as distinguished from the transfer of mere possession or the right of possession, constitutes the subject of *Sales.* A sale may be defined to be a contract by which the title to personal property is transferred for a consideration in money, or money's worth. This transfer of title to personal property may be entirely independent of the transfer of possession. One may make a sale of personal property by which the purchaser takes the title while the possession remains in the seller, or in some third person.

When, and under what circumstances the title passes is an im-

portant question. A sale of personal property ordinarily gives the purchaser the right to immediate possession of the property. The time the title actually passes to the purchaser does not depend upon the time the property is delivered to the purchaser, but upon the intention of the parties to the contract of sale. A sale is a contract requiring all the elements of a simple contract. There must be a meeting of the minds of the contracting parties, a valuable consideration, competency of parties, etc. (See *Elements of a Contract,* chapter on Contracts.)

203. Sale Distinguished from a Contract to Sell. A sale is a contract by which the title passes to the purchaser at the time the sale is made. A contract to sell is a contract by which the title passes to the purchaser at a future time. A sale is a present transfer of title or ownership to personal property. A contract to sell is an agreement to pass the title or ownership to personal property to another at a future time. The practical distinction is in determining upon whom the loss falls in case the goods are destroyed or injured by fire, or other accident. In case of a sale, title or ownership passes to the purchaser, even though possession remains in the seller. If the goods are lost by fire, without fault of the seller, the purchaser bears the loss. In case of a contract to sell, the title or ownership does not pass to the purchaser until the time for fulfilling the contract has arrived, and until the conditions of the contract are fulfilled. If the goods are lost before the contract is carried out, the loss falls on the seller. For example, *A*, a farmer, sells ten barrels of apples to *B*. *B* examines the apples, selects the ten barrels, pays *A* the stipulated price, and says he will call for them the following day. Before *B* calls, the apples are destroyed by fire, without fault of *A*. *B* must stand the loss. The title or ownership passed to him when the sale was made. If *B* calls on *A* and enters into a contract by the terms of which *A* agrees to deliver at *B's* residence ten barrels of apples the following day, at an agreed price, and the apples are destroyed by fire before *A* delivers them, the loss falls on *A*. This is a contract to make a sale, not a sale. Title to the apples does not pass to *B* until they are delivered by *A*, according to the terms of the agreement.

Parties may agree that title may pass at a certain time, or upon the performance of a certain condition. In this event, title does not pass until the time mentioned arrives, or the condition is fulfilled.

In the majority of sales of personal property, the parties do not set forth the terms and conditions fully. In the absence of an express agreement or custom to the contrary, parties are presumed to intend the title or ownership to pass to the purchaser at the time the sale is made.

204. Sale Distinguished from Barter. A sale is an agreement to transfer the title of personal property for a consideration in money, or for something measured by a money standard. An agreement to exchange goods, or an exchange of goods, is a *barter,* and not a sale. The distinction is technical, but serves some useful purposes. If *A,* for a consideration of $200.00, purchases a car of cabbage from *B* in Nashville, to be delivered in Cleveland, June 20th, and the car does not arrive, *A* may go into the nearest market, and purchase a car of cabbage of the same quality, and collect the difference between the market price and contract price from *B.* If *A* is obliged to pay $250.00 for the cabbages, he can collect $50.00 from *B.* If, on the other hand, *A* agrees to give *B* a horse for a car of cabbages, no price having been fixed on the horse or on the cabbages, and *B* fails, and refuses to carry out the contract, *A* must sue *B* on the contract, and collect as damages such amounts as he is able to show he lost by reason of *B's* failure to carry out the contract.

Salesmen are commonly employed to sell goods. This means to sell for money, and unless they are expressly authorized to barter or exchange goods, attempted exchanges are without authority, and do not bind their principal.

205. Conditional Sales. The term, *conditional sale,* has come to have a technical meaning. Articles of merchandise, such as sewing machines, cream separators and cash registers are commonly sold under a special contract, by which possession is given the purchaser, and the title by express agreement remains in the seller until the entire purchase price is paid. The purpose of this form of contract is to obtain security for the purchase price of the article sold. In the absence of statutory regulations, if the purchaser does not pay the purchase price at the agreed time, the seller may take possession of the property. It is the custom of sellers using this form of contract to require the purchaser to sign a contract stipulating that the purchase price be represented by promissory notes of the purchaser, payable in installments, and that the title is to remain in the seller

until the entire purchase price is paid. If the purchaser defaults in any one of his installments, by the terms of the contract all the remaining installments at once become due. This form of contract worked many hardships. Purchasers were required to make a substantial payment in advance. If they succeeded in paying practically all the installments, but defaulted in one, the seller could take possession of the property, causing the purchaser to lose all he had paid. This form of contract proved so unconscionable in some of its workings that the legislatures of most states have passed statutes requiring conditional sale contracts to be filed with a public official to be enforceable, and do not permit the seller to take possession of property without repaying the purchaser the amount already paid less the actual damage the property has sustained. This damage usually cannot exceed 50% of the original selling price of the property.

206. Sale Distinguished from a Bailment. Possession of personal property is frequently given another, for the purpose of having work performed on it, to be used by another, to secure a debt, or to be protected or preserved without transfer of title. Such a transaction is called a *bailment.* It is discussed more at length under a separate chapter. A bailment does not constitute a sale, in that there is no transfer of title, or ownership of the personal property, possession of which is given to another. For example, *A* hires the use of a horse and carriage from *B*, a liveryman, for two days. *A* secures possession of the horse and carriage. He has the right to retain possession of them for two days, and has the right to use them for the purpose hired. He cannot sell them, however, nor can he do anything inconsistent with *B's* ownership. This transaction is a bailment.

207. What May Be the Subject of a Sale. Any article of personal property having a present existence may be sold. It matters not, whether it is a chose in possession, or chose in action. By *chose in possession* is meant a tangible piece of personal property as distinguished from a mere right. A horse, plow, chair or desk is an example of a chose in possession. A promissory note, a contract or mortgage is an example of *chose in action.* Either may be the subject of a sale. The distinction between a sale or present transfer of title to personal property, and a contract to make a sale, must be borne in mind. If *A* sells his horse to *B* for $100.00, in the absence of any

agreement as to delivery the title to the horse passes to *B* as soon as the contract is made. This transaction is a sale. If *A* promises to sell his horse to *B* the second of next month, if *B* will agree to pay him $100.00 when the horse is delivered the second of next month, and *B* so agrees, the contract is not a sale, but a contract to make a sale. Articles of personal property, to be made or manufactured, are not the subject of a sale.

Business men commonly make contracts to sell goods in the future which they do not have in stock, but expect to manufacture, or purchase elsewhere. Such contracts are not sales. The title to the goods does not, and cannot pass to the purchaser when the contract is made. They are mere agreements to make sales in the future. They are treated the same as ordinary contracts, not as present sales. If the goods are destroyed before they are completely manufactured, the seller stands the loss, since the title has not passed from him. If a person agrees to sell in the future goods to be manufactured, and fails to deliver the goods specified in the contract, the buyer has the usual remedy. He may purchase the goods in the market nearest the place of delivery at the time of delivery, and sue the seller for the difference between the contract price and the market price. The buyer is not obliged actually to purchase the goods to enable him to bring suit against the seller. He may bring a suit against the seller for the difference between the price he contracted to pay for the goods and the market price at the time and place of delivery. Crops to be grown are not the subject of present sale. Crops planted, but not matured, may be sold. Title to the crops at the present stage of their existence passes to the buyer.

208. Statute of Frauds, or Contracts of Sale Which Must Be in Writing. One section of the English Statute of Frauds applied to sales. This statute was passed in England about 1676. The seventeenth section, which applies to sales of personal property, is as follows:

> And be it further enacted by aforesaid authority, that from and after the four and twentieth day of June, no contract for the sale of any goods, wares or merchandise for the price of ten pounds sterling, or upwards, shall be allowed to be good except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of said bargain be made, and signed by the parties to be charged by such contract, or their agent thereunto lawfully authorized.

The states, generally, have a statute modelled after this section of the English statute, and providing that contracts for the sale of personal property, the price of which exceeds fifty dollars, shall not be enforceable unless a memorandum of the contract be made and signed, except there be a delivery of at least a part of the property, or except something be paid by the purchaser to bind the bargain. Some of the states have no statute of frauds containing a provision relating to the price of the goods. In many of the states, the valuation fixed by statute exceeds fifty dollars. Where the statute exists, contracts which are not in writing are not void. They are merely voidable. The parties may voluntarily carry them out if they so choose. The law does not prohibit them, but if one party refuses to recognize the contract, the other party cannot enforce it by an action at law. A portion of the fourth section of the English Statute of Frauds provides that contracts, by their terms not to be performed within one year from the time of the making thereof, must be in writing to be enforceable. The states, generally, have a similar statutory provision. This statute applies to sale of personalty as well as to real estate. If the contract can be performed within one year, it is not within the provisions of the statute.

209. Delivery of Personal Property Sold. In the absence of any express agreement to the contrary, there is an implied agreement, on the part of the seller, to deliver personal property sold, when the purchaser pays the price. By delivery is meant placing the personal property at the disposal of the purchaser. It must be borne in mind that in a contract of sale of personal property, title or ownership passes to the purchaser at the time the sale is made, even though possession remains in the seller. This gives the buyer the right to obtain possession of the goods upon paying the price. If the goods are destroyed without fault of the seller after the sale, and before delivery, the loss falls on the buyer. If *A* offers to sell *B* his wagon for $100.00, and *B* accepts, nothing being said about delivery, the title to the wagon passes at once to *B*. If it is destroyed without fault of *A*, the loss falls on *B*, even though *B* has not paid the price or received possession of the wagon. *B* is entitled to possession of the wagon when he pays *A* $100.00. *A* is not obliged to give *B* possession of the wagon, even though *B* is the owner of it, until he receives the price. $100.00.

In the above example there is no stipulation about delivery. The parties make a sale, agreeing upon the price and thing to be sold, nothing being said about the delivery. The law in such cases impliedly requires the seller to deliver when the price is paid, and not until then. In many contracts, however, the time, place, and manner of delivery are stipulated in the contract. Sometimes usage and custom supply these things when the parties do not expressly so stipulate. When a time, place, or manner of delivery by the seller is stipulated in a contract, either by express agreement, or by usage and custom, title to the property usually does not pass to the buyer until the time has elapsed, and until the seller has delivered according to the manner stipulated, or has tendered delivery.

A stipulation in a contract of sale that the seller shall deliver at a particular time or place, or in a particular manner is deemed to show an intention on the part of the parties that title shall not pass until the seller has so delivered. If the buyer refuses to accept the goods or pay the price, an offer to deliver by the seller is equivalent to a delivery. The seller, on the other hand, is not obliged to give up possession of the goods until he receives the agreed price. If the seller agrees to give the buyer credit, this rule is not applicable. If no time of delivery is mentioned, delivery must be made within a reasonable time, depending upon the circumstances connected with the particular contract. When delivery is to be made in installments, failure to pay for one installment ordinarily entitles the seller to refuse to deliver the balance, or if the seller refuses, or fails to deliver the first installment, the buyer may refuse to accept subsequent installments. The buyer is not obliged to accept anything except the article ordered. If more or less is tendered him, he is not bound to accept. If he accepts more or less, he is bound to pay the reasonable value of the same. If no place of delivery is mentioned, the presumption is that delivery is to be made at the place where the property is located at the time the sale is made.

The mere fact that delivery is to be made in the future does not prevent title from passing at the time the sale is made. There must be something in addition to the fact of future delivery to delay the passing of the title until the time of delivery. If *A* purchases an automobile from *B*, making the selection, delivery to be made the following Thursday, title passes at once to *A*. If the automobile

is destroyed by fire, or injured without *B's* fault, the loss falls on *A*. If, however, *B* is to do anything with the property, or is himself to make delivery, this shows an intention on the part of the parties that title is not to pass until delivery is made.

210. When Title Passes. The question of when title to personal property, the subject of a sale, passes to the purchaser is important in determining upon whom the loss falls, if the property is destroyed, stolen, lost or levied upon by judgment of attaching creditors. Title or ownership to property sold does not depend upon possession. Personal property may be sold, and title or ownership may pass to the purchaser, while the seller still has possession, as well as the right to possession. The general rule is that title or ownership of personal property sold passes to the purchaser at the time the parties to the sale intend it to pass. If their intention is expressed, it governs, and the question is settled. In the great majority of sales, however, the parties do not expressly determine when title shall pass and this must be presumed from the circumstances.

For example, if *A* offers *B* $20.00 for a certain harness which is selected, and *A* accepts the offer, nothing being said about the delivery or payment, or when title or ownership shall pass to *A*, the law presumes it to be the intention of the parties that title shall pass when *B* accepts *A's* offer—and from that time, the harness belongs to *A*. *B*, however, has the right to retain possession of the harness until *A* pays him the purchase price of $20.00. When *A* offers *B* the $20.00 at the place where the harness was located when the sale was made, *B* must give *A* possession. *B* is not obliged to deliver at any other place. If, however, *A* offers *B* $20.00 for *B's* harness, which is determined upon and selected, *B* to deliver same at *A's* place of business the following evening, this shows an intention on the part of the parties that the title is not to pass to *A* until *B* delivers the property to *A* the following evening. A tender or offer by *B* to deliver the property to *A* the following evening, passes title and places the property at *A's* risk. If, however, delivery is to be made merely in the future, not requiring the seller to take the property to any particular place, the fact that delivery is to be made in the future does not prevent title passing to the purchaser at once.

If *A* purchases *B's* harness for $20.00, the harness having been selected, delivery to be made in five days, title passes at once to *A*.

A is obliged to offer *B* $20.00 at the expiration of five days, and *B* must give possession to *A*. If the article sold is to be prepared for delivery, or any work is to be performed on it by the seller before delivery, title does not pass until this work has been completed. If the goods are to be weighed or measured to determine the quantity or price, title does not pass to the purchaser until this has been done. Probably, if the goods are determined upon, and the entire mass is sold and delivered to the buyer who is to weigh or measure it to determine the quantity only, the title passes upon delivery.

If the contract, sale provides that goods are to be delivered to a carrier, delivery to the carrier passes title to the purchaser. Delivery to the carrier must be made so as to protect the interests and rights of the purchaser. The goods must be properly packed, and the proper kind of a bill of lading taken.

If goods are sold upon approval, or upon trial, they must be approved or tried before title passes.

If a portion of goods in mass or bulk is sold and the mass or bulk contains different qualities, the portion purchased must be separated and selected before the title passes. If a portion of goods in bulk is purchased, the bulk being of the same quality, separation of the portion sold is sufficient to pass title. Some courts even hold that separation is not necessary to pass title, if the bulk is of the same quality. Title to goods to be manufactured does not pass until the goods are manufactured and tendered.

211. When Payment of Price Must Be Made. Parties to a contract of sale may expressly agree upon a time of payment of the article sold. In this event, the time agreed upon prevails. In the absence of an agreed time of payment, the law presumes that payment is to be made at the time and place of delivery. The seller may retain possession of goods sold, until he receives payment of the agreed price, even though title has passed to the purchaser. If the sale is made on credit, the purchaser cannot be required to pay until the time for which he was to be given credit has expired. In the absence of an agreed time for payment, payment must be made at the time of delivery of the goods.

If the seller reserves any control over the goods, title remains in him. For example, if he is to ship the goods to another, and if he

takes the bill of lading in his own name instead of the name of the purchaser, title remains in the seller.

212. Effect of Fraud Upon a Contract of Sale. Fraud has been defined by a prominent author to be "A false representation of facts, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it." If a party innocently makes a representation, even though it proves to be false, the representation is not fraudulent unless the party making the representation should have known, or could easily have discovered, its falsity.

If *A* endeavors to buy goods from *B*, and tells *B* that he is worth $5,000.00, when in fact he is worth nothing, and *B* relying upon *A's* statement, sells the goods to *A*, *B* is entitled to rescind the contract by reason of the fraud. He may sue and recover the price of the goods, or he may retake the goods from the buyer. (See *Rescission* under chapter on Contracts.) If the goods have been sold to a third party who purchases for value and without notice of the fraud, the original seller cannot take the goods from him. A sale procured through fraud is voidable, and not void. The seller may avoid the sale if he chooses. That is, title vests in the purchaser subject to being retaken by the seller, if he chooses, when he discovers the fraud. If a third person innocently purchases the goods before the original seller rescinds the contract, the last purchaser's title cannot be disturbed. The seller may permit the purchaser to keep the goods, and bring an action for damages based upon deceit.

One kind of a sale frequently induced by fraud is void, absolutely, and not voidable. If a person fraudulently induces another to believe that the purchaser is someone else, and purchases goods under this representation, no title passes from the seller, and he may recover the goods from an innocent purchaser.

213. Rule of Caveat Emptor, or Let the Purchaser Beware. One who purchases chattel property from anyone except the grower or manufacturer of the article in question, which is inspected by the purchaser, or may be inspected by the purchaser, purchases at his own risk. If the article turns out to be of poor quality or worthless, in the absence of fraud or warranty, the purchaser has no redress. This rule is called the *rule of Caveat Emptor*, (let the purchaser

beware). Its purpose is to decrease litigation, and make men rely upon their own judgment. If a purchaser is unwilling to rely upon his own judgment, he must exact a warranty from the seller. In the absence of warranty or fraud, the purchaser must abide by the result of his purchase. If the article purchased has defects apparent to anyone upon inspection, the purchaser cannot complain. He should have seen the defects. If the defects are not apparent upon inspection, he must bear the loss. He should have required the seller to warrant the goods against latent defects, if he was unwilling to purchase on his own judgment. In all sales by an owner, however, title to the goods is impliedly warranted, and in case of sale of goods grown or manufactured by the seller, there is an implied warranty against latent defects. In all other sales, the purchaser buys at his own risk, and has no redress against the seller unless the latter warrants the goods. Warranties are discussed in the following section.

214. Express Warranty. Contracts of sale often contain collateral agreements called *warranties.* Warranties are either express or implied. An *express* warranty is an agreement in addition to the ordinary agreement to transfer a certain chattel for a consideration in money or money's worth, by which the seller agrees that the thing sold is of a certain quality, or is in a certain condition. An express warranty is not an essential part of a contract of sale. That is, a sale containing no collateral promise to the effect that certain conditions or terms of the contract are warranted, may be made. If the contract of sale does not expressly state that the seller warrants certain terms or conditions, or does not contain words of similar meaning, the contract of sale is without express warranty. An express warranty, by express agreement, adds something to the contract of sale. This additional agreement, called an express warranty, enables the purchaser to recover damages from the seller for failure of the warranty, when he might not be able to have any redress if the sale were made without warranty. Express warranties may be made orally, or in writing.

If the seller, in making the sale expressly states that he warrants certain terms of the contract, or uses language which means that he intends to warrant certain terms of the contract, there is an express warranty. *A* sells a wagon to *B* and warrants that it will carry 6,000 lbs. of stone. If it fails to carry this amount, *B* can

recover from *A* on this warranty. If *A* had sold the wagon to *B* without this stipulation, and it had failed to carry 6,000 lbs. of stone, *B* would have no redress.

A seller is permitted to express his opinion relative to the quality of the article which is the subject of the sale without making a warranty. This is called "trade talk," or "puffing." A seller is permitted to express his own opinion relative to the quality of goods he is endeavoring to sell, without having his words amount to a warranty, but if he makes positive assertions, his words will be construed as a warranty. Such expressions as, *This is first class*, and *This is equal to any on the market*, are usually regarded as "trade talk" and not as warranties.

215. Implied Warranties. Some contracts of sale carry with them *implied warranties*. These warranties are common to all sales of the particular class in question. Implied warranties cannot be said to be in addition to the contract of sale, but are impliedly a part of the contract. The most common implied warranties are warranties of title, warranties of wholesomeness in sale of food, warranties in sales by sample, warranties of merchantability, and warranties of fitness of goods to be used for a particular purpose.

216. Implied Warranty of Title. In every sale, in the absence of an express stipulation to the contrary, there is an implied warranty of title. This means that the ownership is in the seller, and that he has the right to sell the property, and that it is free from incumbrances. This, of course, does not prevent the seller from disposing of just what interest he has in the property if he expressly so contracts. For example, if *A* negotiates the sale of a horse to *B*, and tells *B* that he has purchased the horse a few days previously from *C*, and does not know whether there are any incumbrances on the horse, but will sell what interest he has, and if *B* purchases on these representations, he cannot sue *A* on an implied warranty of title if it subsequently develops that *D* has a mortgage on the horse. If, however, *A* offers to sell *B* a horse, saying nothing about the matter of title, and *B* purchases the horse, and later is obliged to yield possession to *C*, who holds a mortgage, *B* may recover the purchase price of the horse from *A* upon an implied warranty.

Formerly, a distinction was drawn between sales of property in the possession of the seller, and of property in the possession of some

third person, making the seller not liable upon an implied warranty in the latter case. At present, however, the tendency of the courts is to make the seller liable upon an implied warranty, regardless of whether the property is in his possession, or in the possession of a third person at the time the sale is made. When a person sells chattel property, not as owner, but in an official capacity, or as an agent, there is no implied warranty of title. Common examples of this principle are sales by a pledgee, mortgagee, sheriff, guardian, administrator, assignee, or trustee in bankruptcy.

217. Implied Warranty of Wholesomeness in Sales of Food. In the sale of articles to be used for food, there is an implied warranty that the article sold is wholesome and fit for the purpose which it is sold. This rule is based upon the principle of public policy, that it is the duty of the state to protect life and health. *A*, a grocer, sold canned tomatoes to *B*, for use in *B's* family. The tomatoes contained poisonous adulteration. *A* was held liable in damages to *B*, for breach of implied warranty of wholesomeness of the article sold for food. Some jurisdictions hold that this rule does not apply in sales of food, where the article is not sold to a consumer. That is, if the article is sold by a wholesaler to a jobber, or to a retailer, the warranty does not apply, but where it is sold by anyone to a consumer, it does apply.

218. Implied Warranty in Sales by Sample. When goods are not inspected by the buyer, but a sample is furnished him, from which he purchases, there is an implied warranty that the goods sold correspond with the sample. The fact that a sample of goods is exhibited by the seller and examined by a purchaser does not necessarily mean that a resulting sale is one by sample. The sample exhibited may not be claimed by the seller to represent in every respect the article to be furnished, or the purchaser may not desire to purchase according to the sample. To constitute a sale by sample, a sample must be exhibited by the seller upon a representation that it is a sample of the goods to be sold. If exhibited for any other purpose, the resulting sale will not be a sale by sample. The purchaser must make the purchase relying upon the sample, and with the understanding that the goods are to correspond with the sample. If the goods are present at the time the sale is made, and the purchaser inspects them, or has the opportunity to inspect

them, in the absence of fraud, he cannot claim that the sale is by sample.

219. Implied Warranty of Merchantability. Where goods which have not been inspected or selected by the purchaser are ordered to be delivered in the future, there is an implied warranty that they are of average quality. This is called an *implied warranty of merchantability*. *A* ordered a "Buckeye" mowing machine of *B*, to be delivered the following week. *B* delivered a machine which would not cut grass. *B* was held liable to *A* upon an implied warranty of merchantability. If *A* had inspected the machine, and made the purchase upon his own selection, in the absence of fraud on the part of *B*, *A* would have no redress. But, in case the article is purchased without opportunity for inspection, to be manufactured or delivered in the future, there is an implied warranty that the article is an average one of its kind.

220. Implied Warranty of Fitness of Goods for the Purpose for Which They are to Be Used. When a purchaser makes known to a seller the purpose for which the article is to be used, and the seller is himself the manufacturer or grower of the article, there is an implied warranty that the article is fit for the purpose for which it is to be used. This applies only to articles to be manufactured or delivered in the future, and not to articles inspected and selected by the purchaser. If *A* goes to *B*, a manufacturer, and tells him he desires to have manufactured an instrument to hold liquid soap suitable for the use of workingmen in shops, and *B* agrees to manufacture and sell such an article, there is an implied warranty on *B's* part that the soap-holders will be suitable for the purpose for which they are to be used. If, however, *A* furnishes *B* plans for the manufacture of a liquid soap-holder, and orders a quantity, there is no implied warranty on *B's* part that the articles will be fit for the purpose intended. *A* in this case relied upon his own judgment. *B's* contract is fulfilled when he furnishes the article according to *A's* plans. The work must, of course, be done in a workmanlike manner, free from defects of material and workmanship. This implied warranty of fitness of an article for the purpose for which it is to be used, applies only where the purchaser reveals the purpose of the article to the grower or manufacturer who agrees to furnish such an article. It does not apply to articles

furnished according to furnished plans, or to articles selected by the purchaser.

221. Remedies for Breach of Warranty. In case of breach of warranty, the purchaser may bring a suit for damages against the seller, or he may promptly return the goods, and recover the purchase price. The latter remedy is called *rescission*. In case of breach of an express warranty, in most jurisdictions the remedy is the same as for breach of implied warranty. In some states, however, the buyer is not permitted to return the goods and sue for the purchase price, but is restricted to an action for damages.

222. Seller's Lien, Delivery to Carriers, and Stoppage in Transitu. In case of sales for cash, the seller has the right to retain possession of the goods until he receives payment of the purchase price. If the goods are sold on credit, or if the seller agrees to deliver at a certain place, the seller must comply with his contract. But if the purchaser becomes insolvent before the goods are delivered, the seller may retain possession until paid. He is not obliged to deliver goods on credit, even though such is his contract, if the purchaser subsequently becomes insolvent. The right of a seller to retain possession of goods until the purchase price is paid is called *the seller's lien*. This lien is lost by the seller's delivery of the goods to the purchaser. If the possession is obtained by fraud on the part of the purchaser, it is regarded as no possession, and the seller may still enforce his lien by retaking possession of the property.

Where goods are ordered by a person in one town from a person in another town, necessitating delivery by a carrier, in the absence of express stipulation to the contrary, title to the goods passes to the vendee upon delivery of same by the vendor to the carrier. If *A*, in Cleveland, orders a car of pine lumber from *B*, in Milwaukee, for $1,500.00, title to the lumber passes to *A* when *B* delivers the lumber to the transportation company in Milwaukee. If *A* orders the lumber delivered F. O. B. Cleveland, title does not pass to *A* until the lumber reaches Cleveland. If *A* orders the lumber, agreeing to pay $1,500.00 for the same, "freight allowed" to Cleveland, title passes to *A* when *B* delivers the lumber to the transportation company in Milwaukee, even though *B* must allow *A* to deduct the freight from the purchase price of $1,500.00. This question is important in determining upon whom the loss falls in case of damage of the goods

while in the hands of the transportation company. The one who has the title at the time the loss occurs must stand the loss. Such party may recover from the transportation company. This question is discussed in the chapter on Carriers.

While a seller loses his lien by delivery of possession of the goods to the purchaser, if the goods are delivered to a carrier and the purchaser becomes insolvent before the carrier delivers the goods to him the seller may stop delivery of the goods, and retake possession even though title has passed to the purchaser. The seller's lien in this event revives. By *insolvency* is meant inability to pay one's debts. The right of a seller to stop a carrier from delivering goods to a vendee, in case of insolvency of the latter, is called *stoppage in transitu.* This question is also discussed in the chapter on Carriers.

A seller may enforce his lien by keeping the goods, and suing the purchaser for damages, or by selling the goods at private or public sale, with notice to the purchaser of the time and place of sale, and then by suing the original purchaser for the difference between the amount he receives for the goods on resale, and the amount the original purchaser agreed to pay. The seller may, of course, hold the goods and demand the original purchase price of the purchaser, and not yield possession until he receives the purchase price.

223. Remedies of Seller. The seller's lien described in the previous section is one of the remedies of a seller. If the purchaser refuses to accept the goods, the seller may keep or resell the goods, and if he receives less than the original purchaser agreed to pay, he may recover the difference as damages from the original purchaser. For example, *A* agreed to manufacture and deliver a specially constructed cash register for *B* for $500.00. When it was completed, *B* refused to accept same. *A* sold it for $200.00, the fair market price, and recovered from *B*, $300.00 as damages for *B's* breach of contract. If the purchaser accepts the goods and fails to pay for them when due, the seller may sue and recover the entire purchase price, together with damages and expenses which are necessarily connected therewith.

224. Remedies of Purchaser. Where title has not passed to the purchaser, if the seller refuses or fails to deliver goods according to the contract of sale, the purchaser may go into the market at the time and place of delivery and purchase goods, and if obliged

to pay more than the original contract price, he may recover the excess from the seller. For example, suppose *A* purchases five hundred pounds of lard of *B* for $60.00, *B* agreeing to deliver the lard October 30th, at Chicago. If *B* fails to deliver the lard in Chicago, October 30th, *A* may purchase lard of the same quality in Chicago, and if he is obliged to pay $90.00 for the same, he may recover $30.00 damages from *B*. If there is no market at the place of delivery mentioned in the contract, the purchaser may purchase at the nearest market. If the purchaser makes the purchase for a particular purpose, which he makes known to the seller at the time the sale is made, and he is specially damaged by reason of the failure of the seller to keep his contract, special damages may be recovered for losses arising by reason of the special circumstances. If title to the goods has passed to the purchaser, in case the seller refuses to deliver them, the purchaser may bring an action of *replevin* to recover their possession. Replevin is a possessory action. (See chapter on Courts and Legal Remedies.)

QUIZ QUESTIONS

BANKING, LOANS, MONEY, AND CREDITS

1. Define a *bank*.
2. Classify banks.
3. How are national banks created?
4. What are state banks?
5. Define and distinguish *banks of discount, banks of circulation,* and *banks of deposit.*
6. Are most banks incorporated companies?
7. What are the powers of an incorporated bank?
8. Do banks have the power to deal in real estate?
9. Do banks have the power to collect commercial paper?
10. What are *bank deposits?*
11. Is a bank required to receive deposits from any one who tenders them?
12. What name is applied to the person authorized to receive bank deposits?

13. Do savings banks permit their customers to draw their deposits by check?

14. Distinguish *general* and *special deposits.*

15. Define *check.*

16. What kinds of banks do a checking business?

17. By what process may a depositor withdraw money from a savings bank?

18. Define a *paid voucher.*

19. When do banks return checks to their customers?

20. When are checks payable?

21. What should a customer do with paid checks when they are received from his bank?

22. When must checks be presented for payment?

23. Is a bank required to pay the checks of its depositors?

24. If a bank refuses to pay a check what, if anything, must the holder do to hold the maker liable?

25. Are national banks permitted to make loans on real estate?

26. Are savings banks permitted to make loans on real estate?

27. Define *credit.*

28. By what means is credit information furnished?

29. Distinguish *credit* and *capital.*

30. Are forged negotiable instruments void or voidable?

31. Is a bank liable for paying forged checks, or must the depositor whose signature is forged stand the loss?

32. If a forgery is not reported by a depositor until six months after it was committed, who must stand the loss?

33. Is a bank liable if it pays a *bonâ fide* holder a check payable to bearer?

34. Under what laws are national banks created?

35. Does the United States Constitution expressly provide for the creation of national banks?

36. What United States officer has supervision over national banks?

37. Are national banks furnished with circulating notes? If so, in what amounts?

38. In case of the bank's insolvency, what is the liability of national bank stockholders?

39. What rate of interest can national banks charge?

40. Can national banks buy and sell bonds?
41. What penalty is imposed upon national banks for usury?
42. Define and distinguish *savings banks* and *trust companies.*
43. Are clearing houses banks? What are the functions of clearing houses?
44. In what two ways is the term *money* used?
45 What is *legal tender?*
46. Are silver certificates legal tender?
47. Define *discount.*
48. Distinguish *discount* and *purchase of negotiable paper.*
49. Are banks permitted to purchase negotiable paper at a profit in excess of legal rates of interest?
50. Are individuals and business concerns permitted to purchase negotiable paper at a profit in excess of legal rates of interest.
51. Define *exchange.*
52. Distinguish *foreign* and *domestic exchange*
53. Define *interest.*
54. Define and give an example of *usury.*
55. What is the usual penalty for usury?

INSURANCE

1. Define *insurance.*
2. Are insurance companies controlled by the legislatures of the states?
3. May an individual or a partnership enter into insurance contracts?
4. Is insurance business interstate commerce if transacted between citizens of different states?
5. May one state exclude insurance companies of another state from transacting business within its territory?
6. Does an insurance contract require all the elements of an ordinary contract?
7. In what way does an insurance contract differ from an ordinary contract?
8. How many parties are there to an insurance contract?
9. Define *underwriters.*
10. Define *beneficiary.*

11. Name the principal kinds of insurance written at the present time.

12. Define and give an example of *insurable interest.*

13. Must an insurance contract be in writing to be binding?

14. Are insurance contracts within the Statute of Frauds?

15. Define *binder.*

16. Define *warranty* as used in an insurance contract.

17. Distinguish warranty as used in insurance contracts from warranty as used in contracts of sale.

18. Define *representation* as used in connection with insurance contracts.

19. Distinguish *warranty* and *representations.*

20. Does breach of warranty avoid a contract of insurance?

21. Does breach of representation discharge an insurance contract?

22. Define *life policy.*

23. Define *term policy.*

24. Define *tontine policy.*

25. Define *marine insurance.*

26. What implied warranty enters into a policy for marine insurance?

27. Define *general average.*

28. Define *standard policy.*

29. If a policy of insurance contains no stipulation relative to suicide, and the insured takes the policy intending to commit suicide, and does commit suicide, is the policy enforceable?

30. If an insurance policy contains a suicide clause, and the insured commits suicide while insane, is the policy enforceable?

31. May an insurance company stipulate against suicide in such a manner as to avoid the policy if the insured suicides when insane?

32. Define and distinguish *fidelity* and *casualty insurance.*

33. What is *re-insurance?*

34. Is a company writing a policy of re-insurance liable to the party originally insured?

35. May a company re-insure at greater risk than it itself has insured?

36. Can a fire insurance policy be assigned before a loss has occurred?

37. Can a fire insurance policy be assigned after a loss has occurred?

38. Can a life insurance policy be assigned at any time?

39. Define and distinguish *open* and *valued policies.*

40. Define *other insurance.*

41. What limit, if any, is placed upon the amount of life insurance a person may take?

42. May a person insure personal property for more than its actual value?

43. If a person insures his house in three different companies for two-thirds of its value in each company, in case of loss how much an he recover, if anything, on each policy?

SURETYSHIP

1. Define *suretyship.*
2. Is a suretyship obligation a contract?
3. What contracts is the term *suretyship* used to designate?
4. How many parties are there to a suretyship contract?
5. Define *principal.*
6. Give an example of a suretyship contract.
7. Define *promisor.*
8. Define *creditor* to a suretyship contract.
9. Give the different technical names that may be applied to a promisor of a suretyship contract depending upon the nature of the liability.
10. Define *surety.*
11. Give an example of a contract of a surety.
12. Is the liability of a surety conditional upon that of his principal.
13. Define *guarantor.*
14. *A* promises a creditor of *B* to pay *B's* debt if *B* does not. Is *A's* contract that of a surety or of a guarantor?
15. In commercial practice what form of suretyship contract is most frequently used, that of a surety or of a guarantor?
16. Define *indorser.*

17. Is an endorser's contract found outside of negotiable instruments?

18. Is an indorser bound by any implied contract?

19. What are the warranties of an indorser?

20. Is consideration a necessary element of a contract of suretyship?

21. If a suretyship contract is part of the transaction which it secures must it be supported by a separate consideration?

22. Must any contracts of suretyship be in writing?

23. Is an oral contract of suretyship illegal?

24. What is meant by the Statute of Frauds as applied to suretyship contracts?

25. Define *general guaranty.*

26. Define *limited guaranty.*

27. Define *special guaranty.*

28. Define *continuing guaranty.*

29. What kinds of notice may a guarantor be entitled to?

30. When, if at all, is a guarantor entitled to notice of default of his principal?

31. When, if at all, is a guarantor entitled to notice of acceptance of his guaranty by a creditor?

32. If *A* is surety for *B* upon *B's* debt to *C* of $100.00 and *B* settles his debt with *C* for $50.00, can *C* hold *A* for the balance?

33. If *A* guarantees *B's* debt to *C* of $100.00 due one year and with interest at 6%, and *B* without *A's* consent reduces the interest to 5%, is *A* thereby discharged?

34. If *A* guarantees *B's* debt to *C* of $100.00 payable in one year, and *C* without *A's* consent extends the time of payment six months upon *B's* agreement to pay 6% interest, is *A* thereby discharged?

35. Is fraud practiced by the principal upon the promisor to a suretyship contract, a defense to the promisor in an action brought by the creditor?

36. In the absence of special statute can a promisor to a suretyship contract compel by notice a creditor to sue a principal?

37. Are surety companies favorites of the law?

38. Define *subrogation.*

39. Give an example of *subrogation.*

40. Define *indemnity* as applied to a suretyship contract.

41. *A* guarantees *B's* debt to *C* of $100.00 upon a promissory note. *B* defaults and *A* pays the debt. *A* then sues *B* for $100.00 upon the promissory note. Is this an example of indemnity or subrogation? May *A* sue *B* for $100.00 independently of the promissory note?

42. Define *contribution.*

43. *A, B,* and *C* guarantee *D's* debt to *E* of $300.00. *E* sues *A* and collects $100.00. Can *A* sue *B* and *C* for $33.33 each?

PERSONAL PROPERTY

1. Define *personal property.*
2. Classify personal property.
3. Distinguish *chattels real* from *chattels personal.*
4. Define and give an example of *chose in action.*
5. Define and give an example of *chose in possession.*
6. How may title to personal property be acquired?
7. May a person obtain title to personal property by finding it?
8. How can personal property be transferred?
9. Upon death of the owner, to whom does title to personal property pass?

SALES

1. Distinguish ownership and possession of personal property.
2. May title and possession of personal property be in different places?
3. Define *sale.*
4. How does a sale differ from a contract to sell?
5. *A* promises to deliver a car of coal to *B* the following month in consideration of *B's* promise to pay *A* $300.00 upon delivery of the coal. Is the transaction a sale or a contract to sell?
6. In a contract to sell, if the property is destroyed by fire before the property is delivered, who stands the loss?
7. Distinguish *barter* from *sale.*
8. *A* agrees to deliver to *B* one hundred bushels of apples for twenty tons of coal at $5.00 per ton. Is the transaction a *sale* or a *barter?*

9. Define *conditional sale.*

10. At the present time is a vendor of a conditional sale contract permitted to take possession of the property after 90% of the purchase price has been paid.

11. *A* leaves his automobile at *B's* shop for repairs. Is this transaction a sale?

12. Distinguish *sale* from *bailment.*

13. What kinds of personal property may be the subject of a sale?

14. May personal property to be manufactured be the subject of a present sale?

15. What is meant by the Statute of Frauds as applied to sales?

16. What contracts of sales must be in writing?

17. When must personal property sold be delivered?

18. In the absence of any express agreement as to delivery, when and by whom must personal property be delivered?

19. If a sale is made in which delivery is to be made in the future may title pass to the purchaser at once?

20. When does title pass to the purchaser in a sale of personal property?

21. Does the fact that delivery is to be made in the future, of itself, prevent title passing to the purchaser at the time the sale is made?

22. *A* sells a desk to *B* for $10.00, agreeing to revarnish the desk and deliver same to *B* the following Saturday. When does title to the desk pass to *B?*

23. What, if anything, does intention of the parties have to do with the passing of title to the purchaser?

24. In the absence of an express agreement when must the purchase price be paid?

25. Is the seller permitted to retain possession of the property sold until he receives the purchase price?

26. *B*, by means of fraud, purchases a bicycle from *A*. *B* sells it to *C*, who does not know of the fraud. Can *A* recover the bicycle from *C?*

27. *A* purchases a bicycle from *B* telling *B* that he is *C*. *B* knows *C* by reputation and thinks that he is selling to *C*. *A* sells the bicycle to *D*. Can *B* obtain possession of the bicycle from *D?*

28. Define *Caveat Emptor.*

29. Does the rule of *Caveat Emptor* apply if the seller expressly warrants the goods sold?

30. Define *express warranty.*

31. *A* sells a horse to *B* assuring *B* that the horse is perfectly sound. The horse has blemishes. Does *A* warrant the horse?

32. Define *implied warranty.*

33. Enumerate the most common implied warranties.

34. Does an implied warranty of title accompany every sale?

35. *A* purchases an automobile at a sheriff's sale. The automobile is mortgaged. May the mortgagee take the auto from *A?* If so, can *A* recover on an implied warranty from the sheriff?

36. What is meant by *implied warranty of wholesomeness of food?*

37. Does this warranty extend to any purchaser?

38. Give an example of an implied warranty in a sale by sample.

39. Does the implied warranty of merchantability apply when the goods are selected and inspected by the purchaser?

40. Give an example of a sale in which there is an implied warranty of fitness for the purpose for which the goods are to be used.

41. Does this implied warranty exist if the goods are constructed and furnished according to a model furnished by the buyer?

42. Define *rescission of a contract.*

43. May a contract of sale be rescinded for breach of warranty?

44. Generally, what is a purchaser's remedy for breach of warranty?

45. Define *lien.*

46. Give an example of seller's lien.

47. Define *stoppage in transitu.*

48. *A,* in Cleveland, orders goods of *B* in Chicago. *B* delivers the goods to the Adams Express Company, addressed to *A.* The goods are lost in a railway wreck. Who must bear the loss, *A* or *B?*

49. *A* sells a carriage to *B.* *B* refuses to pay for the same. If *A* has not delivered the carriage to *B* may he sue *B* for damages?

50. *A* purchases a carriage from *B.* *A* tenders the price, but *B* refuses to deliver the carriage. May *A* obtain possession of the carriage by legal action?

51. May *A* sue *B* for damages for refusing to deliver the carriage?

COMMERCIAL LAW

PART IV

BAILMENTS

225. Bailment Defined. A *bailment* has been defined to be "A delivery of goods for the execution of a special object, beneficial to the bailor, the bailee or both, upon a contract express or implied, to carry out this object, and dispose of the property in conformity with the purpose of the trust." It is the giving possession of personal property to another for the purpose of having the property cared for, improved or used, with the understanding that when the purpose of the delivery is fulfilled, the property shall be returned to the bailor or disposed of according to his directions.

A bailment differs from a sale in that the title to the property remains in the bailor, and possession is given the bailee, while in a sale, the title or ownership of the property is transferred to the purchaser, while possession may remain in the seller. Bailment is a broad subject covering many transactions. Loans, pledges, and deliveries of property of every nature, in which mere possession is given another without transfer of title are included. If *A* leaves his watch with *B*, a jeweler, for repairs, the transaction is a bailment. If *A* delivers property to B, a transportation company, to be conveyed to *C*, the transaction is a bailment. If *A* loans his knife to *B*, the transaction is a bailment.

226. Parties to a Bailment Contract. There are two parties to a bailment contract. The one who gives possession of chattel property to another, reserving title to himself, is called the *bailor*, and the one who receives possession of the property under these conditions is called the *bailee*. A bailment is a contract. Parties to a bailment must be competent to contract. (See *Competency of Parties*, chapter on Contracts.) Parties under legal age may avoid contracts of bailment. If *A*, fifteen years of age, hires a horse from *B*, a liveryman, for one hour for $2.00, *B* cannot compel *A* to carry out his con-

tract if *A* objects on the ground of infancy. But if *A* injures the horse he is liable in damages to *B*. An infant is liable for his torts, but not for his contracts.

227. Classification of Bailments. Bailments are usually divided into three classes; bailments for the sole benefit of the bailor, bailments for the sole benefit of the bailee, and bailments for the benefit of both the bailor and bailee. A common example of a bailment for the sole benefit of the bailor is a delivery of property to the bailee, to be kept by the bailee gratuitously for the accommodation of the bailor, or delivery of property to the bailee to have work performed on it, without compensation to the bailee. Examples of bailments for the sole benefit of the bailee are loans to the bailee without compensation to the bailor. Bailments for the mutual benefit of bailor and bailee include deliveries of property to carriers, pledges, renting property, or hiring the bailee to perform work on the property bailed, or hiring the bailee to care for the property.

228. Elements of a Contract of Bailment. It is sometimes said that a bailment for the sole benefit of the bailor is not a contract by reason of there being no consideration. A consideration may consist of any benefit to the party making a promise, or any detriment to the one to whom the promise is made. The giving up of the property bailed to the bailee is considered a detriment to the bailor, even though the bailee receives no benefit. For a transaction to constitute a bailment, there must be a delivery of the property bailed to the bailee, and an acceptance by him of the property. This delivery may be actual or constructive, as by delivery of a warehouse receipt, or a bill of lading. The delivery must be sufficient to enable the bailee to secure the possession of the goods, and to control the possession during the period to be covered by the bailment, to the exclusion of the bailor. The property must be in existence to be bailed. A contract of bailment need not be express; it may be implied as well—a thief or a finder of property is a bailee for the true owner.

229. Title to Property Bailed. The title to property bailed does not pass to the bailee. Mere possession passes to the bailee. It is not necessary that the bailor have title to the property to bail it. If he has right of possession he may, under certain circumstances, bail it. *A* may rent a livery stable, including horses and carriages, of *B*, for three years, with the understanding that he will operate

the business in the usual way. *A* does not have title to the horses and carriages, but he may hire them to *C*, or to anyone he chooses. This transaction with *C* constitutes a bailment, in which the bailor does not have title to the property bailed. He has, however, sufficient right of possession to enter into a bailment contract. The principal distinction between a bailment and a sale of personal property is that, in the latter case, title passes to the purchaser regardless of change of possession of the property, while in the case of a bailment, possession of the property must pass to the bailee, while title is not disturbed.

230. Bailments for the Sole Benefit of the Bailor. Where personal property is deposited with another for safe keeping, or for the purpose of having work performed on it, without compensation to the bailee, the transaction is called a bailment for the sole benefit of the bailor. The liability of a bailee for the loss or injury of property intrusted to his care, depends upon the nature of the property itself, and upon whether the bailee receives compensation for his services. Three degrees of care and negligence, respectively, are recognized in bailments; slight, ordinary and great care, and gross, ordinary and slight negligence. What constitutes ordinary care or negligence is determined by considering what a man of ordinary prudence would do under the circumstances in question. Any case of negligence above or below this standard constitutes great care or gross negligence. If *A*, in going to lunch, leaves his umbrella in *B's* office, and the umbrella is stolen, *B* is not liable to *A*, if he exercised slight care. If *A*, a lawyer, is obliged to go to police court to try a criminal case, and leaves his diamond pin with *B*, a brother attorney, *B* is obliged to exercise only slight care, as in the case of the umbrella, and is liable only for gross negligence. But slight care means a much greater degree of care in case of the diamond pin than in the case of the umbrella. In case of a bailment for the sole benefit of the bailor, the bailee is obliged to exercise only slight care, and is liable only for gross negligence. He receives no compensation for the service, and for this reason is not obliged to exercise a great degree of care. Property cared for gratuitously for the accommodation of the bailor, or to be carried to some place, or to have something done to it gratuitously, constitutes this class of bailments.

231. Bailments for Sole Benefit of Bailee. Property loaned to a bailee for the latter's accommodation constitutes a bailment for the sole benefit of the bailee. *A* borrows *B's* horse to drive to *Y*. *A* pays *B* nothing for the use of the horse. *A* must exercise great care in the use of the horse, and is liable to *B* for slight negligence. It is no defense, in case the horse is injured while in *A's* possession, that *A* acted as an ordinarily prudent man would act under the circumstances. He must act as an ordinarily prudent man would act when exercising great care. If, from the circumstances connected with the injury to the horse, it is determined that an ordinarily prudent man would have been guilty of slight negligence in the method of handling the horse or causing the injury, *A* is liable to *B* for the injury to the horse.

A court said on this point, "A bailee who is a borrower must use extraordinary care to protect the property loaned to him, and is responsible for the slightest neglect. He must exercise all the care and diligence that most careful persons exercise in the transaction of their own affairs."

If the bailee uses the property for any purpose other than that for which it was bailed, or if he exceeds the authority of the bailor in the use of the property, he is liable for injuries resulting. For example, *A* borrowed *B's* oxen to plow up a hedge. *A* used the oxen to draw a load of stone. A stone rolled off the cart and injured one of the oxen. *A* was held liable for the injury.

232. Bailments for Benefit of Both Bailor and Bailee. The majority of bailments are for the benefit of both bailor and bailee. This class of bailments includes the hiring of personal property. *A* rents *B's* automobile for three hours, at three dollars an hour. This is an example of this class of bailments. This class also includes pledges or pawns of goods. If *A* pledges ten shares of stock in a corporation to his bank for a loan, this transaction constitutes this form of bailment. This also includes the hiring of a bailee to carry goods from one place to another. The most common example of this class of bailments is that of common carriers. For example, *A* employs *B*, an express company, to carry a package of jewelry from Cleveland to Chicago. The bailment is for the mutual benefit of both *A* and *B*. Any case in which one party employs another to carry goods from one place to another for compensation is included in

this class of bailments, and is discussed more at length in the chapter on Common Carriers.

Hiring a person to care for personal property for compensation is included in the class of mutual benefit bailments. A traveling salesman leaving his trunk and satchel with a hotel-keeper is a common example. Where one person hires another to perform work or services on the thing bailed, the transaction constitutes a mutual benefit bailment. For example, if *A* leaves his overcoat with *B*, his tailor, to be cleaned and pressed, the transaction constitutes this form of bailment. In mutual benefit bailments the bailee has the right to use the property bailed only for the purposes of the bailment. If *A* rents *B's* automobile, he is entitled to use it during the period covered by the contract. If he rents it for a particular designated trip, he cannot use it for any other trip. In a mutual benefit bailment, when the bailee hires out the use of a chattel, there is an implied contract on his part that the chattel is fit for the purpose for which it is to be used, and that it may safely be used for such purposes. *A* rents *B's* naphtha launch for the purpose of taking a lake ride. *B* has carelessly supplied the wrong fuel. An explosion results, injuring *A*. *B* is liable for the injury. In mutual benefit bailments, the bailee is obliged to exercise ordinary care, and is liable for ordinary negligence.

The bailee must act as an ordinarily prudent man would act under the same conditions in protecting and caring for the property. *A* rents a typewriter of *B*. If the typewriter breaks or gets out of order during ordinary usage, *B* must stand the loss. If the parties to a bailment of this class specifically contract as to who shall bear the loss in case of accident, or as to the degree of care which shall be exercised, these express stipulations prevail.

233. Warehousemen and Storage Companies. A person who keeps a place for the storage of goods for a compensation is a warehouseman or storage-keeper. In a few states, public warehouses are provided for by statute. In these states, the statutes define the duties and liabilities of warehousemen. These public warehousemen are generally required to take all goods offered for storage, no matter who the owner may be, if the goods are in condition to be stored and if the storage charges are tendered.

Most warehouses operate their business as private enterprises. A few states provide by statute for public warehouses. Private

warehousemen may select their customers. They are not required to accept goods for storage if they do not so desire. The government provides warehouses for the storage of goods upon which customs or duties are to be paid. These warehouses are private enterprises authorized by the government to act as government warehouses. The government requires a bond of these warehousemen for the protection of itself, but the government is in no way responsible for the warehouseman's treatment of the goods, or for breaches of contracts between the warehousemen and their customers.

Warehousemen commonly issue receipts for goods stored with them. These warehouse receipts ordinarily are made payable to the customer's order, and may be negotiated. They are not generally recognized as negotiable instruments. A few states have statutes making them negotiable instruments, but outside these jurisdictions, warehouse receipts are merely evidences of ownership of the property. The purchaser takes the same right to the property which the original bailor had, with the additional right to sue the transferor if the title proves defective.

A warehouseman has a lien on the property for his charges. The warehouseman or storage-keeper must exercise ordinary care in the protection of the property. The bailor must reveal to the bailee the character of the goods stored. If the goods are of a dangerous character and injury results, the bailor is responsible to the bailee for damages, if he has failed to reveal the dangerous character of the goods.

234. Degree of Care Required of Bailee. A bailee of property is required to exercise a certain degree of care in the use, preservation and protection of the property placed in his possession, and is liable for a certain degree of negligence. The amount of care a bailee is obliged to exercise, and the amount of negligence for which he is liable, depends upon the kind of property bailed, and whether the bailment is for the sole benefit of the bailor, the bailee, or for the mutual benefit of both the bailor and the bailee. If the property bailed is of great value, or so delicate that it is easily lost, destroyed or injured, a greater degree of care is required on the part of the bailee than if the property is of little value, or is of such a nature that it is not easily damaged, lost or destroyed.

If *A*, with *B's* permission, stores his wagon in *B's* barn, and the

wagon is stolen, *B* is not liable unless he was grossly negligent. He was not paid for the bailment, and was obliged to exercise only slight care in the protection of the wagon. If, however, *A* leaves his watch with *B* while he attends a ball game, and the watch is stolen, *B* must have exercised greater care than in the case of the wagon by reason of the value and nature of the property bailed. Otherwise, he will be liable. In this case as well as in the case of the wagon, *B* received no compensation for the bailment, and is obliged to exercise only slight care in the protection of the property bailed, and is liable only for gross negligence. What constitutes slight care and gross negligence differs materially in the case of the wagon and in the case of the watch.

In connection with bailments, care is said to have three degrees, *great, ordinary* and *slight.* Negligence is also said to have three degrees, *gross, ordinary* and *slight.* Ordinary care or negligence is the standard for testing each case. After ordinary care or negligence is determined, slight or great care, and slight or gross negligence is determined by ascertaining whether the care or negligence is above or below ordinary. Any care greater than ordinary is great care; any care less than ordinary is slight care. Any negligence greater than ordinary is gross negligence. Any negligence less than ordinary is slight negligence. If a person takes such precautions in the use, preservation, and protection of the property as an ordinarily prudent person would take of his own property under similar circumstances, he is said to exercise ordinary care. The degree of care required of a bailee depends upon the kind of a bailment in question, as well as upon the kinds of property bailed.

If the bailment is for the sole benefit of the bailor, the bailee receiving no compensation for his inconvenience and work, he is required to exercise only slight care, and is liable only for gross negligence. If the bailment is for the sole benefit of the bailee, the bailor receiving no compensation for his inconvenience and the loss of the use of his property, the bailee is required to exercise great care in the use and preservation of the property, and is liable for slight negligence. In case of mutual benefit bailments, the bailee is obliged to exercise ordinary care in the use and protection of the property, and is liable for ordinary negligence. Two classes of mutual benefit bailees, inn-keepers and common carriers, do not come within the

above rule. These are known as *exceptional mutual benefit bailments*, and are discussed under separate chapters.

235. Rights of Bailee as Against Bailor. A bailee has the right to keep the property, to use it according to the terms of the contract of bailment, and to defend this right even against the bailor himself. While the title to the property in question remains in the bailor, the right of possession during the period covered by the contract of bailment is in the bailee. He may retain possession of the property for the purpose of the bailment. A bailee is entitled to use the property bailed, and is restricted only by the limitations of the contract. If the bailee uses this property in a way not authorized by the contract of bailment, he is liable in damages to the bailor.

Where a mutual benefit bailment requires the bailee to use skill in connection with the property bailed, the bailee must exercise a degree of skill ordinarily used by persons who perform similar work. If the bailee fails to use this degree of skill, he is liable in damages to the bailor. For example, if *A* leaves his horse with *B*, a blacksmith, to be shod, and *B* attempts the work, but performs it so unskillfully, or carelessly that the horse is injured or lamed thereby, *B* is liable to *A* for the damage caused.

236. Rights of Bailee as Against Third Persons. A bailee has the right to keep the property bailed as against third persons who endeavor to interfere with his possession. The bailee is not permitted to dispute the title of the bailor for his own benefit. If, however, the property is taken away from the bailee by action at law, by one whose title is superior to that of the bailor, the bailee is relieved from liability to the bailor. In this event, the one who has the paramount title coupled with the right of immediate possession, may take the property from the bailee. If the bailee yields possession to one whose right of possession and title are inferior to the bailor's, the bailee is answerable to the bailor for any losses sustained. The bailee cannot confer good title upon anyone to whom he attempts to sell the property bailed, even though the purchaser buys without notice of the bailment. Anyone who injures the property while it is in the possession of the bailee is responsible either to the bailor or bailee for the damages.

237. Lien of Bailee. A bailee who has performed work on the article bailed, for which he is to be paid a consideration, is said

to have a *lien* for the value of the work performed, or materials furnished. By a lien is meant the right of the bailee to retain possession until the value of his labor or material has been received. At common law, a livery stable keeper had no lien upon horses fed and cared for. By statute in most states, livery stable keepers now have a lien upon horses left with them. If a bailee is employed to perform work or labor upon personal property, and the property is destroyed without fault of the bailee after part of the work has been performed, the bailee may recover for the amount of work performed and materials furnished, unless the contract of bailment is to the effect that the entire job is to be completed before any payment is made.

A bailee loses his lien by parting with possession of the property. At common law, a bailee could not sell the property to enforce his lien. By statute in most states, the bailee is permitted to sell the property, by giving notice of the time and place of sale to the bailor, or by foreclosing his lien by a legal action.

PLEDGES

238. Pledge Defined. A *pledge* is one form of a mutual benefit bailment. It is a deposit of personal property by a debtor with a creditor as security for a debt, the title to the property remaining in the debtor until the property is disposed of by the creditor in accordance with the express or implied agreement of pledge. A pledge differs from a chattel mortgage in that possession of personal property is given a creditor for the purpose of securing a debt, the title remaining in the debtor. In case of a chattel mortgage, the title to the personal property passes to the mortgagee, who is the creditor, subject to revesting in the mortgagor, who is the debtor, in case of payment of the mortgage debt. In a chattel mortgage, possession of the property generally remains in the debtor.

A owes *B* $100.00. He gives *B* possession of a diamond ring as security for the debt. If *A* does not pay the $100.00 when due, *B* may retain possession of the ring until he receives $100.00 from *A*, or he may sell the ring at public sale, advising *A* of the time and place of sale. If the ring sells for more than $100.00, *B* must pay *A* the excess of $100.00.

Pledges form an important part of present day business. Pledges

of bonds, stocks and negotiable paper are common in transactions with banks. Banks commonly make loans, taking a promissory note secured by a pledge of stocks, bonds, negotiable instruments, or other personal property. Their loans are commonly called loans on *collateral* or loans on *collateral security.*

239. Parties to a Pledge. A pledge of chattel property is a contract express or implied. The party giving the property as security to his creditors is called the *pledgor,* the party receiving the property is called the *pledgee.* Like any contract, it requires competent parties. (See *Competency of Parties,* chapter on Contracts.) A person mentally insufficient, intoxicated, or an infant, is not competent to make a contract. An infant's contracts of pledge, like any of its contracts are voidable, but not void. The infant may carry out the contract if he chooses. An infant's contracts are not illegal. They cannot be enforced against an infant, however, if he objects by reason of infancy. A competent party, contracting with an infant, cannot void his contract on the ground of infancy of the other contracting party. Most contracts of pledge are implied. If *A* owes *B* $10.00 and gives *B* his watch as security, *B* impliedly has the right to retain possession of the watch until *A* pays him $10.00. *B* also has the right after *A* fails to pay him the $10.00 when due, to sell the watch at public auction, and apply as much of the proceeds as is necessary to the payment of his debt. In most pledges of importance where securities are pledged, the contract of pledge is reduced to writing, and a stipulation is made giving the pledgee the right to sell the property at public or private sale without notice to the pledgor, and permitting the pledgee himself to be a purchaser at the sale. No matter what the contract of pledge provides, the sale should be public, notice of which should be advertised, and notice of the time and place should be given the pledgor.

240. Personal Property Which May Be Pledged. Any kind of personal property which is the subject of transfer may be pledged. This includes personal property having a tangible existence, as well as that which is intangible. That is, choses in action as well as choses in possession may be pledged. A promissory note, a certificate of stock, or a bond which is an evidence of something tangible or the right to obtain something tangible, is the subject of a pledge, as well as furniture, jewelry and other tangible personal property. Property

which has no active or potential existence is not the subject of a pledge. A person cannot pledge a horse which he expects to purchase, or a crop which he expects to grow on the land of another. A person may, however, pledge a growing crop.

241. The Debt Secured. A pledge or delivery of personal property is for the purpose of securing a debt owing the pledgee. The existence of a debt is one of the essential elements to a valid pledge. A delivery of personal property to another in the absence of a debt may constitute a bailment for the sole benefit of the bailor, the bailee, or for the mutual benefit of both parties. To constitute a pledge, however, there must be a debt owing the pledgee, and the property must be delivered to him, and accepted by him as security for the debt. The debt must be legal, and must be supported by a sufficient consideration to support the contract of pledge.

A won $50.00 at cards from *B*. *B* gave *A* his watch as security for the debt. *B* was permitted to recover possession of his watch from *A* by legal action, since the gambling transaction was illegal. *B* did not legally owe *A* $50.00. An illegal debt cannot support a contract of pledge. If, for any reason, the debt is not owing or is not valid, it will not support a contract of pledge.

242. Title to Property Pledged. The legal title or ownership of personal property pledged remains in the debtor or pledgor. A right of possession is given the pledgee. This is sometimes called a *special property*. A pledge differs from a sale in that, in a sale, the title or ownership of the personal property passes to the purchaser, while the possession may remain in the seller. In a pledge, however, the possession passes to the pledgee or creditor, while the title remains in the pledgor or debtor. A pledge differs from a chattel mortgage in that, in the latter, the title passes to the creditor or mortgagee, subject to revesting in the mortgagee or debtor, upon the latter's paying the mortgage debt.

There is probably one exception to the rule that title to property pledged does not pass to the pledgee, and that is in case of negotiable instruments. A negotiable instrument endorsed in blank, or made payable to bearer passes like currency by delivery. A pledge of such paper passes title to the pledgee. A pledge of negotiable paper not endorsed in blank, or not payable to bearer should be made by proper endorsement. In this event title passes to the pledgee. The

title is revested in the pledgor by proper indorsement, or by delivery, if the instrument is transferable by delivery, when the debt secured is paid. A pledgee of negotiable paper, who takes it before it is due without notice of defenses, is an innocent purchaser for value without notice, and as such, is entitled to the rights of an innocent purchaser for value without notice. (See *Innocent Purchaser for Value Without Notice*, chapter on Negotiable Instruments.)

243. **Collateral Securities.** Loans by banks are frequently made on collateral securities. This means that the borrower gives a bank a promissory note for the amount, and pledges personal property to secure the note. The contract of pledge may be by separate written instrument, or it may be made a part of the note itself. Where made a part of the note, the note is called a *collateral note.* (See *Collateral Note*, chapter on Negotiable Instruments.) Any kind of property which is the subject of a pledge may be used as collateral security. Stocks, bonds, and even commercial paper are commonly used. Jewelry, bills of lading, and warehouse receipts are not infrequently used in this kind of a pledge. Collateral security given as security for a promissory note or other negotiable instrument is a pledge. The rules governing ordinary pledges govern this kind of pledge as well. The only practical distinction between a collateral loan and an ordinary loan is that, in a collateral loan, the debt is evidenced by a negotiable instrument which is secured by a pledge of personal property.

244. **Rights and Duties of Pledgor and Pledgee.** A pledgor has the right to have his pledged property returned to him upon payment of the debt secured by the pledge. He also has the right to have the property carefully preserved and cared for while in the possession of the pledgee. The pledgee is entitled to retain possession of the property pledged until the debt owing him is paid. He may re-pledge the property if he so desires. If the pledged property is negotiable paper, the pledgee must collect the paper as it falls due, and observe all the requirements necessary to preserve the rights of the pledgor. If the property pledged is tangible personal property, the pledgee must use the care of an ordinarily prudent man in the preservation and protection of it. He is not permitted to use property which may be injured by use, and should not use the property except to the extent that it is necessary for its preservation. If the pledgee sells or transfers

the debt secured, the purchaser is entitled to the benefit of the pledge. That is, if *A* owes *B* $500.00 and pledges five shares of stock to *B* as security for the debt, and *B* sells the debt to *C*, *C* is entitled to the benefits of the pledged certificates of stock. If *B* gives *C* possession of the stock, *C* may retain the same until he receives the $500.00 from *A*. If *B* does not turn over the shares of stock to *C*, *C* may bring an action to compel the transfer of possession to him.

245. Disposal of Property by Pledgee After Default. If the pledgor fails to pay the debt secured when due, the pledgee has the right to enforce his pledge. In the absence of any special agreement, the law impliedly gives the pledgee the right to sell the property at public sale, and apply as much of the proceeds of the pledged property as is necessary to the payment of his debt. This sale must be public. The pledgee must first notify the pledgor that he is in default of payment, and of his intention to sell the property, giving the time and place of the proposed sale. The pledgee cannot be a purchaser at the sale, unless so permitted by express stipulation in the contract of pledge. Many contracts of pledge are in writing, by the terms of which the pledgor waives notice of default and of time and place of sale, and permits the pledgee to sell at private sale, and to become a purchaser at the sale. When a pledgee is given the right to purchase by the contract of pledge, he cannot make a valid purchase without advertising the property, and without exerting himself reasonably to obtain the greatest amount possible for the pledged property at the sale.

In selling pledged property, notice of default should be given the debtor. He should also be notified of the time and place of sale. The sale should be advertised publicly, and should be public. The pledgee cannot himself purchase the property unless the contract of pledge expressly so provides. Even in this event, the sale will not be held valid unless it is public and fair in every way to the interests of the pledgor. A pledgee is permitted in some states to sell according to certain statutory methods provided. A pledgee may sell by foreclosing his lien in equity. This means by filing a written request in a court of equity to sell the property. In this event, the sale is conducted by order of court.

246. Redemption. A pledgor has the right to obtain possession of the property pledged, by paying the debt secured at any time before

actual sale of the property. A pledgor sometimes agrees by the contract of pledge, to waive the right to redeem the property after default of payment of the debt secured. Courts will not enforce such a provision of the agreement against him. The pledgor is permitted to redeem the property by paying or tendering the amount of the debt at any time before sale of the pledged property. If the pledgor is in default of payment, however, and agrees by separate agreement, made subsequently to the contract of pledge, that the pledgee may keep the property pledged in satisfaction of the debt, he is bound by this agreement.

MORTGAGES OF PERSONAL PROPERTY

247. Mortgages of Personal Property Defined. By *mortgage* of personal property, is meant the transfer of title to personal property by a debtor to a creditor; the possession of the property usually remaining in the debtor, and the transfer being made for the purpose of giving the creditor security for the debt, the debtor having the right to secure a return of title to the property by paying the debt within a stipulated time. It is a conditional sale. It is not absolutely necessary that possession of property which is the subject of a chattel mortgage, remain in the debtor. Possession may be given the creditor with the understanding that possession and title are to revest in the debtor when the latter pays the debt secured. As a matter of business practice, however, possession of personal property which is the subject of a chattel mortgage, remains in the debtor, the creditor taking the title as security for the debt, with the right to secure possession or sell the property in case the debtor fails to pay the debt secured when due. When possession of personal property is given a creditor as security for a debt, the transaction is usually in the form of a pledge. In a pledge, title remains in the debtor, but possession is given the creditor. The distinguishing features of a sale, bailment or pledge, and a mortgage of personal property are important. In a sale of personal property title passes to the purchaser, while possession usually remains in the seller until the purchase price is paid. In a pledge, which is a form of a bailment, title remains in the bailor, and possession only is given the bailee or creditor. In case of a chattel mortgage, possession remains in the debtor, while title passes to the creditor subject to revesting in the debtor upon payment of the debt secured. The

debtor, or person giving the mortgage, is called the *mortgagor*, the creditor, or person receiving the mortgage, is called *mortgagee*.

248. What Kinds of Personal Property May Be Mortgaged. The rule is usually stated as follows: Any interest in personal property which may be the subject of a present sale may be mortgaged. Any tangible personal property such as furniture, horses, cattle and clothing, as well as intangible personal property, such as promissory notes, contracts, and shares of stock may be mortgaged. It is not necessary that the mortgagor have absolute, unencumbered title to the property to give a mortgage. An owner may give several mortgages on the same property. He may mortgage his interest as long as any remains. If *A* owns a stock of goods worth $10,000, he may give successive mortgages to different creditors to whom he is indebted. He must practice no fraud, however. He must make each mortgage subject to the prior ones, and must reveal the facts to the creditor taking the mortgage. But he is permitted to mortgage his remaining interest.

249. A Mortgage of Personal Property as Security for a Debt. A mortgage of personal property is a contract, and must be supported by a consideration. Mortgages are usually given to secure loans of money. They may, however, be given to secure any kind of obligation. A mortgage of personal property may be given to secure advances of money to be made in the future, as well as present or past advances or obligations. It is usually held that a past indebtedness is sufficient consideration to support a mortgage, as to all persons, except one who may have been defrauded out of the property mortgaged.

250. Form of Mortgages of Personal Property. To constitute a transaction a chattel mortgage, there must be an agreement by which title to personal property is transferred to a creditor upon condition that it is to revest in the debtor upon the latter paying a certain sum of money, or fulfilling an obligation, within a certain time. As between the mortgagor and mortgagee themselves, an oral chattel mortgage is binding, unless within the provisions of the Statute of Frauds. (See *Statute of Frauds*, chapter on Sales.) Most states provide that contracts for the sale of personal property involving more than $50.00 must be in writing to be enforceable. This provision applies to chattel mortgages. If possession of the mortgaged personal property is given the mortgagee under an oral mortgage,

the transaction is binding, not only between the parties thereto, but as to third persons as well. Most states provide by statute that as against third persons who purchase the property, or as against creditors of the mortgagor, the chattel mortgage must be in writing, and be recorded or filed with a public official, in case possession of the mortgaged property is left with the mortgagor. This question is discussed more at length in the following section.

251. Filing and Recording Mortgages of Personal Property. Most states have statutes providing that chattel mortgages must be filed or recorded with a designated public official to be effective as against creditors, subsequent purchasers or mortgagees. This requires that the mortgage be in writing, and be deposited or recorded according to the provisions of the statute with the designated public official. For example, if *A* orally mortgages his horse to *B* to secure a loan of $40.00, the mortgage may be binding between *A* and *B*, but if *C*, a creditor of *A*, secures a judgment against *A* and levies on the horse, his levy is superior to *B's* mortgage. If *A* sells the horse to *D*, who has no notice of the mortgage to *B*, *D's* rights to the horse are superior to *B's*. If *A* gives a mortgage in writing to *E*, who records his mortgage according to statute, his rights to the horse are superior to *B's*. The statutes of the different states require these mortgages to be refiled at stated intervals. Most states require them to be refiled each year. Some require them to be refiled only every three years.

252. Rights of Mortgagor in Property Mortgaged. A mortgage of personal property ordinarily contains a stipulation that the mortgagor shall retain possession until after default of payment of the mortgage debt. Some states have statutory provisions giving the mortgagor the right of possession of the mortgaged property before default of payment of the mortgage debt. It is the custom at the present time to give the mortgagor possession of the property before default. If a mortgagor having possession of the property has it stored on his own behalf, and the warehouseman acquires a lien on the goods for his charges, his lien is inferior to the mortgage. The same is true if a mechanic acquires a lien for repairs upon the property.

A mortgagor may mortgage his interest in the personal property by giving a second mortgage. The second mortgagee takes the

mortgagor's right to have the property revest in him upon payment of the debt secured by the first mortgage. A mortgagor may sell his interest in the property, subject to the interest of the mortgagee. If the mortgage stipulates that a mortgagor cannot sell his interest, this stipulation is binding. A mortgagor has the right to pay the debt secured, and by this means to have the title to the property revest in him.

253. Rights and Liabilities of Mortgagee. A mortgagee of personal property has a conditional title to the property. If the mortgagor does not pay the debt secured, according to the terms of the mortgage the mortgagee has the right to seize the property or at least to subject it to the satisfaction of his debt. The mortgagee has the right to sell the debt secured by the mortgage. In the absence of an express stipulation to the contrary, a transfer by a mortgagee of the debt secured by the mortgage, transfers the mortgage. An assignment of a chattel mortgage apart from the debt secured, passes no interest to the transferee. A mortgagee has the right to seize the property upon default of payment of the debt secured, if the mortgage contains a stipulation to that effect. The mortgagee has the right to foreclose his lien. By this is meant that he has the right to file a petition in a court of equity asking that the property be sold, and that his claim be paid from the proceeds first, and that the mortgagor's right to pay the debt and secure a return of the property be cut off. This is discussed under the section on *foreclosure*.

254. Mortgagor's Right of Redemption. In law, a mortgage is regarded as a security for a debt, rather than as a transfer of property. By a chattel mortgage, a transfer of title to personal property is made by a debtor to a creditor as security for a debt. The debtor has the right, however, to secure a return of the title to the property by paying the mortgage indebtedness according to the terms of the mortgage. When the debtor fails to pay the debt when it is due, absolute title to the property vests in the mortgagee or creditor. The law, however, permits the debtor or mortgagor to pay the debt at any time before actual sale of the property by the mortgagee, together with interest and expenses, and thus secure the title to the mortgaged property. This is known as the *mortgagor's equity of redemption*.

Legal title is vested absolutely in the mortgagee upon failure

of the mortgagor to pay the mortgage debt when due. The mortgagor, however, is permitted to pay the debt with expenses at any time before sale of the property, and by this means to secure a return of the title to the property. This makes a mortgage of personal property in effect a security for a debt, rather than a transfer of title. The purpose of the law is to give the creditor or mortgagee the right to secure the payment of his debt out of the mortgaged property, and nothing more. Most states have statutes providing a method by which a mortgagor may obtain his equity of redemption. Where there are no statutes, this right must be enforced by a petition in a court of equity.

255. Mortgagee's Right of Foreclosure. Equity permits the mortgagor to recover the mortgaged property by filing a petition in a court of equity, even after he has defaulted in paying the mortgage debt, by tendering the amount due, together with interest and expenses. This right of the mortgagor may be cut off by an equitable right enforced on the part of the creditor or mortgagee. This right is called the *mortgagee's right of foreclosure*. When the debtor or mortgagor is in default, the creditor or mortgagee is permitted to file a petition in a court of equity, setting forth the fact, and asking the court to order the property to be sold, the expenses to be paid, the mortgage debt to be satisfied, and the balance of the proceeds of the sale to be paid to the debtor or mortgagor. After this proceeding has been resorted to and completed, the debtor cannot enforce his equity of redemption.

The common method afforded a mortgagee of foreclosing a mortgagor's equity of redemption is by the petition in equity above described. Many of the states have provided statutory methods which may be followed. Some mortgages by express stipulation give the creditor or mortgagee the right to seize the property and sell same upon default of the debtor to pay. This takes the place of an equitable foreclosure. When a mortgage contains a power of sale stipulation, the mortgagee may seize the property when the mortgagor defaults, and sell the same at public sale. The excess recovered over the mortgage debt and expenses, must be paid the mortgagor. If possession of the property cannot be obtained peaceably, the mortgagee must bring an action in replevin, by which possession is obtained by an officer of the court. In some jurisdictions, a mort-

gagee is permitted to seize and sell mortgaged property upon default of the debtor, even though the mortgage contains no power of sale stipulation. The sale must be *bona fide* and public, or it can be set aside at the instance of the defrauded mortgagor.

CARRIERS

256. Carriers Defined. *Carrier* is the term applied to individuals or companies engaged generally or specially in carrying goods or passengers from place to place. The business of carriers has grown rapidly with the development of this country. The business of steamboat, railway, express, and electric package companies forms an important part of present day affairs. Carriers are usually classified as *common* or *private*. Both common and private carriers may carry either passengers or goods. Carriers of passengers are discussed in a separate chapter.

257. Common Carriers of Goods. A common carrier of goods is one who represents himself as engaged in the business of carrying goods from place to place for anyone who desires to employ him. A common carrier of goods is liable as an insurer of the goods. By reason of this exceptional liability attaching to a common carrier, it is important to know who are common carriers. Everyone who carries goods from place to place is not a common carrier. To constitute a person a common carrier, there must be a representation on his part of a willingness to carry goods belonging to anyone who desires to employ him for that purpose. A common carrier need not necessarily hold himself out as willing to carry all classes of goods. He may limit his business to carrying a peculiar class of goods, and still be a common carrier. It may be stated as a rule that anyone who holds himself out as willing to carry goods of any person is a common carrier. Common examples of common carriers are railroad companies, express companies, public transfer companies, and electric package companies. An express company, in holding itself out as willing to carry goods of any person, is a common carrier.

If persons carry goods only on special contract, and choose their customers, they are private carriers, and are not liable as insurers of the goods entrusted to their care. Anyone may engage in the business of a private carrier, and so long as he does not hold himself out as a common carrier, he cannot be compelled to accept for carriage goods against his will, neither is he liable as an insurer of the goods.

A private carrier is an ordinary bailee. If he agrees to carry for compensation, he must exercise ordinary care, and is liable for ordinary negligence. The business of a common carrier is said to be one of the exceptional mutual benefit bailments. The exceptional liability of a common carrier is discussed under a separate section.

258. Implied Liability of a Common Carrier. In early days when pirates infested the seas and stagecoach robberies were common, it was an easy matter for a common carrier to conspire with robbers and thieves, in unjustly depriving the owner of the goods entrusted to the carrier's care. By reason of the opportunity given a common carrier fraudulently to deprive a shipper of his goods, the law at an early time placed the exceptional liability of an insurer upon a common carrier. The relation between a shipper and a carrier, after goods are placed in the hands of the carrier, is one of mutual benefit bailment. The liability of a common carrier, however, is not limited to the liability of an ordinary mutual benefit bailee. Common carriers and inn-keepers are said to be *exceptional mutual benefit bailees.* This exceptional liability is placed on them by reason of the opportunity given them fraudulently to deprive the owners of their goods, and to compel the carriers to protect the goods against robbery and theft.

A common carrier is liable as an insurer of the goods entrusted to his care. He cannot avoid liability by acting as an ordinarily prudent man would act under the circumstances in protecting and caring for the goods, but he must actually protect them or be liable to the owner for their loss or damage. There are a few exceptions discussed under a separate section. If *A* employs *B* to keep, feed, and care for his horse for six months, for fifty dollars, and *B* puts the horse in his stable, where it is stolen, together with *B's* own horse, *B* is not liable to *A* for the loss of the horse, if he acted as an ordinarily prudent man would act under the same conditions. If, however, *A* delivers his horse to *B*, a railroad company, to be shipped from Buffalo to Chicago, and the horse is stolen from *B's* possession, *B* must pay *A* the value of the horse. He is not permitted to say that he exercised ordinary care in the protection of the horse. This is what is meant by the exceptional liability of a common carrier. While the reason for this exceptional liability of a common carrier has largely passed away by the practical extermination of highway robbers and

pirates, the exceptional liability of common carriers remains as a part of the law. This exceptional liability is not a matter of express contract between the shipper and the carrier, but is impliedly a part of the contract.

259. Exceptions to the Liability of a Common Carrier as an Insurer. A common carrier of goods is not absolutely liable as an insurer of the goods entrusted to his care. If the goods are lost, injured, or destroyed by an Act of God, by a public enemy, by negligence of the shipper, by the inherent nature of the goods, or by the exercise of public authority, the carrier is not liable as an insurer.

By *Act of God* is meant an inevitable act arising without the intervention or aid of a human agency. A loss of goods by a storm, by lightning, or by earthquake is an example. If the goods are lost or injured as a result of any act of the shipper, the carrier is not liable as an insurer. A carrier is permitted to adopt and enforce reasonable regulations relating to the packing and shipment of goods. If the shipper negligently packs goods so that they are injured by reason thereof, the carrier is not liable as an insurer. If the shipper improperly addresses packages, and they are lost by reason thereof, the carrier is not liable as an insurer. If the shipper accompanies live stock, and injury occurs by reason of the carelessness of the shipper, the carrier is not liable as an insurer.

By *public enemy* is meant a power at war with a nation. This includes pirates. Mere insurrections, robberies, thefts, mobs, and strikes are not included in this class of public enemies. If a loss of goods occurs by means of public enemy, a carrier is not liable as an insurer of the goods. If the loss occurs through the *inherent nature of the goods,* without the negligence of the carrier, the latter is not liable as an insurer. For example, if fruit spoils as a result of warm or cold weather, if the carrier is not in any way at fault, he is not liable as an insurer, since the loss occurs on account of inherent defects of the goods. If animals injure themselves while in the carrier's possession by reason of their viciousness, or fright, which injury could not have been prevented by reasonable care on the part of the carrier, the latter is not responsible.

If the goods are lost or injured by reason of the *exercise of public authority,* the carrier is not liable as an insurer. If the goods, while in the possession of the carrier are seized upon attachment, or by

levy on execution by the creditors of the shipper, the carrier is not liable if he promptly notifies the shipper.

260. Limiting Common Law Liability by Special Contract. The common law liability of a common carrier of goods is that of an insurer. It matters not how the loss or injury occurs, whether without, or through the carelessness of the carrier, the latter is liable for the loss, if it does not come within the recognized exceptions. Carriers commonly endeavor to limit their exceptional liability by making a special contract with a shipper, by the terms of which the carrier limits his exceptional liability in case of loss.

There is considerable conflict of authorities between the different states as to whether a carrier may limit his exceptional liability at all by special contract. Where permitted to limit this liability, there is considerable controversy as to the extent to which a carrier may limit his liability by special contract. The courts of most jurisdictions agree that a common carrier cannot limit his exceptional liability by special contract as to his own negligence or the negligence of his servants. This special contract by which a common carrier limits his exceptional liability as an insurer is usually in the form of a written contract signed by the shipper or in the form of stipulations in the bill of lading given to the shipper and called to his attention.

If a carrier accepts a carload of hay for shipment, without limiting his common law liability by special contract, and the hay is destroyed by fire, the carrier must respond in damages for the loss, regardless of his negligence. If, however, the carrier enters into a special contract with the shipper to the effect that the carrier shall not be liable for loss by fire, and the hay is destroyed by fire without negligence of the carrier or his agents or servants, the carrier is not liable in damages.

261. Limiting Common Law Liability by an Agreed Valuation. Common carriers frequently attempt to limit their liability for loss or injury to goods by stipulations in a bill of lading, that in case of loss, the valuation shall not exceed $50.00, or some specified amount. If the shipper does not notify the carrier that the valuation is a greater amount, the amount mentioned in the bill of lading is the valuation fixed by special contract. In case of loss there is a great variety of holdings as to whether a carrier may limit his liabilities to the amount mentioned in the contract. Probably the courts in the majority of

cases hold that such a stipulation is valid in case of losses arising not by reason of the negligence of the carrier or his agents. The courts of a few jurisdictions hold that the stipulation as to valuation is good even as against the negligence of the carrier or his agent.

So far as interstate shipments are concerned, the question is settled by the Federal Interstate Commerce Act of 1906. This act provides that as to shipments from one state to another, such a stipulation is not valid. The language of the Interstate Commerce Act relative to this question is as follows:

> A common carrier receiving property for interstate transporation shall issue a receipt or bill of lading therefor, and be liable to the holder for any loss, damage or injury to the property, and no contract, receipt, etc., shall exempt the carrier from the liability thereby imposed.

At present, so far as interstate shipments are concerned, a common carrier cannot limit his common law liability by a special contract.

262. Bills of Lading and Shipping Receipts. *Bill of lading*, or *shipping receipt* is the term applied to the receipt given a shipper by a carrier, when goods are delivered into the latter's possession. A bill of lading serves two purposes. It is a receipt of the shipper from the carrier for the goods delivered to the latter, and it is a contract representing the agreement between the shipper and the carrier. It is usually held that the terms printed on the bill of lading are binding on the shipper, even though the bill is not signed by him. A bill of lading represents the title to the goods. It may be transferred like a negotiable instrument. A purchaser takes the position of the shipper. A bill of lading is negotiable in the sense that it represents title or ownership of the goods, and in the sense that a purchaser takes the right of the shipper in the goods. But it is not negotiable in the sense that a purchaser takes a better position than the original holder had.

263. Title to Goods After Delivery to Common Carrier. In the absence of special agreement to the contrary, where a party in one town purchases goods from a party in another, the goods to be delivered by common carrier, title to the goods passes to the purchaser when the goods are delivered to the carrier properly packed and addressed. This kind of a sale is commonly called a sale *F. O. B.* place of purchase, "F. O. B." means "free on board." Careful business people, in making sales or purchases, specify whether the

goods are to be F. O. B. place of shipment, or F. O. B. place of delivery. If the sale is F. O. B. place of delivery, title does not pass to the purchaser until the goods are delivered at the place specified. If the goods are lost by the carrier, the loss falls on the shipper or carrier, and not on the purchaser. If goods are shipped F. O. B. place of shipment, or if no agreement is made about shipment or payment of freight, title passes to the purchaser when the goods are properly delivered to the carrier. If the goods are lost, the loss falls on the carrier or purchaser, and not on the seller. Where no stipulation is made relative to payment of freight or carrier's charges, the law presumes that the purchaser is to pay the carrier's charges. Sales are sometimes made in which it is specified that the freight charges are *to be allowed*. This means that the shipper is to pay the carrier the freight charges. If the goods are lost, the loss falls on the purchaser. If there is an express stipulation that the goods are to be delivered at the place of delivery by the seller, this means that title does not pass to the buyer until the delivery is made at that place, and the shipper or seller stands the risk of loss in transit.

264. Duty of Common Carrier to Accept Goods for Carriage. A common carrier of goods holds himself out to the public as ready to carry the goods of anyone who desires to employ him. The carrier may demand payment of reasonable charges in advance. He may also enforce reasonable regulations relating to the packing, delivery, and addressing of goods. Carriers are not obliged to carry goods other than the kinds they purport to carry. For example, an express company representing itself to the public as a carrier of light packages cannot be forced to accept heavy machinery for carriage. A carrier cannot be compelled to accept goods not belonging to the class it represents itself as being in the business of carrying. But a carrier must accept for carriage goods of the class it purports to carry, no matter by whom tendered. If the bill of lading offered by the carrier contains stipulations not agreeable to the shipper, the latter may demand the carrier to carry the goods under the terms of the implied common law liability of a carrier. The carrier is excused from accepting goods in the event of a great and unexpected bulk of business. He must, however, furnish sufficient equipment to meet the general requirements of business.

265. Stoppage in Transitu. Where goods sold on credit have been delivered to a carrier, if the vendor learns that the purchaser is insolvent, he may order the carrier to withhold delivery of the goods. This is called *stoppage in transitu.* This question is also discussed in the chapter on sales. The vendor may compel the carrier to withhold delivery of goods by giving him written or oral notice to that effect. To be effective, this notice must be given before the carrier has surrendered possession of the goods to the purchaser. If the carrier delivers the goods to the purchaser after receiving notice from the seller to withhold shipment, he is liable in damages to the seller. If the purchaser has received possession of the bill of lading, and has sold it to a *bona fide* purchaser, as to the latter, the seller cannot exercise the right of stoppage *in transitu.* If the carrier is in doubt about who is entitled to possession of the goods, he may file a petition with a court, called an *interpleader,* asking the court to determine who is entitled to possession of the goods.

266. Delivery of Goods by a Carrier. The manner of delivery of goods required of a common carrier, depends largely upon usage and custom. In large cities, express companies and carriers of small packages usually make deliveries to residences and places of business. In small towns, and in the country they usually deliver at their depots or store rooms only. Persons dealing with common carriers are bound by their customs, and by reasonable regulations of the carriers. Carriers by water and rail ordinarily deliver at their depots and warehouses only. The purchaser is obliged to call for his goods. The carrier is obliged to give the purchaser notice that the goods have arrived. If the purchaser fails to call within a reasonable time thereafter, the exceptional liability of a common carrier ceases, and the liability of a warehouseman attaches. A warehouseman is obliged to exercise only ordinary care in the protection of the goods, while a carrier is an insurer of the goods.

If a carrier delivers goods to the wrong person, he is liable in damages to the owner. If the consignee refuses to accept the goods, the carrier should notify the shipper of this fact. The carrier's liability then becomes that of a warehouseman.

Goods are frequently delivered to a carrier *C. O. D.* (collect on delivery). A carrier, in this event, is required to collect a specified

amount from the purchaser before delivery. The purchaser is entitled to inspect the goods. Title to goods sent C. O. D., is in the purchaser, the possession only being reserved by the owner for the purpose of collecting certain charges, ordinarily the purchase price.

267. Charges and Lien of Common Carrier. A common carrier usually stipulates by special contract with a shipper the amount of charges for carriage. In the absence of special contract, the carrier is entitled to a reasonable amount for this service. The United States Congress has the right to regulate charges for interstate carriage. The states may, through their legislatures, regulate the rates within their respective jurisdictions. A carrier has a lien on the goods carried for his charges, and may retain possession of the goods until these charges are paid.

268. Discrimination by Common Carrier. A common carrier represents himself as willing to carry the goods of anyone who desires to employ him. Business depends to a large degree upon the facilities offered by carriers, notably by railroads. If certain business men or interests are favored by carriers, competition in the same line is eventually destroyed. For this reason, the law prohibited discrimination on the part of a common carrier. All persons shipping under the same conditions must be treated alike. The policy of the law is to promote competition. There are cases which hold that a carrier is permitted to charge one person a less rate than another, if the latter is not charged an unreasonable rate. But this rule does not apply where the parties are competitors and where the difference in rate charged is for the purpose of destroying competition. The matter of discrimination is now regulated largely by interstate commerce legislation discussed under a separate section.

269. Carriers of Mail. The Constitution of the United States gives Congress the power to establish postoffices and post roads. Under this provision, the postoffice department has been created. It is a department of the government. While the postoffice department carries mail for compensation, it is a department of the government and not a common carrier. The government cannot be sued without giving its consent. It is an elementary principle that a government or sovereign power cannot be sued by its citizens. If the mail is lost, the government cannot be sued for damages. The government employs postal clerks, postmasters and mail-carriers

to operate the postal system. These agents or servants of the government are required to give bond to the government. If they violate their contract, or neglect their duties, the government may collect its losses on these bonds. A person whose mail is lost cannot sue a postoffice agent on his bond. If, however, a person whose mail is lost can trace the loss to the carelessness of a particular postmaster or mail-carrier, he may sue such postmaster or carrier for damages sustained.

270. Interstate Commerce Act. The United States Constitution gives Congress the power to regulate interstate commerce. The United States Congress enacted interstate commerce regulations in 1887, 1889, 1891, 1895 and in 1906. The present United States interstate commerce regulation is commonly known as the *Interstate Commerce Act of* 1906. This act provides for an interstate commerce commission, consisting of seven members. Each member receives a salary of $10,000 a year. The act compels carriers engaged in interstate or foreign commerce to publish a schedule of charges for carrying property. Carriers who give rebates or offset, or discriminate between shippers in any way, are subject to heavy fines, and the officers and agents are subject to imprisonment. The commission is authorized to investigate the profits and charges of carriers, and to fix the maximum and minimum rates for carriage as well as the proportion of through rates to which each of several carriers is entitled. Persons discriminated against may make complaints to the commission. The commission may investigate these complaints as a court by summoning witnesses, and by taking testimony. The commission may award damages to the party injured. If the carrier refuses to comply with the orders of the commission, the latter may invoke the machinery of the United States courts to enforce its order. When matters are removed to a United States court, the finding of the commission makes out a *prima facie* case.

Section 20 of the act prevents carriers doing interstate or foreign commerce business from relieving themselves from liability by special provision in the bills of lading. This is a very salutary act, since it was the common custom of carriers to place many provisions in their bills of lading by which they endeavored to evade their liability as common carriers. It was practically impossible for a shipper to comprehend all the printed stipulations contained in

a bill of lading. This provision of the act compelling a common carrier doing an interstate or foreign commerce business to issue a bill of lading by which he is liable, in case of loss, for the real value of the goods lost, is as follows:

"Any common carrier, railroad or transportation company receiving goods for transportation from a point in one state to a point in another shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it, or by any common carrier, railroad or transportation company to which such property may be delivered, or over whose lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

The act also provides that every person or corporation, whether carrier or shipper, who shall knowingly grant, give, solicit, accept or receive any such rebates, concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars ($1,000.00), nor more than twenty thousand dollars ($20,000.00).

The act also provides that the willful failure, upon the part of any carrier, to file and publish the tariff or rate and charges required by said act, or the failure strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof, the corporation offending shall be subject to a fine of not less than $1,000.00 for each offense, nor more than $20,000.00 for each offense.

The act also provides that agents or officers of a corporation convicted of violating the act may be imprisoned not more than two years in addition to the fine. A person delivering property to a carrier for transportation to another state or to a foreign country who shall accept a rebate or offset from the regular scheduled charge shall, in addition to the above described penalties, forfeit to the United States a sum of money three times the amount received from the carrier.

CARRIERS OF PASSENGERS

271. Carriers of Passengers Defined. One who holds himself out as ready and willing to carry from place to place for compensation, all who desire to employ him for this purpose is a public carrier

of passengers. The liability of a public carrier of passengers is not the same as that of a common carrier of goods. A common carrier of goods is liable as an insurer of the goods, while a common carrier of passengers is obliged to exercise a high or extraordinary degree of care, only in the protection of passengers. Railroad, steamboat, ferry and omnibus companies are common examples of public carriers of passengers. Owners of buildings operating elevators are in the position of public carriers of passengers. While, strictly, they are not obliged to carry all persons, they operate the elevator publicly for the convenience of their tenants, and their tenants' clients. The liability for injury to passengers of owners of buildings in which elevators are operated is the same as that of public carriers of passengers.

272. Who Are Passengers? A person does not have to be on board a public conveyance to be a passenger. Steamboat companies provide depots, waiting rooms, and wharves for the convenience of passengers. Railroad companies provide depots, rest rooms, and waiting rooms for persons desiring to make use of the railroad. It is said to be the rule, that when a person enters the premises of a public carrier for the purpose of becoming a passenger, he is a passenger from the time he enters upon the property of the public carrier. If a person enters the premises of a public carrier not for the purpose of purchasing a ticket, nor to become a passenger, he is a mere trespasser, and is not entitled to the rights and privileges of a passenger. A person traveling on a pass is a passenger. A carrier of passengers is permitted to enforce reasonable regulations for acceptance of passengers. Until these reasonable rules are observed a person is not a passenger. A person is a passenger until he has a reasonable time to leave the public conveyance and premises of the carrier after reaching his journey's end.

273. Rights and Liabilities of Carriers of Passengers. A public carrier of passengers is obliged to carry all suitable persons who desire to become passengers, so far as the carrier has facilities for their accommodation. The carrier is also obliged to furnish reasonable facilities to accommodate all who may reasonably be expected to present themselves as passengers. A carrier may refuse to carry drunken or disorderly persons, as well as those who, by reason of contagious diseases or for other reasons, are not proper passengers. A carrier may require passengers to purchase tickets before admitting

them to the vehicle of conveyance. The carrier is permitted to pass reasonable rules and regulations for conducting his business. Unlike a carrier of goods, a carrier of passengers is not liable as an insurer. A carrier of passengers is bound to exercise extraordinary care in the protection of the passengers, and is liable for any negligence resulting in a passenger's injury, and which is not contributed to by the passenger.

If a passenger refuses to pay his fare, or becomes disorderly, he may be removed by the carrier. The carrier is entitled to use only the force necessary to effect the removal of the passenger. If the passenger is injured by reason of excessive force used by the carrier in his removal, the carrier is liable in damages. Some states require by statute that carriers remove obnoxious passengers only at regular stations. In the absence of such statutes, a carrier may remove a passenger at any place where he may be removed without injury. If a passenger is injured by reason of his own negligence, or if his own negligence in any way contributed directly to the injury, he cannot recover damages from the carrier.

274. Baggage. A public carrier of passengers may pass reasonable rules and regulations governing the control and amount of personal baggage a passenger is permitted to carry with him. The contract between a passenger and an ordinary public carrier impliedly gives the passenger the right to carry with him on his journey, baggage consisting of articles to be used on his journey. The business of the passenger, his social position, and the purpose of the journey largely determine the question of what articles properly constitute personal baggage. A workingman would not be permitted to claim that jewels and fancy dresses were a part of his personal baggage Such articles would properly constitute the personal baggage of an actress or a society woman.

If the personal baggage is placed in trunks and packages, and placed in the absolute control of the carrier, the latter is liable for their protection as an insurer. If the articles are retained by the passenger, the carrier is liable only as a bailee for hire. That is, the carrier is liable only for ordinary negligence, and is obliged to exercise only ordinary care.

A carrier is permitted to charge for excess baggage, and becomes liable as an insurer of such baggage. A carrier is not obliged

to carry any baggage not necessary for the convenience or comfort of a passenger, and if attempt is made to carry it as personal baggage, the carrier does not become liable for loss or injury thereto. Sample goods carried by traveling salesmen do not constitute personal baggage. A carrier is not permitted to carry these samples free of charge. If the freight is paid by the salesman, the carrier becomes liable as an insurer.

INNKEEPERS

275. Innkeeper Defined. An innkeeper is a person who keeps a public house for the entertainment, for compensation, of all fit persons who desire to become guests and who are willing to pay the regular price. An innkeeper furnishes both food and lodging to guests. Persons who furnish one or the other, only, are not innkeepers. Innkeepers are classed as exceptional bailees. They are liable as insurers of their guests' baggage entrusted to their care. A boarding-house keeper is not an innkeeper. A restaurant keeper is not an innkeeper.

276. Duties and Liabilities of Innkeeper. Innkeepers are obliged to receive all fit persons who present themselves as guests and who offer the regular price for entertainment. An innkeeper is obliged by reason of his public profession, to keep food and lodging facilities sufficient to meet all reasonably expected demands. Like a carrier of passengers, an innkeeper is not obliged to receive obnoxious persons. After a traveler has been received by an innkeeper for the purpose of obtaining food and lodging, he is a guest. The innkeeper is then obliged to use reasonable care for the protection of the guest. A person who boards at an inn is not a guest, neither is one who rooms at an inn, but does not board there.

An innkeeper is liable as an insurer, for the loss of, or damage to, the goods entrusted to his care by his guest. If the goods are lost or injured without any negligence on the part of the guest himself, and not by an Act of God (see *Act of God*, chapter on Carriers), or by a public enemy, the innkeeper is liable to the guest. If the goods are retained by the guest, and remain in his possession and control, the innkeeper is not liable as an insurer for their protection, but is obliged to exercise only ordinary care.

277. Lien of Innkeeper. An innkeeper has a right to retain possession of the goods of his guests until he receives his compensation. This is called an *innkeepers' lien*. At common law, a boarding-house keeper has no lien on the goods of the boarder. Some states provide by statute for a boarding-house keeper's lien upon the goods of a boarder. Even though the goods brought to an inn are the goods of a third person, the innkeeper has a lien thereon for the charges of the guest, unless the innkeeper knows at the time of receiving the guest, that the goods belonged to another. Unless otherwise provided by statute, an innkeeper cannot sell the goods of a guest upon which he has a lien, but must file a bill in equity, a petition in a court of equity requiring the goods to be sold under order of court for the payment of his charges.

REAL PROPERTY

278. Real Property Defined. The great English legal writer, Blackstone, divides all property into two kinds, *real* and *personal*. The latter embraces everything of a movable nature, while the former embraces everything of a permanent nature. Blackstone defines real property as consisting of *lands*, *tenements* and *hereditaments*. By land is meant the soil, and everything above and beneath the soil, the trees and vegetation above as well as the deposits beneath the soil. By tenement is meant anything that may be held, such as a franchise or right of way. By hereditament is meant everything that can be inherited. It includes lands and tenements. Under the English law, heirlooms were considered hereditaments. They are not so considered under our law.

279. Trees, Growing Crops, and Emblements. Growing trees are part of the land and are considered real property. Nursery trees may be planted by a tenant for the purpose of the tenancy. In this event, they are considered personal property. Trees cut down and cut into logs are personal property. Trees blown down or cut down, but not cut into logs are real property. Trees sold, but not cut, are regarded as personal property. A practical distinction between real and personal property is that real property passes to the heirs at the death of the owner, while personal property passes to the executors or administrators of the owner's estate. Personal property is first subjected in the satisfaction of judgments at law against the owner.

Emblement is the term applied to crops which must be planted annually. Such crops as corn, potatoes, wheat, and melons are emblements. They are personal property even though not severed from the soil. They belong to the tenant who plants them. Apples, peaches, clover, and similar things which are harvested annually, but are grown from roots or trees which are not planted annually, are real property. They are a part of the real estate, and pass with it when the latter is transferred.

280. **Party Walls.** A wall between two estates standing partly on the land of each estate is a *party wall.* If injured or destroyed by one of the adjoining owners, the other has an action for damages against him by reason thereof. If a wall stands wholly upon the land of one owner, and another constructs his house using a part of the wall as a foundation, he is a trespasser and is liable in damages, or may be compelled to remove his house therefrom. If, however, he is permitted to use the wall in such a manner for twenty years, the wall is regarded as a party wall. The party so using the wall for twenty years is said to acquire an *easement by prescription.* Party walls are owned in common by adjoining owners. Each party does not own half the wall. Both parties own the entire wall together.

281. **Fixtures.** By attaching a piece of personal property permanently to the land, or to something permanently connected with the land, the personal property, in law, becomes a part of the realty. A tenant may so attach personal property to the land of his landlord as to lose title thereto. No distinct line can be drawn between articles which may constitute fixtures and those which may not. It is something of a matter of intention of the one so attaching the articles to the land. It is now usually conceded by the courts that a tenant may attach such articles to the real property as are necessary and desirable for the purpose of his tenancy, and may remove them at or before the expiration of his lease, if the same can be done without injury to the real estate or to the fixtures to which they are attached. A different rule is applied in case of an owner as against a purchaser or mortgagee. For example, if *A* leases a building for the purpose of operating a dry goods store, he is permitted to put in shelves and to remove them at the expiration of the tenancy. If *A* were the owner, and permanently attached the shelves,

he could not remove them as against a purchaser of the building or a mortgagee.

282. Fences. Most of the states have statutes regulating the building and maintenance of fences. Parties may enter into a contract relating to partition fences if they choose. The duty to maintain certain portions of a partition fence may result from usage. If *A* and *B* are adjacent owners of a farm, and *A* has for a period of twenty years maintained a certain portion of the partition fence, he may be compelled to continue to maintain that portion of the fence. A partition fence constructed jointly by the adjacent owners is their common property. It is their joint duty to keep it up. Either one has a right to go upon the premises of the other for that purpose. One person may construct a fence on his own premises, which he may rebuild or take away at pleasure. A person constructing a fence must use reasonable care in seeing that it is so constructed and kept up that stock coming in contact with it is not injured.

283. Private Ways. The right to go over the land of another is known in law as a *way*. Originally, ways were of three kinds, a mere foot way, a foot and horse way, by which a horse might be ridden over the way, and a cart way. The last two classes are now treated as one. Ways are classified as *ways of necessity* and *ways of convenience* or *easements*.

If *A* sells land to *B* and the only access *B* has to a highway is over *A's* land, *B* has a way of necessity over *A's* land. If *A* sells land to *B* and the only access to a highway left to *A* is over the land of *B*, *A* has a way of necessity over *B's* land.

A way of convenience may arise by continuous usage under a claim of right for a period of twenty years. If *A* for an uninterrupted period of twenty years, under claim of right uses a path over *B's* premises, he acquires a way of convenience or easement which gives him the right to continue the use of the path.

284. Highways. Ordinarily, highways are established by public officials acting under statutory authority. Land is taken from the owners by order of court granted upon a petition properly filed and heard. It is said that the public has an *easement in a highway*, a right to use the highway as a roadway. The absolute title remains in the original owner. If the highway is abandoned, the property reverts to the original owner or to his grantees or assignees.

A highway may be created by declaration or admission of the owner that a certain piece of property is to be used as a highway. It must also be accepted as such by public officials. The public may also obtain the right to use certain property as a highway by adverse user for a period of twenty years. This is called *obtaining the right by prescription.*

285. Estates in Land. The extent of the interest of a person in a certain piece of land or real estate is said to be his *estate.* Estates are designated by different names, depending upon the amount of the interest held. In general, estates in land are divided into *freehold estates* and *estates less than freehold.* Freehold estates are in turn divided into *estates of inheritance,* and *estates less than inheritance.* Estates of inheritance are divided into *estates in fee simple,* and *estates in fee tail.* Estates less than inheritance consist of *dower estates, estates curtesy, estates for the life of another,* and *estates for one's own life,* and *homestead estates.* Estates less than freehold or leasehold estates consist of *estates for years, from year to year, at sufferance* and *at will.*

286. Freehold Estates. Freehold estates embrace estates of inheritance and estates less than inheritance. They are estates of uncertain periods of duration. The estate may be one of inheritance, that is, forever, or for a lifetime. The term, *freehold,* is taken from the name, *freeman.* A freehold estate originally applied to the estate of a freeman. A freeman, that is, a person permitted to go anywhere he chose, belonged to the only class of persons permitted to hold estates of this character. The meaning of the term has lost its significance. Under our law, all persons are freemen.

287. Estates in Fee Simple. Absolute ownership in land is termed an *estate in fee simple.* It means that the owner has absolute and unconditional ownership of the land in question. It is an estate of general inheritance. At the owner's death, the estate passes to the general heirs of the owner, unless particular persons are designated by will of the owner to take the title.

288. Estates Tail. It was formerly the custom in England for wealthy land owners to give land to the oldest son to be given by him to his oldest son, a particular person or his direct heirs. That is, instead of giving the entire interest in the land to a person in such a manner that the latter could sell or dispose of it as he chose, it was

given by deed or will to a particular line of heirs or persons. If *A* gave his property by will to *B* and *B's* direct heirs, the estate created did not permit *B* or his direct heirs to dispose of the estate in such a manner that the direct heirs designated could be deprived of the estate at *B's* death. Granting estates to a particular person or heir rather than to heirs generally, is called *entailing estates*. The estate granted is called an *estate tail*. The result of entailing estates is to continue them in the hands of a few.

England no longer permits the entailing of estates for long periods. In this country, the matter is controlled by statutes of the different states. A person is permitted to give real estate, by will, to a person for the latter's life, and then to a person not yet born. The latter takes the estate in *fee*. A person is not permitted to give property to *A*, and to the unborn child of the unborn child of *A*. If this is attempted, when *A* has a child, the latter takes an *estate in fee simple*. The above doctrine is called the rule against perpetuities.

289. Life Estates. An estate created to exist during the life of the holder, during the life of a third person, or until an uncertain event happens or fails to happen, is called a *life estate*. Life estates embrace homestead estates, dower estates, and estates by the curtesy. If *A* gives *B* a farm for life, remainder in fee to *C*, *B* takes a life estate. He may sell or transfer his life estate, but no more. If *A* dies leaving a will, by the terms of which *B*, his wife, is given a farm for life, or during widowhood, *B* takes a life estate in the farm. If she marries, she loses her estate. This estate may be created by deed as well as by will.

290. Estates by the Curtesy. At common law, the husband, at the wife's death, has a life estate in the real property owned by the wife, if issue has been born alive during the life of the wife. The husband may waive his right to the estate if he signs a deed with the wife, whereby he expressly waives his right to his estate by the curtesy. The interest of the husband in the estate of his wife, is at the present time in most states regulated by statute.

291. Dower Estates. At common law, at the death of her husband, a wife takes a life interest in one-third the real property owned by her husband during the marriage. If *A* owns one hundred acres of land, and dies, leaving a wife, *B*, *B* takes one-third interest for life in the one hundred acres of land. This interest of *B* is called

her *dower estate.* Some states by statute provide that the wife shall have a definite share of the husband's estate at the latter's death. In the states having these statutes, the wife is not entitled to dower, but takes the prescribed share in place thereof. The husband cannot deprive the wife of right of dower, by transferring his real estate. If she does not expressly release dower in the deed of conveyance, it may be enforced against the estate, if she survives her husband.

292. Exempt Estates. The states generally provide by statute that certain property shall be exempt from execution on judgment obtained by creditors of the owner. Exemption statutes usually provide that a certain amount of real estate used as a home by the owner shall not be subjected to the satisfaction of judgments of creditors. If the debtor has no real property used as a home, he is sometimes permitted to retain a certain amount of personal property in place thereof. This statutory right to keep a certain amount of real property exempt from creditors is sometimes called a *debtor's homestead estate.* It exists during the life of the owner.

293. Estates for Years. The right to the possession, or the contract for possession of land for a definite period of time is called an estate for years. Originally in England, only freemen could hold freehold estates. Freehold estates are those of inheritance and those less than inheritance. Persons occupying a position inferior to that of freemen under the early English law, sometimes called *villeins,* were permitted to hold estates for years, but not freehold estates.

If *A* leases his farm to *B* for five years, *B* has an estate for years. If *A* leases his house and lot to *B* for one month, *B* has an estate for years. If *A* leases his house and lot to *B* for two years, and to *C* for three years, *C's* estate to follow *B's*, *B* and *C* have estates for years. Estates for years are also discussed under *Landlord and Tenant.* Estates for years are commonly called leases or leaseholds. A holder of an estate for years may assign or sublet his estate, unless it is provided otherwise in his lease.

294. Waste. If persons have estates for years or life in real property, certain rules for the use of such property are recognized in order that they may not destroy or injure the remaining estate. That is, if *A* has an estate for life in a farm, and *B* has the remainder, *A* is not permitted to destroy *B's* interest. If a tenant for life or years so treats the estate as permanently to injure it, he is said to

commit *waste*. A tenant for life is not permitted to cut off the timber. He may cut out underbrush. If such is the custom in the vicinity, he may cut timber for fuel and to repair buildings and fences. The general rule is, that a tenant for life or years may so use the estate as not permanently to injure or destroy it. He is entitled to the fruits and crops, to cultivate the estate to advantage, but not to destroy the buildings or fences, or to so treat the land as ultimately to destroy its productiveness.

295. **Estates at Will and at Sufferance.** Estates at will and at sufferance are discussed under the title of *Landlord and Tenant*. They are estates in land, and are classified as estates less than freehold. An estate which may be ended at the desire or will of either party is known as *an estate at will*. If *A* and *B* agree that *A* may occupy *B's* house, *A* to pay thirty dollars per month, the tenancy to cease at the desire of either party, *A* is said to be a tenant at will, and the estate he possesses is called *an estate at will*. It is not transferable. If *A* attempts to assign his lease, it ceases. An estate at will is terminated by either party notifying the other of his intention to terminate the lease or by either party doing anything inconsistent with the estate. If the owner dies, the estate is terminated.

If a person has a lawful estate in land, and retains possession without right after his interest ceases, he is said to be a *tenant at sufferance*. If *A* rents *B's* house for one year, and, at the expiration of the year he still occupies the house without *B's* consent, he is a tenant at sufferance. He, in fact, has no estate in the premises except that which the owner suffers him to enjoy. This interest is called an *estate at sufferance*. A tenant at sufferance is a wrongdoer. He may be ejected at the will of the owner. The owner is not permitted to use excessive force in ejecting a tenant at sufferance. He may use the force necessary to eject him. At the present time, most of the states have statutory provisions by which unlawful tenants may be ejected by legal process.

296. **Estates in Remainder.** There may be many estates in the same piece of real property. If an owner of an estate in fee simple by one instrument grants an estate less than fee simple to one person and the balance of the fee simple estate to another, the latter estate is called a *remainder*. If *A*, an owner in fee, by the same

instrument grants *B* an estate for life, remainder in fee to *C*, *C* has an estate in remainder. If *C* is living at the time the estate is granted, the estate in remainder vests in him at the time of the grant, and is called a *vested remainder*. If the estate in remainder depends upon any contingency, or is conditional in any way it is said to be a *contingent remainder*. If *A* grants a life estate in his farm to *B*, and the remainder to the heirs of *C*, the heirs of *C* cannot be determined until *C's* death. The estate in remainder is said to be *contingent*.

297. Estates in Reversion. An owner of an estate in real property in fee simple is permitted to grant his interest in the form of as many estates as he pleases. As long as the total of his grants do not equal his interest, he is said to retain an *estate in reversion*. If *A* owns a farm in fee simple, and grants *B* an estate for ten years, *A's* remaining interest is called an estate in reversion.

298. Title to Real Property. Title to real property or the right of the owner eventually to obtain possession of it may be acquired in several ways. Mere occupancy under claim of title will, under certain circumstances, if for a certain uninterrupted period of time, give the occupant title. An uninterrupted possession of real property, under a claim of right for a period in excess of twenty years will in most states give the occupant title by *adverse possession*.

Civilized nations provide by law that the heirs of the owner of real property shall take the title to the property at the owner's death. Estates less than freehold pass as personal property to the executors of the estate of the deceased owner. The statutes of the different states designate who are heirs.

Title to land owned by the government is transferred by public grant. Title by an owner may be conveyed to another by voluntary gift, by devise or will, or by deed. Title by devise or will is discussed in the chapter on Wills.

299. Deeds. The customary method of transfer of real property is by deed. A deed is a written instrument sealed and delivered for the conveyance of land. Deeds were originally divided into *deeds-poll*, and *indentures*. Deeds-poll were mere written obligations of the grantor delivered to the grantee, the grantee making no covenants. An indenture, on the other hand, consists of mutual obligation on the part of grantor and grantee. The obligation of each was reduced to writing, signed, sealed, and delivered, the one

in exchange for the other. A lease is an example of an indenture. The term, *indenture*, originated from the custom of writing the obligation of both parties on the same piece of paper, and by writing some letters of the alphabet between the two agreements, and by cutting the paper through these letters at sharp angles. The separate obligations could be identified by fitting together the saw-tooth edges of the different instruments. At present, duplicate copies are made designating them as indentures. Leases are discussed more at length in the chapter on Landlord and Tenant.

At present, the form of deeds in common use are *quit claim deeds* and *warranty deeds*. Some states provide forms of deeds by statute. Even in the absence of statute, a written instrument, properly signed and delivered by the grantor, containing a description of the property, and an expression of intention to convey the real estate described, is probably sufficient to constitute a deed. A formal deed is customarily used. Transfers of real property are important transactions. A formal deed contains several formal parts known by different names. These formal parts have resulted from well recognized customs and practices, some of them dating back a great many years. The formal parts of a warranty deed are the *premises*, the *habendum*, the *redendum*, the *conditions*, the *warranties* or *covenants*, the *conclusions* and the *acknowledgment*.

300. Premises of a Deed. The premises of a deed contain the name and description of the parties. If a deed is given by an unmarried person, he should be designated in the premises of the deed as *A B*, unmarried. This enables abstractors of titles to determine that a complete transfer of title has been made. Otherwise there is nothing to show that *A B* did not have a wife at the time the transfer was made. In this event, the wife would retain her right of dower. The premises usually contain the date of instrument. Sometimes, the date is placed at the end of the instrument. The consideration is also contained in the premises. The consideration of a deed may be either good or valuable. If the grantor receives something of value, as money or an article of value, the consideration is said to be *valuable*. If a parent grants real property to a child or relative and states the consideration to be love and affection, the consideration is adequate, and is known as *good consideration*. The receipt of the consideration is also acknowledged in the premises of a deed. The

language by which the grantor conveys the estate, such as "give," "grant," "set over," and "release" is contained in the premises as well as the description of the estate granted.

301. Habendum and Redendum Clauses. The premises of a deed are followed by the *habendum* and *redendum* clauses. The *habendum* clause describes the estate granted, whether an estate in fee, an estate for life, or an estate for years. It is not necessary to repeat the description of the estate in the *habendum* clause. The *habendum* clause usually commences with the words, "To have and to hold."

The *redendum* clause contains any interests or rights retained by the grantor. If the grantor reserves to himself the right to use a certain driveway, he places this reservation in the *redendum* clause.

302. The Conditions, Warranties and Covenants of a Deed. A warranty deed may not be an absolute transfer of real property, but may be conditional. For example, if the deed is absolute in form, but contains a condition that the transfer is to be of no effect if the grantor pays the grantee a certain sum of money by a certain time, the deed is a conditional one. The conditions above described constitute the deed a mortgage. This class of conditional transfer is discussed in the following chapter. Most deeds are without conditions.

The next formal part of a warranty deed is the covenant of warranty. The grantor covenants that he is lawfully seized of the estate. This means that the grantor has the legal title and right to possession, which right he conveys to the grantee. The grantor also covenants that the grantee shall have quiet enjoyment of the estate, that the estate is free from incumbrance, and that the grantor and his heirs warrant the title to the estate.

303. The Conclusion of a Deed. The conclusion of a deed contains the signature of the grantor and the statement that he has signed and sealed the deed. Most states require by statute that a deed must be signed in the presence of two witnesses. The signature and statement of the witnesses to the effect that the deed was signed in their presence is a part of the conclusion. The mere statement that the grantor signs and seals the deed makes it a sealed instrument. Seals were originally impressions made in wax affixed to the instrument. A scroll or flourish of the pen was regarded as a seal,

but at present a deed is in itself regarded as a sealed instrument, and requires no seal nor substitute therefor.

304. Acknowledgment of a Deed. The states of this country require by statute, deeds to be recorded by the public recorder, if parties to the deed desire to give notice of the transfer to third persons. Third persons are deemed to have notice of deeds so recorded even though they have no actual notice. For the purpose of having a deed recorded, the grantor must acknowledge his signature before a notary public who adds his statement to that effect to the deed, and signs and seals the same. A quit claim deed contains no warranties nor covenants. It is merely a release of the grantor's interest to the grantee.

QUIZ QUESTIONS

BAILMENT

1. Define *bailment.*
2. For whose benefit may bailment be made?
3. Distinguish a *bailment* from a *sale.*
4. Give an example of a bailment.
5. Name and define the parties to a bailment contract.
6. May an infant enter into a bailment contract?
7. Is an infant liable for his torts?
8. Classify bailments.
9. Give an example of a bailment for the mutual benefit of both bailor and bailee.
10. Is a bailment a contract?
11. What is the consideration in a bailment for the sole benefit of the bailor?
12. What party to a bailment contract has possession of the property?
13. Is a finder of lost property a bailee?
14. In whom is the title to bailed property?
15. Are the title and possession in the same person?
16. May a person not the owner of property bail it?
17. Give an example of a bailment for the sole benefit of the bailor.

18. What degree of care is required of a bailee in case the bailment is for the sole benefit of the bailor?

19. Give an example of a bailment for the sole benefit of the bailee.

20. What degree of care is required of a bailee in a bailment for his sole benefit?

21. *A* hires of *B* an automobile for $3.00 per hour. Is the bailment for the sole benefit of the bailor, the bailee, or for the mutual benefit of both parties?

22. In the above example what degree of care is required of *A*?

23. What implied warranties accompany mutual benefit bailments?

24. Define and distinguish public and private warehousemen.

25. What are government warehouses?

26. Are warehouse receipts negotiable?

27. What degree of care is required of warehousemen?

28. What degrees of care are recognized in bailments?

29. How is the standard for determining degrees of care arrived at?

30. Is ordinary care the same in the bailment of different kinds of property?

31. If a third person takes property away from a bailee may the latter recover possession?

32. What are the rights of a person purchasing from a bailee?

33. What is meant by *liens* on personal property?

34. *A* leaves his watch with *B* for repairs. *B* repairs the watch. Can *B* retain possession until he receives his pay?

35. May a bailee sell property to satisfy his lien?

PLEDGES

1. Is a pledge a bailment?
2. Define a *pledge*.
3. Does title to property pledged remain in the pledgor?
4. Distinguish *pledge* from *chattel mortgage*.
5. Name and define the parties to a contract of pledge.
6. May an infant pledge property?
7. What kinds of personal property may be pledged?

8. Can a person pledge personal property which he expects to purchase?

9. Can a person pledge a growing crop?

10. What is the purpose of a contract of pledge?

11. Can there be a pledge which is not security for an existing debt?

12. If *A* delivers possession of personal property to *B* but does not owe *B* anything, is the transaction a pledge? If not a pledge, what is the transaction?

13. Who has possession of pledged property?

14. Does the pledgee have title to property pledged?

15. In case of a chattel mortgage who has title to the mortgaged property?

16. In case of pledge of negotiable instruments, who has title to the instruments?

17. What is meant by *loans on collateral securities?*

18. What is a *collateral note?*

19. By whom are collateral notes commonly used?

20. After payment of the debt for which property is pledged, who is entitled to possession of the pledged property?

21. Who is entitled to possession of property pledged before payment of the debt secured?

22. In case of pledge of negotiable instrument who must collect the interest and instrument when due?

23. What degree of care is required of a pledgee in the protection of pledged property?

24. If the pledgor fails to pay the debt when due, what may the pledgee do with the property?

25. In selling pledged property what notice, if any, should the pledgee give the pledgor?

26. What is meant by *foreclosing a lien in equity?*

27. Define and explain *redemption.*

28. When may the right of redemption be exercised?

MORTGAGES ON PERSONAL PROPERTY

1. Define *chattel mortgage.*

2. In case of a mortgage of personal property, who has possession of the property? Who has title?

3. Define *mortgagor* and *mortgagee.*

5. Distinguish *chattel mortgage* and *sale.*

4. Distinguish *chattel mortgage* and *pledge.*

6. Distinguish *pledge* and *sale.*

7. May *choses in action* be mortgaged?

8. Define and distinguish *choses in action* and *choses in possession.* May both be mortgaged?

9. What is the purpose of a chattel mortgage?

10. Does a chattel mortgage require a consideration?

11. Can there be a chattel mortgage without a debt to be secured?

12. Must a chattel mortgage be in writing?

13. *A* mortgages his horse to *B* to secure a debt of $40 00. *A* delivers the horse to *B.* The mortgage is oral. Is it binding?

14. What is the reason for filing or recording a chattel mortgage?

15. Does a chattel mortgage of property, possession of which is given the mortgagee, have to be recorded to be binding?

16. Who is entitled to possession of mortgaged personal property?

17. *A* mortgages his household furniture to *B,* later he stores the furniture with *C. C* acquires a storage keeper's lien. Is the latter's lien superior to *B's?*

18. Does a mortgagor retain an interest which he may dispose of?

19. Does a mortgagee have absolute title to the property mortgaged?

20. If *A,* the mortgagee of personal property, sells the debt secured by the mortgage to *B,* what becomes of the mortgage?

21. When the mortgagor defaults in payment of the secured debt, how may the mortgagee obtain possession of the property?

22. Define *equity of redemption.*

23. Can a mortgagor enforce his equity of redemption after the mortgagee has obtained possession of the property?

24. Can a mortgagee enforce his equity of redemption without paying the mortgage debt?

25. Define *foreclosure.*

26. What is the purpose of foreclosure?

27. How is foreclosure enforced?

CARRIERS

1. Define and give an example of *common carrier.*

2. Define and give an example of *private carrier.*

3. What constitutes a person or company a common carrier of goods?

4. Is a common carrier of goods obliged to carry goods of all kinds?

5. Distinguish *common carrier* and *private carrier.*

6. What is the exceptional liability of a common carrier, and what is the reason for this liability?

7. If goods intrusted to a common carrier are lost without negligence of the carrier is the latter liable to the owner?

8. Is the exceptional liability of an insurer a matter of express or implied contract?

9. What are the exceptions to the liability of a common carrier as an insurer of the goods intrusted to his care?

10. Define and give an example of *public enemy.*

11. Define and give an example of *Act of God.*

12. Is a common carrier permitted to limit his common law liability as an insurer of the goods by special contract?

13. Is a common carrier permitted to stipulate against the carelessness of his agents or servants?

14. Is a common carrier permitted to limit his liability as an insurer of goods by stipulating in the bill of lading issued that the valuation is limited to a certain amount, unless informed otherwise by the shippee?

15. What does the Interstate Commerce Act provide relative to the above question?

16. What is a *bill of lading?*

17. Distinguish bill of lading and shipping receipt.

18. What are the two essential features of a bill of lading?

19. In what sense, if any, is a bill of lading a negotiable instrument?

20. *A*, in Cleveland, orders a car of hogs from *B*, in Buffalo. *B* delivers the hogs to the railway company in Buffalo, to be shipped to *A* in Cleveland. In whom is the title to the hogs?

21. If *A* stipulates that the hogs are to be delivered F. O. B. Cleveland, in whom is the title to the hogs after they are delivered to the railway company, and before they reach Cleveland?

22. What goods, and under what circumstances, is a carrier obliged to accept for shipment?

23. Explain the meaning of *stoppage in transitu.* Under what circumstances is a shipper permitted to exercise the right?

24. What carriers are obliged to make delivery at the residence or place of business of the consignee, and what carriers are obliged only to deliver at their depots or warehouses?

25. Define and explain *carrier's lien.*

26. How may a carrier enforce his lien?

27. Why is a common carrier not permitted to discriminate between shippers?

28. When, if at all, is a carrier of mail liable for negligence?

29. Is the government liable to an owner of mail for its loss?

30. What are the principal features of the Interstate Commerce Act of 1906?

CARRIERS OF PASSENGERS

1. Is every person or company carrying passengers for compensation a common carrier?

2. Are owners of buildings operating elevators common carriers of passengers?

3. When does a person become a passenger?

4. Is a person traveling on a pass a passenger within the legal meaning of the term, passenger?

5. Is a public carrier of passengers obliged to accept all who present themselves as passengers?

6. When, and how, may a public carrier eject a passenger?

7. What degree of care is a public carrier of passengers obliged to exercise?

8. What constitutes baggage?

9. What is the liability of a carrier of passengers for loss or injury to baggage?

INNKEEPERS

1. Must a person represent himself as being ready and willing to furnish both food and lodging to all who desire to become guests, in order to be an innkeeper?

2. Are boarding-housekeepers innkeepers?

3. Are innkeepers obliged to receive all persons who present themselves as guests if the regular price is tendered?

4. What degree of care in the protection of guests is required of innkeepers?

5. What degree of care is required of innkeepers in the protection of the baggage of guests?

6. What is an *innkeeper's lien?*

7. How may an innkeeper enforce his lien?

REAL PROPERTY

1. Define *real property.*

2. What is included in the term, real property?

3. Define and give an example of *hereditament.*

4. Define and give an example of *tenement.*

5. Are standing trees real or personal property?

6. Are trees blown down real or personal property?

7. What is the practical distinction between real and personal property?

8. Define *emblements.*

9. Do emblements belong to the tenant or to the landlord?

10. Are apples emblements? If not, why not?

11. How may a wall become a party wall by prescription?

12. Define *fixtures.*

13. Are fixtures real or personal property?

14. Does the rule as to fixtures differ in case of a tenant, and in case of an owner?

15. Do owners of adjoining property own a partition fence jointly or does each one own a particular part of the fence?

16. Define and give an example of a *way of necessity.*

17. Define and give an example of a *way of convenience.*

18. How are highways ordinarily established?

19. How may a highway be established by prescription?

20. Into what classes are estates divided as to the quantity of interest held?

21. What is a *freehold estate?*

22. From what is the term, freehold, derived?

23. Define and give an example of an *estate in fee simple.*

24. What is meant by *entailing an estate?*
25. What was the reason for the practice of entailing estates?
26. To what extent may an estate be entailed in this country?
27. What is the rule against perpetuities?
28. Define and give an example of a *life estate.*
29. What claims do life estates embrace?
30. Define *estate by the courtesy.*
31. Define and give an example of *dower estate.*
32. Define and give an example of *homestead estate.*
33. Define and give an example of an *estate for years.*
34. Is a lease for two months an estate for years?
35. May a holder of an estate for years transfer it?
36 What is meant by *waste?*
37. What is the general rule relating to waste?
38. Give an example of an *estate at will.*
39. Distinguish an *estate at will* from an *estate at sufferance.*
40. How may an estate at will be terminated?
41. Define and give an example of an *estate in remainder.*
42. Distinguish *vested* and *contingent remainder.*
43. Distinguish *estates in reversion* from *estates in remainder.*
44. How may title to real property be acquired?
45. Define *deed.*
46. Define *deed poll.*
47. Define *indenture.*
48. What are the formal parts of a deed?
49. What things are included in the premises of a deed?
50. What is meant by the *habendum* and *redendum clause* of a deed?
51. What is a *warranty of a deed?*
52. What are the general warranties of a deed?
53. What things are included in the conclusion of a deed?
54. What is meant by the *acknowledgment of a deed?*

COMMERCIAL LAW

PART V

MORTGAGES OF REAL ESTATE

305. Mortgage Defined. By the common law, a mortgage was an absolute deed of conveyance, by the terms of which the debtor was entitled to receive a reconveyance of the property upon payment of the debt described in the mortgage, or upon performing the conditions for which the mortgage was given. For example, *A* owes *B* one thousand dollars, *A*, to secure the debt, gives *B* an instrument of conveyance of his house and lot, the instrument containing a provision that if *A* pays *B* one thousand dollars ($1,000.00) on or before January 1st, 1911, *B* is to reconvey the house and lot to *A*. The above represents a mortgage at common law. As explained later, a present day mortgage is somewhat different.

At common law, the creditor had possession of the property from the time the mortgage was given, unless it was expressly agreed that the debtor was to remain in possession. The real purpose of a mortgage is to give security for a debt or obligation. To permit a creditor to keep the mortgaged property upon default of the debtor to pay the debt when due, is unjust in many cases. For example, if *A* gives a mortgage to *B* upon property worth one thousand dollars, to secure a debt of three hundred dollars, and *A* defaults in payment, it is unjust to permit *B* to keep the property. Courts of equity have for a long time regarded this transaction as a mere security for a debt, and not an absolute transfer of title to property. Courts of equity long ago permitted the debtor to file a petition in a court of equity asking that the property be reconveyed to him upon payment of the debt, and damages due the creditor. Courts of equity recognize this right of the debtor, which is called *equity of redemption*. At the present time mortgages are, in form, an absolute conveyance of real estate, with a condition that the title is to revest in the debtor, or that the conveyance is to be void and of no effect, if the debtor

pays the debt or performs the condition. If the debtor fails to perform this condition at the time stipulated, he is still able to enforce his equity of redemption. This, in effect, makes a mortgage of real estate a mere security for a debt. The creditor is permitted to cut off the debtor's right of redemption by foreclosure, which is discussed under a separate section.

306. Parties to a Mortgage Contract. A mortgage of real estate is a contract. Like any contract, it requires competent parties, a consideration, mutuality, etc. (See *Essentials of a Contract*, chapter on Contracts.) The party conveying the real estate to another as security for the debt is called the *mortgagor*, the party to whom the mortgage is given is called the *mortgagee*.

307. Possession of Mortgaged Property. Originally at common law, the mortgagee was entitled to the possession of the mortgaged premises as soon as the mortgage was given, and before default of the mortgagor to pay the debt described in the mortgage. At the present time, the mortgagor is entitled to possession of the mortgaged premises until after default of payment of the mortgage debt. After default, the mortgagee may take possession of the premises. Some states now provide by statute, that the mortgagor shall have possession of the mortgaged premises until he defaults in payment of the mortgage debt. Independently of such a statute, the mortgagor has the right to possession of the mortgaged premises before default of payment of the mortgage debt. This is by reason of the fact that the law regards the transaction as a security for a debt rather than an absolute transfer of title.

Parties are permitted to enter into any contract they choose so long as the provisions are legal. Parties to a mortgage may stipulate who is to have possession before default or payment on the part of the mortgagor. If it is stipulated that the mortgagee is to have possession, he is entitled to it under the terms of the mortgage contract If no stipulation is made, the mortgagor impliedly is given the right of possession before default.

308. Deeds as Mortgages. If a deed, absolute on its face, is given by a debtor to a creditor to secure a debt, it will be treated by a court of equity as a mortgage. Equity regards the substance of things rather than the form. (See *Courts of Equity* under chapter on Courts, Remedies, and Procedure.) Courts of equity were origi-

nally created for the purpose of granting justice where the rules of the common law failed. In England, they were called *courts of chancery.* A judge sits alone as a court of equity, without the aid of a jury. When there is no remedy at law, and a wrong exists, equity affords a remedy. In this country, the same court frequently sits as a court of equity as well as a court of law. In the case of deeds absolute on their face, if it was the intention of the parties that the conveyance was to constitute a security for a debt, rather than a sale, a court of equity will permit the grantor to secure a return of the property upon payment of his debt. Equity looks at the substance of the transaction disregarding the form. If mortgages are not in proper legal form, and either party is not permitted at law to enforce his right, equity will enforce the transaction according to the intention of the parties. Informal or incomplete mortgages are called *equitable mortgages.*

309. The Debt Secured. A mortgage is a contract, and like any contract, must be supported by a consideration. (See *Consideration,* chapter on Contracts.) The consideration of a mortgage may be anything of benefit to the one giving the mortgage, or any detriment to the one receiving the mortgage. The consideration of a mortgage ordinarily is an advancement or loan, past or present, made by a mortgagee to the mortgagor. That is, a mortgage is given as security for some debt or obligation in favor of the mortgagee. This debt is usually described in the mortgage as a promissory note. Even though no note has been given, if the amount described in the mortgage as a promissory note is the amount of the debt, or if any debt exists, the mortgage is valid. A mortgage may be given to cover future advances, or for a pre-existing indebtedness. If a mortgage is given as security for a promissory note, it will secure all renewals of the note as well.

310. Essentials of a Mortgage. A mortgage is an instrument for the conveyance of land. By the provisions of the Statute of Frauds, such instruments must be in writing to be enforceable. (See *Statute of Frauds,* chapter on Contracts.) The states provide by statute that mortgages must be recorded to be effective as against subsequent innocent purchasers, mortgagees or creditors. Mortgages must be in writing for the purpose of recording, as well as to comply with the Statute of Frauds. When a mortgagee takes pos-

session of the mortgaged premises, this is sufficient notice to creditors and subsequent purchasers of his interests. In this event the mortgage need not be reduced to writing nor recorded.

Mortgages are usually written in the form of formal deeds. (See *Form of Deeds,* chapter on Real Property.) Although it is good business practice to follow these well recognized forms in drawing mortgages, an informal instrument describing the parties and the property mortgaged, and showing an intent to make a mortgage is sufficient. Some states by statute provide a short statutory form. This form may be used, but does not prevent the common law form from being used.

A mortgage is given to secure a debt or obligation. This debt or obligation should be set forth in the mortgage, and the time when it is to be paid or performed should be set forth. The mortgage should also contain a description of the property mortgaged. A complete and accurate description, such as is used by surveyors, is the best form. By this means, a person can locate the property directly from the description given in the mortgage. It is sufficient if the description given enables a person to locate the property either by reference to another record containing a description, or by its own terms. A surveyor's description is better, however. A mortgage should contain the names of the grantor and the grantee.

The mortgagor is entitled to his equity of redemption. That is, he is entitled to the right to file a petition in a court of equity, offering to pay the mortgage debt, interest, and damages to the mortgagee, and asking for a return of the property. This may be done at any time before foreclosure by the mortgagee. Foreclosure is discussed under a separate section.

311. Power of Sale and Delivery in Escrow. If a mortgagor stipulates in the mortgage that he waives, or will not enforce his equity of redemption, the law does not permit the mortgagee to enforce such a stipulation. It is regarded as against public policy, and illegal. Whenever there is a mortgage, there is an equity of redemption in favor of the mortgagor.

Some mortgages contain a stipulation that in case the mortgagor fails to pay the mortgage debt when due, the mortgagee may sell the property, deduct his claim costs and expenses, and return the balance to the mortgagor. Such mortgages are called *power of sale mort-*

gages. They are valid and enforceable. The mortgagor's equity of redemption is protected, in that he receives the balance of the proceeds of the sale of the mortgaged premises, after the mortgage debt and expenses are paid. The sale, under a power of sale mortgage, must be public and *bona fide.*

A mortgage must be signed by the mortgagor. This is called in law, *execution of the mortgage.* The mortgage must also be attested. This means that the signing must be in the presence of a witness or witnesses. This requirement is a statutory one. Some states require only one witness, others two. If a mortgage is to be recorded, the signature of the mortgagor must be acknowledged before a notary public or officer authorized to administer oaths. This is called *acknowledgment.* It means that the mortgagor acknowledges the making of the signature in the presence of an officer authorized to administer oaths. The officer writes a certificate of this acknowledgment on the mortgage. Acknowledgment is a statutory requirement. A mortgage will not be received for record by the public recorder, unless it has been acknowledged.

A mortgage given by a married man must contain a waiver of dower by the mortgagor's wife, or the wife will have a dower estate therein if her husband dies before she dies. The mortgage of a married man should contain a statement that the wife waives her dower interest, and the wife should sign the mortgage before witnesses, and acknowledge her signature. A mortgage, like any written contract, does not become effective until delivered. By *delivery* is meant giving possession of the instrument to the mortgagee or his agent, with intent that it is to become effective from that date. If a mortgage or written instrument is delivered to a third person to be held for a certain purpose or until a certain time, this is called *delivery in escrow.*

312. What Interest in Real Estate May be Mortgaged. Any interest in real estate which is the subject of transfer or sale may be mortgaged. One who has the absolute title, called *fee simple interest,* in real estate may mortgage it. A mortgage is not regarded as a transfer but merely as a security for a debt or obligation. The mortgagor retains an interest called his equity of redemption. For all practical purposes, a mortgage of real estate means that the mortgagee may sell the property mortgaged upon failure of the mortgagor to pay the mortgage debt when due. The mortgagee may keep

enough of the proceeds of the sale to satisfy the mortgage debt. The equity of redemption of a mortgagor and the remainder must be returned to the mortgagor, or his right to the proceeds of the sale of mortgaged premises, after the mortgage debt is paid, is an interest which in turn may be mortgaged.

A mortgagor may give successive mortgages so long as he finds persons willing to accept them as security. In practice, second and third mortgages on real estate are common. Not only may real estate be mortgaged, but anything permanently connected with real estate, such as crops, trees, houses, and buildings. Articles of personal property which have become permanently annexed to real estate are called *fixtures*. (See *Fixtures*, chapter on Real Estate.) If title to real estate has been obtained by fraud, a valid mortgage may be given to one who has no notice of the fraud. The principle involved is that a title obtained by fraud or duress is voidable. The party defrauded may obtain a reconveyance of the property as against the party practicing the fraud, but not as against innocent purchasers who have had no notice of the fraud. If, however, a conveyance is attempted by means of a forgery, no title to the property passes to the purchaser, who in turn can convey nothing by mortgage or otherwise. Similarly, a party who has conveyed his interest in real estate absolutely, by deed or contract, has nothing left to convey, and cannot give a mortgage. An interest in real estate less than absolute ownership, as a life interest, or a mere lease, or term for years, is an interest which may be mortgaged.

313. Recording Mortgages. To be effectual against creditors, subsequent purchasers, and mortgagees, most of the states require by statute, that mortgages be recorded with the public recorder of the county where the property is located. These statutory provisions do not render mortgages ineffectual as between original parties. *A* gives a mortgage on his house and lot to *B*. *B* does not have the mortgage recorded. If *A* fails to pay the mortgage debt when due, *B* may foreclose. As against *A*, *B's* mortgage is enforceable without being recorded. If, however, *A* gives a subsequent mortgage to *C*, and *C* records his mortgage, *C's* mortgage is superior to *B's*. If *A* sells the property to *D* after mortgaging it to *B*, *B* not recording the mortgage, *D*, upon having his deed recorded, takes the title free of *B's* mortgage. If *A* gives *B* a mortgage, *B* not having the mortgage

recorded, and *E* obtains a judgment against *A* and levies upon the real estate mortgaged to *B*, *E* obtains a lien superior to *B's*.

The statutes of a few states provide that mortgages become effective from the time they are left with the recorder for record. The recorder stamps on the mortgage the time it is left for record, and the mortgage becomes effective from that time. Suppose *A* on the second of February gives a mortgage on his house and lot to *B*, for $500.00, and then on the fifth of February gives a mortgage on his house and lot to *C* for $500.00. If *C* has his mortgage recorded February sixth, and *B* has his mortgage recorded February seventh, *C's* mortgage is superior to *B's*. In the few states where a mortgage does not become effective until received for record, the one first received for record is superior to others, even though the mortgagee first leaving his mortgage for record takes his mortgage with actual notice of the prior mortgage. The general rule is that one who takes a mortgage with actual notice of other mortgages, takes subject to such mortgages.

To be received for record, a mortgage must be acknowledged. This means that the mortgagor must acknowledge the signature to the mortgage before a notary public or officer authorized to administer oaths. The officer makes a certificate of the acknowledgment on the mortgage.

314. Transfer of Mortgages and Mortgaged Premises. While, in form, a mortgage is a transfer of real estate, it is regarded merely as security for a debt. The mortgagee is not permitted to transfer title to the real estate. He is, however, permitted to transfer the interest which he possesses in the mortgaged premises. Such a transfer is called an *assignment*. It is a contract of sale by which the mortgagee sells his interest in the mortgage. (See *Assignment of Contract*, chapter on Contracts.) For example, if *A* mortgages his farm to *B* as security for a one-thousand-dollar promissory note, *B* cannot convey title to the property mortgaged, to *C*, but he may sell his interest in the mortgage to *C*. The mortgage cannot be sold separately from the debt secured. The mortgage, separated from the debt, represents nothing of value. If, in the example above given, *B* endeavors to sell the note to one person, and the mortgage to another, the purchaser of the mortgage takes nothing. A sale of the debt secured by the mortgage, carries with it the mortgage security, unless

it is expressly agreed that the debt is transferred without the security of the mortgage.

If *A* mortgages his farm to *B* to secure a promissory note for one thousand dollars, and *B* sells the note to *C*, *C* takes the security of the mortgage as well as the note, unless it is expressly agreed between him and *B* that the security of the mortgage is not transferred with the note. After *B* sells *C* the note, *B* cannot cancel the mortgage. The mortgage now belongs to *C*. If *A* mortgages his farm to *B* to secure two promissory notes of $500.00 each, and *B* sells one of the notes to *C*, in the absence of an agreement to the contrary, *C* has one-half interest in the mortgage as security for his note. *B* may, however, expressly stipulate in the sale of his note to *C*, that *B* is to retain the entire mortgage security for his own note.

When a debt secured by a mortgage is assigned, the assignee should immediately notify the mortgagor of the assignment, in order that the mortgagor shall pay him, and not the assignor. This is the safe policy to follow, although technically, the mortgagor before paying the mortgage debt should be sure that the mortgagee is still the owner of the note, debt, or other obligation, secured by the mortgage.

A mortgagor is permitted to sell his interest in the mortgaged premises before satisfying the mortgage. He may sell his equity of redemption, or he may sell in such a manner that the purchaser assumes the mortgage. If the mortgagor sells the mortgaged premises, the purchaser agreeing to assume the mortgage as between the mortgagor and the purchaser, the purchaser must pay the mortgage. The mortgagee, however, is not bound by this agreement. He may disregard it. He may accept the benefit of it if he chooses and sue the purchaser on this contract. (See *Contract for the Benefit of Third Persons*, chapter on Contracts.) If, however, the mortgagee agrees to accept the purchaser of the mortgagor's interest as the debtor, the original mortgagor is relieved thereby.

315. Satisfaction of Mortgages. A mortgage is given as security for a debt or obligation. It is satisfied by payment of the debt, or fulfillment of the obligation. The mortgage debt may be paid by the mortgagor himself, by a purchaser of the mortgagor's interest, by a subsequent mortgagee, or by any one having an interest in the real estate mortgaged. If anyone, other than the mortgagor, pays the mortgage debt to protect his own interest, he is thereby en-

titled to the benefit of the mortgage. This is called *subrogation*. If *A* owes *B* $5,000.00, and gives *B* a note for that amount, secured by a real estate mortgage on a farm, *C* signing the note as surety or guarantor, in case *C* pays the note upon default of *A*, *C* is entitled to *B's* benefit in the mortgage. Payment of a mortgage debt may be made to a mortgagee, himself, his assignee of the mortgage debt, or any agent or authorized representative of the mortgagee. A party not having an interest in the land cannot voluntarily pay a mortgage debt, and claim the benefit of a mortgage by subrogation. A party interested in the land, even the mortgagor, himself, cannot compel the mortgagee to accept payment before the mortgage debt is due.

Upon payment of a mortgage debt, the title to the mortgaged premises by this act becomes absolute in the mortgagor. At common law, if the mortgagor paid the mortgage debt when due, the mortgagee had to reconvey by deed the mortgaged premises to the mortgagor to give the latter title. But at the present time, a mortgage is not regarded as a conveyance of title, but merely as a security for a debt, the title vesting absolutely in the mortgagor any time he pays the debt before the actual foreclosure of this right by the mortgagee.

When the mortgagor pays the mortgage debt, he is entitled to a written satisfaction of the debt. This is a mere written statement that the mortgage is satisfied, signed by the mortgagee. The mortgagor is thus enabled to have the mortgage cancelled of record, which gives the public notice that the mortgage is no longer effective. The mortgagor presents his written statement of satisfaction to the public recorder, who enters it in his record of the mortgage.

316. Equity of Redemption. A mortgagor does not lose his interest in the mortgaged property by failure to pay the mortgage debt when due. Courts of equity regard a mortgage as a security for a debt, and not a transfer of real property. Even though the mortgagor fails to pay the mortgage debt when due, and in spite of the fact that the mortgage purports to be a transfer of real estate, conditioned only on the payment of the debt described, equity refuses to regard the transaction as a sale, and permits the mortgagor to recover the property by paying the debt, interest, and expenses connected with the mortgage, at any time before the statute of limitations cuts him off. The states have statutes requiring suits of differ-

ent kinds to be brought within certain periods. These statutes vary somewhat in the different states. Most states require an action by which a mortgagor enforces his equity of redemption, to be brought in about twenty or twenty-one years after the debt becomes due. The mortgagor himself or anyone to whom he transfers, or who acquires his interest, is entitled to the equity of redemption.

If *A* mortgages his farm to *B*, to secure a promissory note of one thousand dollars due in one year, *A* does not lose his right to the property by failure to pay the note when due. He may bring a suit in equity at any time, usually within twenty-one years, after the note becomes due, offering to pay the mortgage debt, interest, and costs, and asking for a return of the property. Equity now gives the mortgagee a right to cut off the mortgagor's right of redemption by foreclosure. This is discussed in the following section.

317. Foreclosure of Mortgages. A mortgagor has the right to redeem the property at any time within the statute of limitations, after the mortgage debt becomes due. The mortgagee does not have to wait the pleasure of the mortgagor to redeem or abandon the right. Equity gives the mortgagee the right to cut off the mortgagor's equity of redemption by foreclosure. By foreclosure is meant the mortgagee's right to file a petition in a court of equity asking that the property be sold, and that from the proceeds, the amount of the mortgage debt and costs first be paid, and that the balance be paid the mortgagor. The court orders the property advertised and sold, and the proceeds distributed as above described.

Some mortgages contain a stipulation concerning foreclosure. These mortgages are called *power of sale mortgages*. It is stipulated that when the mortgagor is in default of payment, the mortgagee may advertise and sell the property, deducting from the proceeds the mortgage debt, interest, and expenses, and paying the balance to the mortgagor. These power of sale mortgages are enforceable. The sale must be free from fraud, public, and the mortgagee cannot become a purchaser unless so stipulated in the mortgage, or so provided by statute. The states usually provide by statute a method of foreclosure. These statutes frequently provide that a mortgagee may enforce his mortgage, and obtain a judgment against the mortgagor on the mortgage debt in the same action. If the mortgaged premises do not bring enough to satisfy the judgment, the balance

may be enforced against the mortgagor by seizing any property subject to execution that he possesses.

TRUSTS

318. Defined and Classified. In a popular sense, the term, *trust,* is often used to designate combinations of capital or combinations among business men for the purpose of destroying competition, or for the purpose of regulating prices. This is not the meaning of the term as used in this chapter. It is here used to mean an estate of some kind held for the benefit of another. A trust has been defined to be "An obligation upon a person, arising out of a confidence reposed in him, to apply property faithfully according to such confidence." *A*, by will, appoints *B* trustee of his farm, for the benefit of *C*. Upon *A's* death, if *B* accepts the duty imposed upon him by the will, a trust is thereby created in which *B* holds the legal title to the farm, for the benefit of *C*.

Trusts are sometimes classified as *general* and *special.* If the property is conveyed by deed or will to another to be held in trust for a third person, without specifying any of the duties of the second person, it is said to be a general or simple trust. If, however, the duties of the second person or trustee are defined, the trust is called a special trust. A trust for the benefit of an individual or individuals is called a *private* trust, while one for the benefit of a public institution, or for the public, is a *public* trust. If *A* gives his property to *B* to care for the poor of the city of Chicago, the trust is public. As to their method of creation, trusts are usually divided into *express, implied, resulting* and *constructive* trusts.

319. Parties to Trusts. The party creating a trust is called the *grantor* or *settlor.* The party to whom the title to the property is given to hold for the benefit of another is called the *trustee.* The party for whose benefit the trust is created is called the *cestui que trust.* If the beneficiaries are more than one in number, they are termed *cestui que trust.* If *A* deeds his land to *B* for the benefit of *C*, *A* is the settlor, *B* is the trustee, and *C* is the *cestui que trust.*

320. Who May be Parties to a Trust. Persons of lawful age, and competent to make contracts, including corporations, may create trusts. Any person competent to make contracts, including corporations, may act as trustee. Even infants (persons under

legal age) may act as trustees if the duties require the exercise of no discretion. An infant may hold the legal title as trustee, and if the duties require the exercise of discretion, the court will remove him or appoint a guardian to perform his duties. Anyone capable of holding the legal title to property may be a *cestui que trust.* This includes corporations, aliens, and, in case of charitable trusts, infants. Any kind of property, whether real or personal, may be given in trust. This includes lands, chattel property, promissory notes, accounts, and kindred property rights, regardless of where the property is located.

321. Express Trusts. An *express trust* is one created by the express written or oral declaration of the grantor. If *A* gives a deed of his farm to *B*, by the terms of which *B* is to hold the farm in trust for *C*, *A*, the grantor, has created an express trust in favor of *C*, *B* as trustee holds the legal title to the farm, and *C*, as *cestui que trust* or beneficiary, holds the beneficial or equitable interest. *A*, before giving the deed of trust, was the absolute owner of the farm. That is, *A* held the legal title and the equitable interest in the farm. By creating the trust, he placed the legal title in one person and the equitable or beneficial interest in another

Originally, in England, at common law, trusts could be created by oral declaration as well as by written instruments. At that time, land could be transferred without written instruments. The seller took the buyer on to the land to be conveyed, and in the presence of witnesses delivered to him a symbol of the land, such as a piece of turf or a twig. About 1676, the Statute of Frauds was passed by the English Parliament, requiring among other things, that conveyances of lands, including the creation of trusts therein, must be by written instruments. This provision of the Statute of Frauds has been re-enacted by most of the states of this country. At the present time, trusts in real estate must generally be created by written instrument. Trusts may be created by will to take effect at the grantor's death. Trusts may be created in personal property. Except when created by will, trusts in personal property may be created by oral declaration of the grantor. A grantor may create a trust voluntarily. If actually carried out, or if the grantor's intention to create the trust is expressed as final, it requires no consideration to support it If the declaration of trust amounts to a mere agree-

ment to create a trust, and is not carried out, it requires a consideration to enable the beneficiary to compel its execution. After an express trust is completed, it cannot be revoked by mutual agreement between the grantor and trustee without the consent of the *cestui que trust.*

The most common forms of express trusts are created by deed, by will, or by contract. Any declaration of the grantor, no matter how informal, if expressing his intention to create a trust, is sufficient to create a trust. A trust cannot be created for an immoral or illegal purpose.

322. Implied Trusts. When a person by deed or will does not use language expressly creating a trust, but uses language showing his intention to create a trust, one will be implied. Such a trust is known in law as an *implied trust,* as distinguished from an *express trust.* If *A* devises all his property to his son, *B,* the will containing the following language: "I request my son, *B,* to pay his cousin, *C,* $10.00 per month during his life," this language is held to create a trust in favor of *C,* wherein *B* is trustee.

323. Resulting Trusts. One party may so conduct himself, or so deal with another, that a court will declare the transaction to be a trust, even in the absence of any express declaration, or of an intention on the part of the parties to create a trust. Such a trust is known in law as a *resulting trust. J,* to avoid paying his creditors, purchases property in the name of his wife, *K. K* is a trustee for her husband, *J,* and creditors can by suit in equity subject *J's* interest in the property.

If *A* purchases property, and takes the deed in the name of *B, B* is trustee for *A. B* is the legal owner, and *A* is the beneficial or equitable owner. If a third person purchases the property from *B,* without notice of *A's* rights, and for value, the third person takes good title to the property free from *A's* claim.

In this country, the states generally require by statute, that deeds and mortgages of real estate must be recorded. If an equitable owner does not have a properly recorded written instrument showing his interest in the real estate in question, thereby giving future purchasers notice of his interest, he cannot complain unless the third person has actual notice of his rights or purchases without giving a valuable consideration. A resulting trust is not created by

agreement or contract to that effect, but is created by the trustee using money or funds of the *cestui que trust* in the purchase of property in his own name.

324. Constructive Trusts. If one person is in a confidential relation to another, and misappropriates the money of the other, this act is said to create a *constructive trust*, in which the defrauding party is trustee, and the defrauded party is beneficiary, or *cestui que trust*. A constructive trust differs from a resulting trust in that the former involves fraud on the part of the trustee, exercised on the *cestui que trust*, while a resulting trust never involves fraud between the trustee and *cestui que trust*, although created for the purpose of defrauding third persons.

If *A*, an attorney, is employed by *B* to collect a note of $500.00, and fraudulently reports a collection of $300.00, keeping $200.00, a constructive trust results, in which *A* is trustee for *B*, for $200.00. If *A*, for the purpose of defrauding his creditors, deposits his money in bank in *B's* name, a resulting trust arises in which *B* is trustee for *A*, and *A's* creditors can subject the property.

Anyone defrauding another by duress, by taking advantage of old age or of mental weakness, or by fraud, becomes the trustee for the wronged party in the amount the latter has lost.

325. Rights and Liabilities of Trustee. A trustee of an express trust need not accept the trust against his will. If *A* by deed, will, or written declaration, names *B* as trustee of certain property for *C*, *B* need not accept unless he so desires. If *B* refuses to act as trustee, the trust does not fail by reason thereof. A court may appoint another trustee or may itself administer the trust. After accepting a trust, a trustee cannot resign without the consent of the *cestui*. He may be removed by the court for misconduct, or he may transfer his duties, if so stipulated in the instrument creating the trust.

In England during the reign of Henry VIII, a statute was passed called the *Statute of Uses*, declaring that real property given to one person and his heirs in trust for another and his heirs, should vest the legal title in the trustee. Thus, if *A* gives real estate to *B* and his heirs in trust for *C* and his heirs, *B* takes the legal title. The Statute of Uses is in force in most of the states of this country. It does not apply to personal property, and if the trustee is given some duties, such as to collect rents, or to do anything except to hold the

legal title as trustee, the case is not within the Statute of Uses, and the trust will be carried out.

A trustee holds the legal title to the trust estate. Suits against the estate must be brought against him as trustee, and suits for the protection of the estate must be brought by him as trustee. A trustee has the right to possession of all personal property covered by the trust, and to possession of the real property, if necessary to execute the terms of his trust. A trustee must protect the estate and perform his duties with care, or be liable to the beneficiary for any damages resulting. He is not permitted to make any profit out of his office. Any profit made by him through his connection with the trust estate belongs to the beneficiacy.

326. Rights and Liabilities of Beneficiary. A *cestui que trust* has the right to receive the benefits of the trust estate as outlined in the instrument creating the trust. If the trustee fails properly to perform his duties, the *cestui que trust* may bring legal action to have him removed. A trustee has legal title to the trust property, and may convey good title to one who purchases for value, and without notice of the trust. The *cestui que trust* can follow and regain trust funds or property, if the latter are conveyed to persons not *bona fide* purchasers.

LANDLORD AND TENANT

327. In General. The term, *landlord and tenant*, is applied to the relation existing between one who obtains the right to the possession of the real property of another, under a contract by the terms of which the title or ultimate right to possession, or at least some interest in the property, remains in the grantor. The relation existing between landlord and tenant is contractual. Like all contracts, there must be a consideration, competent parties, and legality of purpose.

The contract by which one party becomes a tenant is called a *lease*. The party granting a lease is called the *landlord*. The owner to whom the lease is given is called the *tenant* or *lessee*. A lease of property is not a sale. By a lease of real property, the lessor grants but a portion of what he possesses. By making a sale of real property, the grantor transfers his entire interest. If a tenant transfers his entire interest in the lease, it is a sale, and is usually

called an *assignment*. If a tenant sublets a portion of his interest in the lease, he, himself, becomes a landlord, and the sublessee becomes a tenant.

328. **Rights of a Tenant.** The form and contents of a lease are discussed under a separate section. Parties to a lease may agree to any terms they choose, if the terms are legal. In the absence of express stipulations in a lease, many things are implied. A tenant is entitled to the possession and use of the premises leased, from the time mentioned in the lease for it to take effect. By possession is meant the right to take actual possession of the premises without being prevented by one having a right superior to that of the tenant.

A tenant is permitted to rent any premises he chooses. A landlord, on the other hand, may lease to a tenant any premises he possesses. There is no implied warranty on the part of the landlord that premises leased are in good condition, or that they are fit for any particular purpose. The tenant makes his own bargain, and, as in the case of making a purchase of goods, or in making any contract, he must take care of his own interests. The tenant may stipulate in the lease that the premises are to be in a certain condition, that they are adapted to a certain purpose. In this event, the tenant is not obliged to accept the premises if they do not comply with the terms of the lease, or he may bring an action for damages against the landlord for not complying with the terms of the lease. In the absence of any express stipulation as to the condition of the premises, or their suitableness for the purpose for which they are to be used, the law implies nothing.

A landlord is not permitted to defraud a tenant. He cannot conceal or misrepresent material facts relating to the lease. If there is a misrepresentation of a material fact by the landlord, which is relied upon by the tenant to the latter's injury, the tenant has been defrauded. He may refuse to accept the property, or he may repudiate the lease as soon as he discovers the fraud. A tenant impliedly has the right to quiet enjoyment of the premises leased. The landlord must not disturb the tenant's right to quiet possession. If the landlord, himself, or one who legally claims a right to possession of the premises disturbs the tenant's possession, the latter may sue the landlord for damages. If a mere trespasser or one who wrongfully claims the right, disturbs the possession or quiet enjoyment of the tenant,

the landlord is not liable. The acts of strangers are beyond his control. The tenant may use the premises for the purposes stipulated in the lease. In the absence of express stipulation, he may use the premises for the purpose and in the manner in which the property leased is customarily used.

329. Taxes, Repairs, and Insurance. The general rule is, that in the absence of express stipulation in the lease to the contrary, all taxes are to be paid by the landlord. Even though the lease provides that the tenant is to pay all taxes, this does not include special assessments, such as assessments for city paving and sewers. Water rent is not included in the general term, *taxes*. The landlord is obliged to pay all taxes on the property unless the tenant expressly assumes them. In the absence of any express stipulation, the tenant must pay water-rent. There is no implied duty on the part of the tenant to insure the property leased.

A tenant is, in the absence of any express stipulation, required to keep the property in repair. He is not liable for ordinary wear and tear of the property, but must make ordinary repairs at his own expense. If the property is destroyed by fire without the fault of the tenant, the tenant is not liable for the loss. He is not obliged to rebuild the property destroyed. The lease is ended by the destruction of the property by fire, and the tenant is not obliged to pay further rent. The above is the rule fixed by statute in most states. The common law rule was that a tenant was not relieved from paying rent by the destruction of the building by fire.

330. Liability for Injuries Arising from Condition of Leased Premises. In the absence of any stipulation in the lease relative to the condition of the premises leased, the tenant is presumed to make the lease on his own judgment. There is no implied duty on the part of the landlord to deliver the premises in any particular condition. This rule is subject to the limitation that a landlord is not permitted to deliver possession of premises containing latent defects of such a character as would be liable to cause injury to a tenant. If injury results from such latent defects, the landlord is liable in damages to the tenant. As a rule, however, the tenant takes the premises as they are, and if injury results to himself by reason of apparent defects in the premises, he has no right of action against the landlord. The tenant has control of the premises. If persons

are injured by reason of accummulations of snow or ice on the walks, the tenant, and not the landlord, is liable therefor.

331. Rent. The compensation given by a tenant to a landlord for the use of leased premises is called *rent*. A tenant may become liable for rent without any express agreement to that effect. If one person, with the consent of another, occupies the premises of the latter as a tenant, he is liable to pay the reasonable value of such occupancy, as rent. This obligation is implied from the relation of landlord and tenant existing between the parties.

Ordinarily, the matter of rent is expressly agreed upon and, until the tenant is evicted, his lease surrendered, or he is released, he is obliged to pay the landlord rent. The tenant's liability to pay rent does not necessarily depend upon actual occupancy of the leased premises. He may rent the premises for the use of another, or he may, without excuse, refuse to accept possession of the premises. In either event, he is liable for rent. If the lease expressly stipulates that the premises are in a certain condition as to plumbing, etc., the tenant may refuse to accept the possession if the conditions are not fulfilled. If, on the other hand, the tenant leases premises, nothing being said about their condition, the tenant is presumed to rely upon his own judgment, and the fact that the premises are uninhabitable by reason of defective plumbing, by reason of unhealthful conditions, or for any reason, does not release him from his contract. He is liable to pay the rent agreed upon. The landlord is not permitted to defraud the tenant. He cannot mislead the tenant by false or fraudulent representations. Fraud enables a tenant to avoid a lease.

If a tenant refuses to accept possession of premises leased, or abandons the premises without excuse, he is still liable for the rent for the balance of the term. If he surrenders the lease, and the landlord consents to the surrender, the tenant is relieved from further liability. But a voluntary abandonment by the tenant, not consented to by the landlord, does not relieve the tenant from liability to pay rent. If a tenant abandons the premises leased, the landlord may permit the premises to remain vacant and compel the tenant to pay the balance of the rent when it is due under the lease. The landlord may, on the other hand, accept the premises, and cancel the remainder of the lease. Again, the landlord may take possession

of the premises and relet them for the benefit of the tenant, notifying the tenant of his intention. He may collect any deficiency in the rent from the original tenant. For example, if *A* rents *B's* house for one year for $300.00 and at the expiration of six months *A* abandons the premises, *B* may relet the premises to *C* for *A's* benefit. If *B* relets for *A's* benefit, he must obtain the best terms possible. If he obtains only $100.00 rent from *C* for the balance of the term, he can collect $50.00 from *A*.

332. Distress. At common law, a landlord had the right to take possession of the personal property of a tenant who was in arrears for rent, and hold the personal property until the rent was paid. This remedy is known as *distress*. When a landlord makes use of this remedy he is said to *distrain for rent*. A landlord cannot deprive the tenant of possession, and then distrain for rent. It is not an action against the tenant personally, as an action for debt. It is a mere right of a landlord to take possession of the tenant's personal property after rent is due, and while the tenant is still in possession of the leased property as tenant. The landlord may retain possession of his property as security for the rent. At common law, a landlord could not sell the property, but could hold it as security for the rent.

At the present time, the right to distrain for rent is not recognized by many states. Where recognized, it is regulated largely by statute. The landlord is usually required to give bond, and file an affidavit with a court to the effect that the rent of a certain amount is justly due. The property is then seized by an officer of the court, and upon final termination of the case, may be sold, and the proceeds applied to the payment of the rent. This action is now treated in the nature of an attachment. (See *Attachment*, chapter on Courts and Legal Remedies.) The remedies of a landlord commonly recognized at the present time are actions for rent, and actions to recover possession of the premises. These remedies are discussed under a separate section.

333. Leases. *Lease* is the term applied to the agreement by which one person becomes a tenant, and another a landlord. Leases are usually in the form of formal written instruments in which the rights and duties of the parties are quite fully set forth. No particular form of language is required to make a valid lease. If the

agreement shows an intention on the part of the parties to create the relation of landlord and tenant, it is sufficient to constitute a lease. Parties may make oral leases covering short periods of time. Most of the states provide by statute that leases beyond certain periods must be in writing to be enforceable. This period varies in the different states. Some require leases in excess of three years to be in writing; others fix the limit at one year. Some of the statutes which do not specially require leases to be in writing, make them void as against purchasers or incumbrances if not recorded. Such statutes in effect require the lease to be in writing. A lease does not require a seal. By statute, most states require leases to be witnessed, usually by two witnesses, and acknowledged before a notary public. Witnessing is called *attesting*, or *attestation*. By *acknowledgment* is meant an admission of the signature by the parties to a lease before a notary public. The notary writes his certificate upon the lease, stating that the parties acknowledged the signature in his presence. The notary signs and seals the certificate of acknowledgment. The states generally require by statute that leases beyond a certain time, usually one or more years, be recorded with the public recorder of the county where the property leased is located, to be effectual as against subsequent purchasers or incumbrances.

Certain requisites are recognized in formal lease. The names and description of the parties, the terms of the lease, the description of the property, the signing, delivery, and acceptance of the lease, and the witnessing and acknowledging are regarded as essential features.

Covenants are express or implied terms of a lease. If parties expressly agree to do certain things enumerated and set forth in the lease, the covenant is said to be *express*. The law implies certain obligations on the part of the parties to a lease. There is an *implied* covenant on the part of the tenant to pay rent, and to make all ordinary repairs subject to the reasonable wear and tear of the premises. The landlord impliedly consents to give the tenant quiet enjoyment, and to pay taxes and assessments.

334. **Transfer of Leases.** A landlord may transfer his interest in a lease. A tenant may, unless the lease stipulates otherwise, transfer his interest in a lease. A transfer of an interest or right in which a third person, not a party to the transfer, has an interest is usually called an *assignment*. For example, *A* owes *B* $100.00.

B may assign his claim to *C*. By notifying *A* of the assignment, *A* is obliged to pay *C*, instead of *B*. Any defense that *A* has against *B* is available against *C*. As a rule, partial interests cannot be assigned so as to be binding upon the obligor, without the latter's consent. If *A* owes *B* $100.00 *B* cannot assign $10.00 of this claim to ten different parties. This would compel *A* to pay ten different persons, while the original obligation bound him to pay but one. *A* may have a counter claim amounting to $50.00. To obtain the benefit of this counter claim, he would have to set it up in five different suits, whereas if the claim were sued by the original owner, or by one owner he would have to make a defense in but one suit.

An assignment may be made orally, if not in conflict with the provisions of the Statute of Frauds. It may be made by written contract. No particular language is required to make a valid assignment. Any words expressing the intention of one party to make an assignment, accepted by the one to whom the assignment is to be made, is sufficient. A landlord may assign a lease. Upon receipt of notice of the assignment from the landlord or the assignee, the tenant must pay to the assignee the rent subsequently coming due. If an assignment is made by a landlord, and no notice is given the tenant, the latter discharges his liability under the lease by paying the original landlord. Originally at common law, a landlord could not assign his rights without the consent of the tenant. The tenant could not be compelled to recognize a new landlord. Recognition of a new landlord was called *attornment*. A tenant may assign his interest in a lease if the lease does not expressly provide otherwise. This does not relieve the tenant from liability under the lease, even though the landlord consents to the assignment, and accepts rent from the assignee. The original tenant is a surety for the rent. After an assignment of a lease by the tenant, the landlord, if he does not expressly release the original tenant, may collect the rent from either party.

335. Leases for Years. A *lease for years* is a lease for a definite and ascertained period of time. If *A* rents *B's* farm for five years commencing June 1, 1910, the lease is for years. If *A* leases *B's* house for a year, a month, or a week, to commence on a certain date, the time of the lease is definite and ascertained and constitutes a lease for years. If *A* rents *B's* house for a year commencing June

23, 1910, at $25.00 per month, the rent to be monthly in advance, the lease is one for years. The fact that the rent is to be paid in installments does not render the lease one from month to month.

A lease is regarded as personal property and, while it is an interest in real property, it is usually called a chattel real, and is treated as personal property. When the owner of a lease dies, the lease is personal property in the hands of the executor or administrator of the owner, and does not descend to the heirs of the owner as real property. In some states, long time leases, such as leases for ninety-nine years, are by statute made real property.

The practical distinction between leases for years and leases from month to month, is that in the former, the lease ends when the time covered by it expires. In a lease from month to month, a new lease is created by implication, if a tenant is permitted to hold over. This question is discussed more at length under the section, *Tenancies from Year to Year.*

336. Subletting. Some states by statute refuse to permit a tenant to sublet any portion of his lease, without the consent of the landlord. A landlord may stipulate in his lease that a tenant shall not sublet any portion of the premises. In the absence of statutory provisions, or stipulations in the lease, a tenant may sublet the leased premises. A transfer by a tenant of an interest in the leased premises may be an assignment, or it may be a sublease. An assignment is a transfer by a tenant of his entire interest in the premises. If *A* rents *B's* farm for five years, and sells his lease for five years to *C*, the transfer is an assignment. A transfer of only a portion of a tenant's interest is a sublease. If *A* rents *B's* farm for five years, and leases the farm for three years to *C*, the transfer is a sublease. If *A* leases the farm to *C* for five years, the transaction is an assignment. An assignment is a transfer of the tenant's entire interest in the leased premises. A sublease is a transfer of a part of a tenant's interest in the leased premises.

A tenant may mortgage his interest in the leased premises. A creditor of a tenant may levy upon the lease in satisfaction of a judgment, the same as upon any article of personal property.

The purpose of the statute and stipulations in a lease, forbidding a tenant to sublet the leased premises, is for the protection of the original lessor. A subtenant is not permitted to avoid a lease on the

ground of such a statutory provision, or by reason of such a stipulation in a lease. For example, if *A* rents *B's* farm for five years, and the lease contains a stipulation that *A* cannot sublet, if *A* sublets the farm for three years to *C*, *C* cannot avoid the obligation to *A* by reason of the stipulation in the lease. The stipulation is a privilege in favor of *B*. It may be exercised by *B* if he chooses to avail himself of the privilege. He may waive the privilege, or refuse or neglect to exercise his right. Neither *C* nor anyone else can avail himself of this privilege.

It is sometimes quite difficult to tell just what constitutes a subletting in violation of a statutory provision or a provision in the lease. Mere privileges granted to others do not constitute sublettings. Permission granted a neighbor to use a barn for a short period, or taking roomers by the week, has been held not to constitute a subletting.

If a tenant in violation of his lease sublets a part of the premises, the original lessor may eject the sublessee, and sue the tenant for damage for breach of contract.

If a tenant exercise his right of subletting a part of the premises, he is not thereby relieved from his responsibility to pay rent under the lease. Even though the landlord agrees to accept rent from the sublessee, and apply the same on the obligation of the original lessee, this does not relieve the original tenant from his obligation to pay rent. For example, if *A* rents *B's* house and lot for three years for $25.00 per month, payable monthly in advance, and *B* agrees to accept the rent from *C*, and does accept payments from *C*, this does not relieve *A* from liability to pay *B* the rent. *A* is a surety, and his obligation to pay the rent to *B* is the same as the obligation of *C*. If *B* expressly agrees to relieve *A* and to accept *C* in place of *A*, he can no longer hold *A*.

337. Tenancies at Will and at Sufferance. A lease may be entered into, the terms of which may be terminated at the will of either party. It is for an indefinite period. Such a lease creates a *tenancy at will*. (See *Estates at Will*, chapter on Real Property.) Tenancies at will are uncommon. The usual tenancies are tenancies for years and tenancies from year to year. If *A* permits *B* to take possession of, and to occupy his house under an agreement that either he or *B* may terminate the lease at the desire of either party,

the tenancy is one at will. *B* may agree to pay rent at the rate of $10.00 per week, $40.00 per month or $500.00 a year, or at any rate, without affecting the estate at will. If the estate is for an indefinite period, but is terminable at the wish of either party, no matter what the arrangement for paying the rent, it is an estate at will, as distinguished from an estate for years, and an estate from year to year.

It is sometimes held that a person who holds over with the consent of the landlord after the termination of a lease for a definite period, called *an estate for years*, is a tenant at will. For example, if *A* rents *B's* house for one year, and at the expiration of the year, *A* with *B's* consent retains possession, *A* is a tenant at will. The tenancy may be terminated at the desire of either party, and upon notice by either party. In most jurisdictions, however, this constitutes *A* a tenant from year to year. (See following section.)

A *tenancy at sufferance* is created by a tenant unlawfully retaining possession of the premises after the termination of his lease, without the consent of the landlord. If *A* rents *B's* house for one year, and at the expiration of the year *A*, without *B's* consent retains possession of the house, he is a tenant at sufferance. He is a trespasser, and may be ejected by *B*. Tenancies at will and at sufferance are estates in land. They are also discussed under the chapter on Real Property.

338. Tenancies from Year to Year. A tenancy may be created for a definite period of time to continue for similar periods unless terminated by notice of either party. Such a tenancy is called a *tenancy for years*. The tenancy may involve any definite period with the understanding that it is to continue for similar periods if not terminated by notice of the landlord or tenant. While the estate is called an estate from year to year, or a tenancy from year to year, it may be for a week, a month, a year, or a series of years, or for any definite period. If *A* rents *B's* house for one year, the rent to be paid at the rate of $30.00 per month, payable monthly in advance, the lease to continue for yearly periods unless either *A* or *B* notifies the other to the contrary, the tenancy is from year to year. If, at the expiration of the year, *A* retains possession of the premises, having received no notice from *B* to leave, *A* has a lease for another year under the same terms, and so on, for succeeding years. The period may be a week, or a month, as well as a year. Sometimes

leases are spoken of as leases from month to month, or from week to week, in case the lease is to continue for a month, or a week. The same principle is involved as in leases from year to year. If the tenant holds over after the expiration of the week or month, he has a lease for a similar period at the same terms.

A tenancy for years may be created by express or by implied contract. It is sometimes difficult to tell whether a tenancy is for years, from year to year, or at will. If a lease specifies that it is to cover a definite period only, it is a lease for years, and terminates at the expiration of that period. If the lease stipulates that it is to cover a definite period, and continue for similar periods unless either party terminates it by notice to the other, it is a lease from year to year. If the lease stipulates that it can be terminated at the will of either party, it is a lease at will. When the lease is oral, or created by implication, the intention of the parties must determine the nature of the lease.

Some difficulty arises in determining whether a lease is one at will, or from year to year when a tenant for years is permitted to hold over with the consent of his landlord. For example, if *A* rents *B's* farm for one year, and is permitted by *B* to remain in possession after the expiration of the year, in theory, *A* is a mere tenant at will, and can be ejected at the will of *B*. This is the law in a few jurisdictions. Most jurisdictions, however, hold that *A*, when permitted to hold over by *B's* consent, becomes a tenant from year to year.

339. Termination of Leases. A lease for years is terminated by expiration of the period covered by the lease. The lease may contain covenants, breach of which may by stipulation constitute a ground of forfeiture. For example, a lease may contain a stipulation that the landlord may declare a forfeiture in case the tenant fails to pay the rent when it is due. If the tenant commits a breach of this or any other covenant made by special stipulation, a ground of forfeiture, the landlord may by notice declare the lease forfeited. This renders the balance of the lease void. Leases for years, definite periods of time, require no notice to terminate. Leases at will, and from year to year require notice on the part of the party seeking their termination to be given to the other party. For example, suppose *A* rents *B's* house for one year, to continue for similar periods if agreeable to both parties. To terminate the lease at the end of the

year, *B* must notify *A* to quit the premises at the expiration of the year. If *A*, on the other hand, desires to terminate the lease at the expiration of a year, he must notify *B* previous to the expiration of the year, of his intention to terminate the lease at the expiration of the year. If *A* holds over without notice to *B*, or without *B's* consent, *A* has a lease for another year at the same terms as before.

To terminate a lease from year to year or at will, the party seeking the termination of the lease must notify the other party of his intention to terminate the lease. The states generally provide by statute the time and manner of giving such notice. In general, the notice must be in writing and must be served on the interested parties or their agents a reasonable time before the expiration of the period of the lease.

A lease may be terminated by a subsequent agreement between the parties. This is commonly known as a *surrender*. A surrender is a release of possession of the premises by the tenant, and an acceptance by the landlord. A mere abandonment of possession by a tenant without the express or implied acceptance or assent of the landlord is not a surrender. Such an abandonment might constitute a breach of contract on the part of the tenant, but it requires the assent of the landlord to terminate the lease. If *A* rents a farm for three years at $500.00 a year, and at the expiration of two years agrees to pay *B* $100.00 to cancel the lease, and *B* accepts, the transaction constitutes a surrender, and terminates the lease. If *A* merely abandons the premises without the consent of *B*, the lease still exists. *B* can collect the rent for the remaining period covered by the lease. If *A* abandons the premises, and notifies *B* that he will not carry out the lease, *B* may refuse to accept the breach, permit the premises to remain vacant, and collect the rent from *B*. *B* may accept *A's* breach of the contract, and terminate the lease, or he may take possession of the premises, and relet them for *A's* benefit, notifying *A* that he takes possession for *A's* benefit, and not for his own. In this event, *B* must use reasonable diligence in obtaining the highest rent possible, and if he is obliged to rent for a less amount than *A* was to pay, *B* can collect the difference from *A*.

340. Liability of Parties to a Lease for Breach. If the landlord fails to fulfill the conditions of the lease, he is liable in damages to the tenant. The damages are the difference between the rent

paid under the lease, and the market value of the premises furnished. For example, if *A* rents his house and lot to *B* for one year at $25.00 per month, and agrees to redecorate the house, but fails to do so, *A* may recover from *B* the difference between $300.000, the rent paid under the lease, and the market rental of the house undecorated. If a tenant abandons the lease, the landlord may recover from him the deficiency between the rental named in the lease, and the rental he is able to obtain for the balance of the time covered by the lease.

For example, if *A* rents *B's* farm for three years at $500.00 a year, and at the expiration of two years, *A* abandons the lease, if *B* is able to obtain but $300.00 for the remaining year covered by the lease, he can recover $200.00 and expenses from *A*.

A suit for damages is not the only remedy the landlord has against a tenant for the latter's abandonment of the premises. The landlord may refuse to accept the breach on the part of the tenant, let the premises remain vacant, and collect the rent under the lease.

The landlord may enter the premises for the purpose of preventing loss or destruction of the premises without accepting the breach. The landlord may accept and cancel the remaining portion of the lease, or he may again lease the premises for the benefit of the tenant, and collect the deficiency in the rent from the tenant. This question is also discussed in the previous section.

341. Actions for Recovery of Rent and Possession of Leased Premises. A landlord may sue and recover judgment by bringing an ordinary action for debt when rent or any installment is due. If *A* rents *B's* house for one year at the rate of $25.00 per month, payable at the end of each month, and fails to pay any installment, *B* may sue him. The judgment may be satisfied out of any property *A* may have. If married, *A*, by statute in most jurisdictions, is entitled to a certain amount of exempt property.

If the landlord has failed to perform all of the terms and conditions of the lease, *A* may bring a counteraction against *B* when sued by *B* for rent. For example, if *B* has failed to repair the house according to the terms of the lease, *A* may counterclaim for damages when sued by *B* for the rent.

When the period of the lease expires, the landlord is entitled to possession of the premises. At common law, he was entitled to use the force necessary to recover possession. He is not permitted

to commit a breach of the public peace in obtaining possession. Most of the states provide statutory methods for obtaining possession. A complaint is filed with a court and an officer of the court ejects the tenant by order of court. Non-payment of rent does not entitle the landlord to terminate the lease, unless the lease expressly so provides. When the lease is forfeited according to its provisions, the landlord is entitled to take possession.

TRADE-MARKS AND NAMES

342. Trade-Marks in General. Persons are permitted to place marks on goods manufactured or sold by them, which indicate their origin or ownership. By this means, they are able to obtain the benefit of any superiority which their goods have over goods of other manufacturers or sellers. These marks placed on goods by owners or manufacturers are called *trade-marks.* A court has defined a trade-mark to be "A word, symbol, figure, form or device, or a combination thereof adopted or devised and used by a manfacturer or seller of goods to designate the origin or ownership of the goods, and used by him to distinguish the goods from those sold or manufactured by others."

A manufacturer or seller of an article is not permitted to appropriate as a trade-mark a name commonly used to describe the article. Flour is manufactured and sold by many persons. Anyone has the right to manufacture and sell flour by that name. No one is permitted to appropriate to himself as a trade-mark the name *Flour.* A person may, however, apply an arbitrary term, not describing the thing produced, for the purpose of designating his brand of flour as distinguished from other brands of flour. While a manufacturer of flour is not permitted to appropriate as a trade-mark to be used on flour the name *Flour,* he may be permitted to use the term *Ideal.* The person first adopting the name *Ideal* as a trade-mark in the sale of flour, acquires a property right in the name. The law will protect him in the use of this name in connection with the sale and manufacture of flour.

Any arbitrary name, sign, mark, symbol, letter or number used for the purpose of designating the origin or ownership of goods may be appropriated as a trade-mark by the person first adopting and continuing its use. A person is not permitted to adopt as a trade-

mark anything which indicates the grade or ingredients, or which is descriptive of the article sold or manufactured. The reason for this rule is that otherwise a person adopting the name would have a monopoly on the production of such articles. *Crack-Proof Rubber Goods*, as applied to rubber goods; *A1 Honey*, as applied to honey, are terms descriptive of quality of goods and cannot be appropriated.

A proper name of a person is not the subject of a valid trade-mark. Persons of the same name are permitted ordinarily to use their name in the manufacture of goods of the same nature. A party is not permitted, however, to manufacture or sell his goods as the goods of another. He may not be permitted to use his own name in the sale of certain goods if another has long made and sold goods under the same name, and if purchasers are defrauded thereby, or if confusion results. This is not by reason of a person having a trade-mark in his own name, but by reason of unfair trade. This is discussed under the section on *Unfair Trade*.

343. Trade-Marks (CONTINUED). A name of a place or locality cannot be appropriated as a trade-mark. Any person is permitted to use the name of a place or locality to designate the origin of the goods and it is the common property of all as much as any descriptive name. A geographical name cannot be appropriated as a trade-mark. A common example of this principle is the use of the term, *Lackawanna*. This is the name of a district in Pennsylvania. A coal company endeavored to appropriate the name, but was not permitted to use it as a trade-mark. Others, mining coal in the Lackawanna district have an equal right to designate their coal by the same name. Any fanciful or arbitrary name not describing the article, may, however, be adopted as a trade-mark. A person first using such an arbitrary mark in the manufacture or sale of a particular class of goods acquires a trade-mark. He may use the mark without any intention of acquiring a trade-mark therein. If another person attempts to use the mark, no matter if without intent to defraud, he may be enjoined from its use. The owner of a trade-mark has no greater right than any other person to use the trade-mark on classes of goods different from the class on which it has been acquired. A trade-mark used on flour may also be used on stoves by another person. This principle is subject to the limitations that one person is not permitted to deceive purchasers in leading them

to believe that they are purchasing the goods of another. This question is discussed under the section on *Unfair Trade.*

A trade-mark is acquired by the person first using it in connection with the sale or manufacture of goods. It is not necessary that it be adopted with the intention of being used as a trade-mark. A trade-mark may be lost by discontinuance. A trade-mark will not be allowed on an article which it is against public policy to manufacture. An example of this principle is adulterated food or medicine. A trade-mark which does not indicate that the goods manufactured or sold are the result of the personal skill of a particular person, may be sold with the business in connection with which the trade-mark is used.

344. Trade Names. A person is permitted to use a name other than his own for the purpose of trade. For example, John Smith may use the name *The John Smith Co., The Eureka Co., The L. X. Co.*, or any arbitrary or fanciful name he may choose, so long as it does not conflict with the rights of others. Such names are called *trade names.* Their adoption and use are governed by the same legal principles as trade-marks. Trade names, however, are applied to a business, while trade-marks are brands applied to articles of manufacture or sale. As in the use of trade-marks, a person is not protected in the use of trade names which describe the article manufactured or sold. The use of the name, *Cleveland Fertilizer Co.* by John Smith, does not prevent others from using the same name. The law does not permit one party to monopolize the use of the term *fertilizer*; neither does it permit him to monopolize the geographical term, *Cleveland.* The party first adopting a trade name other than a descriptive geographical, individual, or proper name, acquires the right to use it as a trade name.

While a person cannot acquire such a right in a geographical or descriptive name, he may, by long use of it, acquire the right to prevent others from using it in such a manner as to deceive purchasers. A person is not permitted to sell his goods as the goods of another. This right to prevent others from using a name which deceives the public is not by reason of any trade name acquired, but by reason of a person unfairly making others believe they were purchasing the goods of one person, when, in reality, they are purchasing the goods of others.

345. **Unfair Trade.** A trade-mark, or a trade name cannot be descriptive of the articles sold or manufactured. Neither can a proper name or a geographical name be appropriated to a trade-mark or name. To enable a person to acquire a trade-mark or trade name, a mark or name must be adopted which in no way describes the article manufactured or sold. It must be one that is not taken from the place where the goods are manufactured or sold, or from the name of the inventor or manufacturer. It must be an arbitrary or fanciful name or mark. A manufacturer of flour may use as a trade-mark the name *Beauty Flour*, but not *Minnesota Flour*, or *Pure Flour*. A party may use as a trade-mark for men's collars the picture of a lion, but not the word *linen*. When a trade-mark or a trade name has once been used as such, the owner, unless he loses or transfers the right, acquires the sole right to its use, and may compel others to cease using it, regardless of actual damages or confusion. At the present time, the courts recognize a principle known as *unfair trade*. Even though a person has adopted a geographical name, or a name descriptive of the articles manufactured or sold as a trade name, he is permitted to enjoin others from the use of this name, if the use of the same enables the latter to sell his goods as the goods of the former. A person cannot use the name *Cleveland Fertilizer Co.*, so as to acquire a trade name therein. But if the name *Cleveland Fertilizer Co.*, is used by a person so long and so extensively as to acquire for its owner a broad reputation as a manufacturer of an excellent quality of fertilizer, another who adopts the name may be enjoined from its use, if purchasers are deceived thereby. This is on the ground of unfair trade.

346. **Unfair Trade** (CONTINUED). The same principle applies in the use of individual names. A person may not acquire a trade-mark in his own or in any individual or proper name, since others have the right to the use of their own name. But a person may acquire such a reputation as a manufacturer of a particular article, that if others of the same name are permitted to use their name in the same connection without distinguishing features, the public will be deceived in making purchases. For the purpose of protecting the public from being deceived, the courts sometimes enjoin persons from the use of their own name in connection with the manufacture and sale of certain articles. For example, Thomas Edison has ac-

quired fame as an inventor and manufacturer of *Edison Batteries.* A person by the name of Edison would not be permitted to manufacture and sell electric batteries under the name of *Edison Electric Batteries*, for the reason that the public would be deceived thereby. This would be what is known as unfair trade. The same principle applies to geographical names. A geographical, individual, proper, or descriptive name cannot be used as a trade name, or a trade-mark, but they can be so used as to prevent others from using them, by reason of violating the law of unfair trade.

347. Registration of Trade-Marks. In 1906 the United States Congress passed the present statute relating to the registration of trade-marks. The act provides that the owner of a trade-mark used in commerce with foreign nations, the several states, or the Indian tribes may register said trade-marks by filing the same with the Commissioner of Patents A trade-mark is acquired in the same manner as at common law. The United States act does not change the method of acquiring trade-marks, nor does it designate what constitutes trade-marks. It simply permits a person to register a trade-mark already acquired. In case of dispute, the owner has the advantage of a public record of his claim, and until he has lost his right in the trade-mark to some one who proves to have a better right, the registration is *prima facie* evidence of ownership.

Before registering a trade-mark, the owner is required to file with the Commissioner of Patents at Washington, an application showing the nature of the trade-mark, on what goods used, and when acquired. A fee of $10.00 is required. The owner must file a verified statement that he is the owner of the trade-mark sought to be filed. Trade-marks which consist of the name of an individual, firm, or corporation, or words descriptive of the articles manufactured or sold, a geographical term, or a photograph of any living person, except with such person's consent, shall not be registered as trade-marks. When such application is filed, if the Commissioner of Patents finds that it is proper to register the same as a trade-mark, he publishes the mark in the official gazette. Anyone may oppose the registration by filing objections within twenty days after said publication. If no objection is filed, the trade-mark is registered, and a certificate of registration is furnished the applicant.

If objection to the registration of a trade-mark is made, the

applicant is notified by the Commissioner of Patents. If the trade-mark interferes with another, or is descriptive of the article to which it is to be applied, the commissioner will refuse to register it. A person whose application for registration of a trade-mark has been refused by the Commissioner of Patents may appeal from the decision of the Commissioner of Patents by filing applications of appeal with the Court of Appeals of the District of Columbia.

Registered trade-marks may be assigned in connection with the good will of the business in which the trade-mark is used. Notice of such assignment must be filed with the Commissioner of Patents within three months from the time the assignment is made, to render it valid as against other innocent purchasers. Certificates of registration shall be effective for twenty years, and may be renewed for like periods upon payment of the registration fee.

After a trade-mark has been registered, anyone who considers himself injured by said trade-mark may file complaint with the Commissioner of Patents, and if the latter determines that there is an infringement, or that someone has a prior right to the trade-mark, the registration may be cancelled. Notice of registration of a trade-mark is given the public by publishing the words, *Registered U. S. Patent Office*, with the trade-mark.

Most of the states have statutes making it a crime falsely to use the trade-mark or brand of another company. The use of labels by trade unions is protected in this manner in several states.

WILLS

348. Will Defined. A will has been defined to be a "disposition of real property to take effect after the death of the testator." Originally, the term *will* applied only to dispositions of real property, and the term *testament* applied to dispositions of personal property. At present, the terms *will* and *testament* are not uncommonly used. But the original limitation of the term, *will*, is no longer commonly recognized. The term, *will*, is now used to describe a disposition of personal as well as real property to take effect at the maker's death.

349. Names of Parties and Terms Commonly Used in a Will. The person who makes a will is called the *testator* or *devisor*. The term *testator* is more commonly used than the term *devisor* to desig-

nate the maker of a will. The term *devise* is used to designate the giving of real property. If *A* desires to give a farm to *B* by will, the language used in the will is, "I, *A*, devise to *B* my farm." Technically, the term *devise* means the giving by will of real estate, but it is commonly used to designate the giving by will of personal property as well. The term *bequeath* is used to designate the giving of personal property by will. If *A* desires to give by will a watch to *B*, he uses the language, "I, *A* bequeath to *B* my watch." The beneficiary, or person designated in the will to receive real property, is called the *legatee*.

350. Origin and Nature of Wills. At common law, a person was permitted to give by will a portion of his personal property. He was not permitted to give real property by will. In England, the right to give real property by will was given by statute. The law of this country has always recognized the right to give real as well as personal property by will. It is not regarded as a right but rather as a privilege extended to an owner of property. This privilege is controlled by the legislatures of the states.

The states differ in their statutory requirements as to the manner of making wills, and the amount of property that may be willed to the exclusion of the wife and family. A will must be signed, acknowledged, and witnessed as required by statute, and may be rendered void if the statutory requirements are changed between the time the will is made and the death of the testator. A will is not a contract. The right to make contracts cannot be abridged by legislation. This right is a constitutional right. The constitution gives an owner of property no right to make a will. It is a privilege which may be abridged or taken away by the legislature. Most of the states give a wife a dower interest in the real estate of her husband. (See *Dower Estate*, chapter on Real Property.) A husband cannot will away his estate, depriving his wife of dower.

351. Law Governing Wills When Testator Owns Property in One State and Resides in Another at Time of Death. Real property is fixed and immovable. No matter where a testator resides at the time of his death, the law of the state where the real property is located governs the will relative to its disposition. If the will does not comply with the law of the state where the real property is located, the general rule is that the will cannot be enforced, even though the

will is valid under the law of the state where the testator resides at the time of his death. For example, if *A* owns real property in Cleveland, Ohio, but resides in Omaha, Nebraska, *A* may make a valid will under the law of Nebraska which may not comply with the Ohio law. If *A* dies, the provisions of the will cannot be enforced as to the real property in Cleveland. Personal property, on the other hand, is movable and is supposed to follow the residence of its owner. If a will is valid where the testator resides at the time of his death it is valid to pass personal property, regardless of where the personal property is located. Some states at present provide by statute that if a will is valid where the testator resided at the time of his death, it is valid to pass real property, no matter where located.

352. Essentials of a Will. Primarily, a will is an instrument in which a person expresses his intention to give his property to certain designated persons, to take effect upon his death. Any instrument, no matter whether it be termed a will, containing an expression of intention to have property pass to another at the death of the maker, satisfies the requirement.

To constitute a will, there must be no present interest in the property passing absolutely to the beneficiaries named in the instrument at the time the written instrument is made. A person may make a gift, a bill of sale, or a deed of property if he chooses. The title to the property passes to the purchaser or donee at once or at some future stipulated time. Such transactions are not wills. A will does not take effect until the death of the testator. It may be revoked, changed, or supplanted at the will of the testator. Any instrument that conveys a present interest is not a will. The two most essential things in determining whether an instrument constitutes a will are, first, the power to revoke the instrument, or a stipulation or language used showing that the instrument is not to take effect until the testator's death; and second, the expression of an intention of the testator to make a will. Certain formal requisites as to signature and witnessing are required by statute in different states. These requirements are discussed under separate sections.

353. Who May Make a Will. By statute in most states, anyone of legal age, of sound and disposing mind and memory may make a will. At common law, when a woman married, her property became her husband's. A married woman could not make a will.

At present, by statute, most states provide that married women may contract concerning their separate estates. They are also permitted to make wills. A person must be of legal age to make a will. What constitutes legal age is fixed by statute in the different states. All provide that twenty-one years is the legal age for males. Some fix the legal age for females at eighteen, others at twenty-one.

What constitutes sound and disposing mind and memory is a matter of some dispute. It is conceded that idiots, imbeciles, and insane persons, while insane, cannot make wills. The mental capacity required of a person to enable him to make a will is usually stated to be that mental capacity which enables a person to describe his property, to name the natural objects of his bounty, and to understand the nature of a will. A person does not have to be in good health to make a will. He does not have to be mentally sound within the ordinary meaning of the term. He may be very ill, and weak both in mind and body. He may be eccentric, may have been insane, may be subject to illusions, or even may be under guardianship for insanity and still be able to make a will. If he is able without assistance from others to describe his property, to understand in general the nature and effect of making a will, and to name the persons who are the natural objects of his bounty, he is capable of making a will. If his mind is not sufficient to perform all of these functions he is not capable of making a will. To constitute an instrument a valid will, it is not necessary that the instrument show in itself that the testator had all these powers. He may not name all, or any of the natural objects of his bounty in the will. He may not describe all of his property. If he was capable of doing these things at the time he made the will, regardless of whether or not he exercised this capacity, the will is valid.

If a testator makes a will under such mental pressure or threat of violence that he does not act according to his wishes, the will may be avoided by reason of undue influence or duress. Undue influence may he exerted by anyone, but not necessarily by a beneficiary under the will. All solicitations or remarks or supplications to the testator to make a particular provision in a will do not constitute undue influence. The influence must be of a sort to compel the testator to act against his wishes, and to destroy his ability to act through his own mental agency.

354. What May be Disposed of by Will. Any property owned by the testator, whether real or personal, may be disposed of by will. Property cannot be freed from liens or incumbrances by will. If *A* owns a farm, but *B* has a mortgage on it, *A* can dispose of his interest by will, *B* retaining his interest in the mortgage as against the devisee. A husband cannot cut off his wife's dower estate by will. A person may dispose of all his real and personal property by will. A will covering all the real and personal property of the testator will pass the real and personal property acquired by the testator after he made the will.

355. Requisites of a Will as to Form. Ordinarily, a will must be in writing. In some jurisdictions, and under certain circumstances, oral wills are recognized as sufficient to pass certain property. These oral wills are called *nuncupative* wills. They are discussed under a separate section. A will may be written on any kind of material, and in any language. It may be printed, written on a typewriter, written in the testator's own handwriting or by another. It may be written on one or several pieces of paper. The pieces need not be fastened together if their contents show their connection. Another instrument not set forth in the will may be incorporated into the will by reference, if the instrument can readily be identified, and was in existence at the time the will was made. A will must be signed.

The statutes of most states require that a will be signed by the testator, or by some one authorized to sign for him. A person not able to write may sign by mark. A person usually signs by

his

mark as follows: John *X* Smith. Any mark made by the testator

mark

is sufficient. Most states require by statute that wills must be signed in the presence of two or three witnesses. These witnesses must be competent to understand the nature of the transaction. They need not necessarily be of legal age. They must affix their signatures as witnesses to the will. A beneficiary under the will should not be a witness. The witnesses of a will are required to observe the competency of the testator and his signature, in order that they may testify to these facts when the will is proven. The statutes of most states make it sufficient for the testator to acknowledge his signature

in the presence of the witnesses. In this event, they need not see him sign his name to the will. The witnesses are usually required to sign the will in the presence of the testator, and in the presence of each other.

356. Publication of a Will. Some states provide by statute that to constitute a written instrument a valid will, the testator must acknowledge it to be a will at the time it is signed and witnessed. This act is known as *publication*. Some states do not have such a statutory provision. In the absence of statutory provisions, publication is not necessary. It is not necessary that the testator read or cause the will to be read to the witnesses to comply with the statutory requirements of publication. The witnesses must know that they are witnessing a will. Any word, expression or act on the part of the testator which notifies the witnesses that they are witnessing a will is a sufficient publication.

A requested *B* and *C* to visit his house in the evening and witness his will. They went to *A's* house, where *A* presented a document to them, which he signed in their presence, and which they signed as witnesses. *A* did not acknowledge that the instrument was a will. The court held this to be a sufficient publication. *B* and *C* had been informed that the instrument was *A's* will.

357. Contract to Make a Will. A person may enter into a contract to make a will which will bind his estate. The party with whom such a contract is made cannot force the other party to make a will, or prevent him from revoking a will if made, but he can bring an action for damages against such party's estate if the latter dies without leaving a will according to his agreement. A will can be revoked at the desire of the testator. Revocability is one of the essential features of a will. A party may bind himself by contract to make a will in favor of a certain person. This contract does not prevent such person from revoking the will if made, but it renders the person's estate liable for breach of contract. *A*, a boy of twenty-one years of age, was told by his father, *B*, that if he would continue to work for him until he was thirty-five years of age, he would will him a certain farm. *A* agreed to this proposition, and worked for his father until he was thirty-five years of age. *B* subsequently died, leaving a will by which the farm was given to another son. *A* was permitted to recover the value of the farm by suit.

These contracts require clear and convincing evidence to support recovery. *A* agreed to board, clothe, care for, and bury *B*, his father, in consideration of *B's* agreement to give *A* all his property. A fulfilled the terms of his contract. *B* died leaving a will by which his property was given to *C*. *A* was permitted to recover the value of the property by suit.

358. Holographic Wills. A *holographic* will is one written entirely in the handwriting of the testator. Such wills are sometimes called *olographic* wills. A minority of the states of this country recognize the validity of holographic wills. These wills need not be witnessed to be valid. An ordinary will may be printed, typewritten, or written by a person other than the testator. The testator must sign and publish the will, that is, he must acknowledge the instrument to be a will, in the presence of the attesting witnesses. In case of a holographic will, there need be no witnesses, acknowledgment, or publication, but the will must be entirely in the handwriting of the testator, and must be signed and dated by the testator himself.

In some jurisdictions, it is necessary that a holographic will be found among the testator's valuable papers, to constitute a valid will. *A* died and the following document was found among his valuable papers:

\$100,000.00

Four years after my death, I hereby authorize my executors to pay Francis Penn one hundred thousand dollars.

Signed *A*.

This was held to be a valid holographic will. A holographic will is frequently in the form of a letter addressed to the beneficiary.

359. Nuncupative Wills. Many of the states of this country recognize the validity of oral wills made under certain circumstances for the purpose of disposing of personal property. Such wills are called *nuncupative* wills. Soldiers and sailors while in actual service may dispose of their personal property by this form of will.

Persons other than soldiers and sailors may make nuncupative wills when in their last sickness or in danger of impending death. The will is made by calling upon disinterested persons to bear witness to the will which the testator describes orally. These words, in substance at least, must be reduced to writing, usually within ten days from the death of the testator, by one of the witnesses, and signed by the witnesses. Nuncupative wills are not favored in law. They

are not sufficient to dispose of real property. Some states do not recognize the validity of these wills unless they are made at the testator's dwelling. An exception to this rule is where the testator, surprised by sickness when upon a journey, dies while away from home. Nuncupative wills must be proven within six months after they are reduced to writing. *A* was suddenly taken seriously ill at his home. He called upon *B* and *C*, disinterested witnesses, to bear witness to his will, and directed that his personal property be given to his wife *D*. *A* died, *B* reduced the words of *A* to writing within ten days after *A's* death, and *C* and *B* signed as witnesses. The will was proven within six months. It was held to be a valid nuncupative will.

360. Revocation and Alteration of Wills. A will may be revoked at any time before the testator's death. The testator may himself revoke his will, or he may cause someone to perform some act under his direction and in his presence, which will revoke the will. The statutes of most states provide that a person may revoke a will by tearing, cancelling, obliterating, or destroying the will with the intention of revoking it. Any of these acts performed by a stranger, not in the presence nor under the direction of the testator, are void acts, and do not destroy the validity of the will. If the testator himself, tears, cancels, destroys, or obliterates the will with the intention of revoking the will, the instrument no longer has any validity or force as a will. A will is cancelled by drawing lines with a pen or pencil across the written portion of the will. A will may be revoked by a later will which expressly revokes the former, or which disposes of all the property of the testator. A later will which does not expressly revoke a former will, and which does not dispose of all the testator's property does not revoke the former will, but both are construed together. A *codicil* is an instrument altering, revoking, changing, or adding to certain portions of a will. It must, itself, be signed, witnessed and acknowledged the same as a will, and is construed as part of the will.

361. Lost Wills. A will which is lost or destroyed with no intention to revoke may be proven as a will after the testator's death. If a will is partially or totally destroyed by accident, or by someone who is to profit by the total or partial destruction, the will is said to be *spoliated*, and its contents, as it existed before spoliation, may be

proven after the testator's death. It must be remembered that a will may be revoked by a testator at any time. If a testator makes a will, and has it in his possession, and after his death the will cannot be found, the presumption is that he revoked the will. This presumption may be rebutted, however. If the testator tells of having a will shortly before his death, or if the will is seen, or any evidence is produced that the will was not revoked by the testator, it may be proven as a lost will. If a will is made and left for safe-keeping with a third person, inability to find it after the testator's death raises no presumption that is was revoked by the testator. To prove a lost will as a will, witnesses must be produced who know in substance the contents of the will, that it was made and that it was not revoked by the testator. If a will is partially destroyed by someone who is to benefit thereby, or by accident, the contents of the portion so destroyed may be proven as a lost will.

362. Abatement, Advancement, and Ademption. If a person does not have sufficient property at his death to pay the bequests and devises made in his will after payment of his debts, his devises and bequests are paid *pro rata* out of the estate remaining after the payment of debts and expenses, unless the testator expressed a wish or intention that certain bequests or devises were to be satisfied in preference to others. In this event, the wishes of the testator must be observed. The rule requiring all devisees and legatees to receive but a portion of the property mentioned in the will, in case there is not sufficient property to satisfy all, is called *abatement.*

If a person makes a will bequeathing a certain article of personal property, or a certain amount of money to another, and if, before the will becomes operative by the death of the devisor, the latter delivers the article or pays the money to the legatee, or sells or disposes of the particular article mentioned in the bequest, the will is said to be *adeemed,* and the act by which it is adeemed is called *ademption.* In case of ademption of a particular article, the bequest is satisfied. In case a certain sum of money is bequeathed to a person by will, and the amount of money is given the legatee by the devisor, whether it satisfies the bequest, or whether it is a gift in addition to the bequest mentioned in the will, is a matter of intention on the part of the devisor. If the devisor expressly says it is a gift in addition to the bequest mentioned in the will, it will not satisfy the bequest

mentioned in the will. If nothing is said which expressly shows the wish or intent of the devisor, the presumption is, that it is to apply on the bequest, or if sufficient in amount, that it satisfies the bequest. The intent of the testator may be determined by the circumstances connected with the payment. If a sum of money is paid by a testator during his lifetime to a legatee mentioned in his will, to apply on the bequest, the payment is sometimes called an *advancement.*

363. Form of Will.

I, John Brown, of the City of Chicago, County of Cook, and State of Illinois, being about 61 years of age, and of sound and disposing mind and memory, do make and publish this my last will and testament.

First, I desire that all my debts and the expenses connected with my funeral be paid.

Second, I give, devise and bequeath to my wife, Jane Brown, the sum of $10,000.00, all the household furniture and chattel property of every kind and nature used in and in connection with our residence, and a life estate in my two farms.

Third, I give and devise to my two sons, John Brown, Jr., and Clark Brown, jointly, my farm known as the "Home Place." This devise is subject to the life estate of my wife mentioned in division two of my will.

Fourth, I give and devise to my daughter, Anna Brown, my farm known as the "North Place," during her life, and at her death to her lawful issue. This devise is subject to the life estate of my wife, provided for in division two of this will.

Fifth, the balance of my personal property I give and bequeath to Smith Home for Aged Men, of Chicago.

I appoint my son, John Brown, Jr., executor of this will, and revoke all former wills. In witness whereof, I have subscribed my name this 10th day of September, 1909.

JOHN BROWN.

The foregoing instrument was signed by the said John Brown in our presence, and by him published, and declared to be his last will and testament, and at his request, and in our presence and in the presence of each other, we subscribed our names as attesting witnesses at Chicago, Illinois, this 10th day of September, 1909.

THOMAS JONES, Residing at 21 State St.,
JAMES JOHNSON, Residing at 4704 Drexel Ave.,
Chicago, Ill.

COURTS AND LEGAL REMEDIES

364. Courts. Courts may be defined to be the institutions established by the government to settle disputes and to administer justice. They may consist of a judge sitting alone, of several judges sitting together, or of a judge and a jury. Courts are assisted in

their work by bailiffs and clerks. Attorneys who conduct the trials for the opposing parties are officers of the court. They can be fined and imprisoned for refusing to obey the lawful order of the court. In general, courts may be divided into state courts and federal or United States courts.

365. Federal Courts. The Constitution of the United States provides that:

"The judicial powers of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges both of the supreme and inferior courts shall hold their offices during good behavior, and shall at stated times receive for their services a compensation, which shall not be diminished during their term of office."

The United States Constitution further proivdes that:

"The judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming land under grants of different states, and between a state and the citizens thereof, and foreign states, citizens or subjects."

Congress has provided for District Courts, Circuit Courts, and Circuit Courts of Appeal, which, in addition to the Supreme Court, constitute the Federal or United States Courts.

366. United States District Courts. The United States as a whole is divided into districts. Each district is presided over by one United States judge, called a district judge. Each state constitutes at least one district and some states are divided into several districts. For example, Ohio has two districts, called the Northern and Southern Districts of Ohio. New York has four districts, called the Northern, Southern, Eastern, and Western Districts. The judges are appointed for life, or during good behavior. The appointments are made by the President of the United States, by, and with the advice and consent of the senate. Each district judge is required to reside in the district for which he is appointed.

367. **United States Circuit Courts.** The entire territory of the United States is divided into nine sections, and each section comprises the jurisdiction of a separate United States Court. That is,

there are nine Circuit Courts in the United States. Each circuit is composed of several districts. For example, the sixth circuit is composed of the states of Ohio, Kentucky, Michigan, and Tennessee. Each circuit has at least two circuit judges, and is presided over by one of the judges of the Supreme Court of the United States. The Circuit Court holds court in each district of the circuit, and the Circuit Court of each district is composed of the United States Supreme Court judge presiding over the circuit, the two circuit judges, and the district judge of the district. The Circuit Court holds court at different times in each district of the circuit. Any one judge may hold court alone. Usually, trials in Circuit Courts are presided over by one judge.

The United States Circuit Court and the United States District Courts have original and exclusive jurisdiction of practically all the cases which may be brought in the United States Courts. The United States Supreme Court has original jurisdiction of a few important classes of cases. By *original jurisdiction* is meant the right to commence cases in the particular court. By *appellate jurisdiction* is meant the right to take a case from one court to a higher court upon appeal or writ of error, for the purpose of having the case retried or examined for errors of law.

368. United States Circuit Court of Appeals. Each of the circuits in the United States has a Circuit Court of Appeals. This court consists of one member of the United States Supreme Court, who acts as presiding judge, and the two circuit judges of the circuit. At least two judges must be present to hold court. If two of the regular circuit judges are not present, a district judge of any district of the circuit may act. A district judge cannot sit as judge of the Court of Appeals in determining cases in the trial of which he acted as district judge. The Circuit Court of Appeals has no original jurisdiction. It is solely an appellate court. Cases from the District and Circuit Courts may be appealed to it, and brought before it on writs of error. Some cases may be appealed direct to the Supreme Court of the United States from the District and Circuit Courts. The Circuit Court of Appeals has final jurisdiction in many matters appealed to it.

369. The Supreme Court of the United States. The Supreme Court of the United States holds court at Washington, and consists

of nine judges. It has original jurisdiction in some important matters, and cases may be appealed to it, or tried on writs of error from the District Court, Circuit Court, and Circuit Court of Appeals. The Constitution of the United States provides that, "In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the Supreme Court shall have original jurisdiction."

370. United States Courts with Admiralty Jurisdiction. The Constitution of the United States provides that the United States Courts shall have jurisdiction over admiralty and maritime cases. Admiralty cases comprise those cases arising out of breach of contract, or out of injuries occurring upon the seas or navigable waters within the jurisdiction of the United States. The District Courts of the United States are given original jurisdiction in admiralty cases. In the trial of admiralty cases, the judge acts alone and is not assisted by a jury.

371. State Courts. The United States Constitution provides that, "The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively or to the people." Thus, the provision of the United States Constitution, authorizing the creation of federal courts does not prevent the states from establishing and maintaining courts. Each state has its own courts. In fact the bulk of litigation is tried by state courts. The courts of the different states differ somewhat in name and jurisdiction. Most of the states have a court of inferior jurisdiction where small cases involving $300.00 or less, are tried, and a County Court where cases involving more than $300.00 are tried, and to which cases may be appealed from the inferior courts. The inferior court is usually called a Magistrate Court, or a court of a Justice of the Peace. All states have a court of last resort, usually called a Supreme Court. The primary function of state Supreme Courts is to hear appealed cases and cases brought to it upon writs of error. They have very little original jurisdiction. Supreme Courts consist of judges only. They have no juries.

Some states have an Appellate Court inferior to the Supreme Court, which has jurisdiction to hear cases on appeal and error. The states also have courts for the administration of estates, called Probate, Surrogate, or Orphans' Courts.

372. Courts of Equity. Originally in England, the king was regarded as having original right to administer justice. It became the custom to appeal to the king in cases where the common law rules afforded no remedy. Later, appeals were made to the chancellor, the king's secretary. Cases were also referred by the king to the chancellor. In time, a distinct court, governed by well established precedents and rules, was established. These courts were called the Courts of Chancery or Courts of Equity. Their jurisdiction covered only those cases not covered by Courts of Law. Chancery courts consisted of a judge only, or a number of judges who heard and determined cases without the assistance of a jury. Courts of Equity are recognized in this country, but few states have separate courts of Equity or Chancery. The same judge is authorized to act as a Court of Law and a Court of Equity. Equity has jurisdiction of those cases only, in which there is no adequate remedy at law.

If *A* makes a contract with *B* by which he purchases a certain desirable house and lot and *B* refuses to make the transfer, and if the house and lot are of such a character that *A* cannot obtain another which suits his purpose and fancy, *B* may be compelled by a Court of Equity to transfer the lot to *A*. A Court of Law would give *A* money damages for breach of contract, but would not compel *B* specifically to perform the contract. The United States, as well as the states, has Courts of Equity.

373. Legal Actions and Their Enforcement. Legal actions may be said to be of three kinds, those arising out of contract, those arising out of torts, and those arising out of crimes. Crimes are punishable by fine, imprisonment, or death. The state, through its officers, punishes criminals. In theory, a crime is a wrong committed against the community. The community, that is, the state, through its officers, convicts and punishes persons who have committed crimes. The person who is injured personally, or whose property is injured, has an action for damages against the party committing the wrong. This action is independent of the crime. The same act may render a person liable to punishment for committing a crime, and liable to an action for damages to the injured party. If a person wrongfully strikes another and injures him, the state may punish the guilty party for committing a crime, and the injured person may sue him for damages.

Legal actions arising out of injuries to persons and property as distinguished from crimes are called *civil* actions. Civil actions arise out of breach of contract, or out of torts. If a person fails to pay a promissory note, or to perform any contract, a legal action arises out of contract. If a person slanders another, or wrongfully strikes him, a legal action arises out of tort. Legal actions are enforced by the injured or complaining party filing a complaint in court. The party against whom the complaint is filed is notified of the suit by an officer of the court. This notice is called the *summons*. The written complaint is usually called the *petition*. The complaining party is usually called the *plaintiff*. The party against whom the petition or complaint is filed is called the *defendant*. The defendant is allowed a certain time in which to file a statement of his defense. This written statement of the defendant in which he sets forth his side of the case is called an *answer*. These written statements are called the *pleadings in the case*. The parties then appear in court with their witnesses and the case is heard. The judge determines questions of law, and the jury determines questions of fact. The decision of the jury is called the *verdict*. The twelve jurymen must agree to enable them to render a verdict. If they disagree, a new trial with another jury is held. The judge may set aside a verdict, and grant a new trial if the verdict is irregular, or contrary to law. When a judgment has been rendered, execution may be levied upon the property of the defeated party for the amount of the judgment and costs. Execution is levied by the sheriff, who seizes and sells the property of the defeated party, sufficient to satisfy the judgment.

QUIZ QUESTIONS

MORTGAGES

1. What was the nature of a mortgage at *common law?*
2. At common law who had the possession of real property mortgaged?
3. Is a mortgage a contract?
4. What names are applied to the parties to a mortgage?

5. At present who is entitled to possession of mortgaged real estate?

6. Under what circumstances, if any, may a deed be construed to be a mortgage?

7. What is the ordinary consideration to a mortgage contract?

8. May a mortgage be given to secure a future indebtedness?

9. What is meant by the *debt secured by a mortgage?*

10. Is an oral mortgage of real estate enforceable?

11. Distinguish a *mortgage* and a *deed.*

12. If a mortgagor stipulates in the mortgage that he waives his equity of redemption can this stipulation be enforced against him?

13. What is meant by *power of sale mortgage?*

14. Explain attestation of a mortgage.

15. Explain acknowledgment of a mortgage.

16. When does a mortgage become effective?

17. Define *delivery in escrow.*

18. What interest in real estate may be mortgaged?

19. Is a mortgage of real estate regarded as a transfer of the real estate?

20. Explain *recording mortgages.*

21. What is the necessity of recording mortgages?

22. May a mortgagee transfer title to the real estate?

23. What interest in the real estate mortgaged can a mortgagee transfer?

24. If a mortgagee sells the debt what becomes of the mortgage?

25. How may mortgages be satisfied?

26. Define and explain *equity of redemption.*

27. Define and explain *foreclosure of mortgages.*

TRUSTS

1. Define *trusts of property.*

2. Classify trusts.

3. Define *grantor of a trust.*

4. Define and give an example of *settlor of a trust.*

5. Define and give an example of a *trustee of a trust.*

6. Define and distinguish *beneficiary of a trust,* and *cestui que trust.*

7. What classes of persons may be parties to a trust?

8. What kinds of property may be the subject of a trust?

9. Define and give an example of an *express trust.*

10. Define and give an example of an *implied trust.*

11. Define and give an example of a *resulting trust.*

12. Define and give an example of a *constructive trust.*

13. Who has the legal title to trust property?

14. Is a person named in a declaration of trust as trustee, obliged to accept the trust?

15. What are the duties and liabilities of a trustee?

16. May a beneficiary of a trust convey title to the trust property?

17. If a trustee wrongfully disposes of trust property what remedies, if any, has the beneficiary?

LANDLORD AND TENANT

1. Define *lessor* and *lessee.*

2. Distinguish *lease* and *sale.*

3. Distinguish *lease* and *assignment.*

4. Is a lease a contract?

5. Does a lease carry with it an implied warranty that the premises described are in good condition?

6. *A* rents *B's* house for one year. *C,* a stranger, without right attempts by legal action to evict *A.* Does *A* have a right of action against *B* for breach of implied warranty of quiet enjoyment?

7. For what purposes may a tenant use leased premises?

8. In the absence of express agreement what party to a lease is obliged to pay taxes and insurance on the leased premises?

9. A lease provides that the tenant is to pay the taxes. A special assessment for paving is levied. Is the tenant obliged to pay this assessment?

10. Who is obliged to pay water rent in the absence of any special agreement in a lease?

11. Who is obliged to pay for ordinary repairs?

12. At common law was a tenant relieved from paying rent by the destruction by fire of the leased premises?

13. What is the rule at the present time as to release of a tenant's obligation to pay rent in case the buildings leased are destroyed by fire?

14. Is there an implied obligation on the part of the landlord to deliver leased premises in any particular condition?

15. If a tenant is injured by reason of secret defects in the premises is the landlord liable to him for the injury?

16. If snow and ice are permitted to accumulate on the walk of the leased premises, causing injury to third persons, is the landlord or tenant liable for the injury?

17. May a tenant become liable for rent without any express agreement to that effect?

18. May a tenant be liable for rent without being in possession of the leased premises?

19. *A* rents *B's* house, nothing being said about the condition of the plumbing. The plumbing leaks. Is *A* obliged to take the house?

20. If a tenant abandons the rented premises before expiration of the term of the lease and so notifies the landlord, is he liable for the balance of the rent?

21. In case a tenant abandons the rented premises, what three remedies has the landlord?

22. Define *distress.*

23. At common law could a landlord sell personal property distrained?

24. What is the present-day method of distraining for rent?

25. Define *lease.*

26. Must a lease be in any particular form to be legal?

27. What leases, if any, must be in writing?

28. What is meant by attestation of a lease?

29. Define *acknowledgment.*

30. What is the necessity of acknowledgment of a lease?

31. What is the necessity of recording leases?

32. Define, and give an example of an *express covenant.*

33. Define, and give an example of *implied warranty.*

34. Is there any limitation upon a landlord's right to transfer his interest in a lease?

35. Is there any limitation upon a tenant's right to transfer his interest in a lease?

36. If *A*, a landlord, assigns his lease to *C* without notifying *B*, the tenant, and later the tenant pays *A*, who is insolvent, can *C* collect the rent from *B?*

37. Define *attornment.*

38. If a tenant assigns his lease is he relieved from his obligation to pay rent?

39. Define, and give an example of a *lease for years.*

40. *A* rents *B's* house for one year, agreeing to pay rent in monthly installments. Is the lease one for years, or from month to month?

41. Is a lease real or personal property?

42. What is the practical distinction between a lease for years and a lease from month to month?

43. When, if at all, may a tenant sublet?

44. Distinguish *assignment* and *sublease.*

45. If a tenant sublets the premises is he relieved of his obligation to pay rent?

46. Define and give an example of an *estate at will.*

47. Distinguish an estate at will from an estate for years, and an estate from year to year.

48. If a tenant for years is permitted to hold over his term with consent of the landlord, in most jurisdictions is the new tenancy one at will, or one from year to year?

49. Define, and give an example of a *tenancy at sufferance.*

50. Define and give an example of an *estate from year to year.*

51. *A* leases a house for a month with the understanding that it is to continue for similar periods if agreeable to both parties. Is the lease from year to year?

52. *A* rents *B's* house for one year. At the expiration of the year *A* is permitted by *B* to hold over for a month. *B* then endeavors to eject *A*. *A* claims he has a lease for eleven more months. Is *A* correct in his assertion?

53. Is a lease from year to year terminated by mere lapse of time?

54. Does breach of a condition or covenant, in the absence of an express stipulation in the lease making it a forfeiture, constitute a ground of forfeiture?

55. Do leases for years require any notice to terminate?

56. Do leases from year to year require any notice to terminate?

57. In general, in what manner must notice to terminate a lease be given?

58. Define and give an example of a *surrender.*

59. Does abandonment of the premises by a tenant without consent of the landlord, constitute a surrender?

60. If a tenant abandons the rented premises, may the landlord relet for the account of the tenant?

61. Distinguish *breach of lease* from *surrender of lease.*

62. If a landlord commits a breach of lease by failing to repair according to agreement, what is the measure of the tenant's damages?

63. If a tenant abandons the rented premises what are the landlord's remedies?

64. If a tenant abandons rented premises, may a landlord permit the premises to remain vacant, and collect rent from the tenant for the balance of the term?

65. If a tenant abandons a lease and the landlord desires to relet for the account of the tenant, must he notify the tenant that he takes possession, and relets for that purpose?

66. How may a landlord recover rent?

67. How may a landlord recover possession of leased premises when the lease has expired, or is broken?

TRADE MARKS AND TRADE NAMES

1. What is the purpose of trade marks?

2. May anything other than words, letters, or figures be used as a trade mark?

3. May a word which describes the article on which it is used be used as a trade mark?

4. May a name of an individual be used as a trade mark?

5. May a name of a place or locality be used as a trade mark?

6. If a person uses a mark without any intention of its becoming a trade mark, does he acquire a valid trade mark therein?

7. *A* has acquired a trade mark on flour; has he also acquired the same trade mark on stoves manufactured by him?

8. If *A* has acquired a trade mark on flour, can *A* prevent *B* from using the same trade mark on stoves?

9. What length of time is required to obtain a valid trade mark?

10. *A* used a trade mark on flour for two years, and ceased using it for two years. In the meantime *B* used the trade mark. To whom does the trade mark belong?

11. What trade marks, if any, may be sold?

12. Define *trade name.*

13. What is the distinction between *trade marks* and *trade names?*

14. May a person acquire a trade name in a name describing the article manufactured?

15. How is a trade name acquired and how long must it be used to be acquired?

16. May a person acquire a trade name in a geographical name?

17. What is meant by *unfair trade?*

18. Is it unlawful for a person to adopt as a trade name or trade mark, a name or mark descriptive of the article manufactured, or a geographical or a proper name?

19. *A* used the name "Chicago Varnish Co.," for ten years, and advertised the name extensively, spending large amounts of money in this connection. *B* adopts the name, "Chicago Varnish Co.," and the public purchases his product thinking they are buying *A's* product. Can *A* prevent *B* from using the name "Chicago Varnish Co."?

20. Is everyone entitled to use his own name in the manufacture or sale of any article he pleases?

21. Who may register trade marks, and when may they be registered?

22. Does registration of a mark constitute it a trade mark?

23. What is the advantage of registering a trade mark?

24. How may registered trade marks be transferred?

WILLS

1. Define *will.*

2. When does a will take effect?

3. Can both real and personal property be disposed of by wills?

4. Distinguish the terms *will* and *testament.*

5. Define and distinguish the terms *testator* and *devisor.*

6. Define the term *devise.*

7. Define the term *bequeath.*

8. Define and distinguish the terms *devisee* and *legatee.*

9. What are the most common statutory requirements of a will?

10. Is a will a contract?

11. By the laws of what state is a will disposing of real property governed?

12. By the laws of what state is a will disposing of personal property governed?

13. May a will be in the form of a letter addressed to a beneficiary named in the will?

14. In a will does any present interest in the property pass to the beneficiaries at the time the will is made?

15. When, if at all, may a will be revoked?

16. May a person under legal age make a will?

17. Can a married woman make a will?

18. What test is applied in determining whether a person is mentally capable of making a will?

19. What kinds of property may be disposed of by will?

20. Must a will be in writing?

21. May a will be printed?

22. Define and describe *signing, attesting,* and *acknowledging a will.*

23. Define and describe *publication of a will.*

24. Give an example of a contract to make a will.

25. May a contract to make a will be revoked?

26. Define and give an example of *holographic will.*

27. What is the distinguishing feature between a holographic will and an ordinary will?

28. Define and describe *nuncupative wills.*

29. May real property be disposed of by a nuncupative will?

30. When, and by whom must a nuncupative will be reduced to writing?

31. Must a nuncupative will be attested?

32. What is meant by *revocation of a will,* and by whom, when, and how may a will be revoked?

33. Define and describe *alteration of a will.*

34. Define *codicil.*

35. When, and how, may a lost will be proven?

36. Define and give an example of *abatement.*

37. What is meant by *ademption of a legacy?*

COURTS AND LEGAL PROCEDURE

1. Define *courts.*
2. In general how may courts be classified?
3. By what authority are Federal Courts established?
4. What is the term of office of Federal judges?
5. Classify Federal Courts.
6. How many United States District Courts are there?
7. How many United States Circuit Courts are there?
8. How many Circuit Court judges are there in each circuit?
9. Do the Supreme Court judges and District judges have anything to do with the Circuit Courts? If so, what?
10. What is meant by *original jurisdiction,* as applied to a court?
11. Does the United States Circuit Court of Appeals have any original jurisdiction?
12. How many United States Supreme Court judges are there?
13. What, in general, is the jurisdiction of the United States Supreme Court?
14. Where are admiralty cases tried?
15. What cases are included in term *admiralty cases?*
16. Are juries used in the trial of admiralty cases?
17. By what authority are State Courts established?
18. Classify, in general, State Courts.
19. What are Courts of Equity, and over what classes of cases do they have jurisdiction?
20. Classify legal actions?
21. Give an example of an act which is both a tort and a crime.
22. Define *plaintiff* and *defendant.*
23. Define *pleadings.*
24. What is the function of a jury in the trial of a case?
25. Define *verdict,* and distinguish it from judgment?
26. How are judgments enforced?

COMMERCIAL ACCOUNTS AS EVIDENCE

CHAPTER I

ACCOUNT BOOKS

The importance of this subject to the student preparing for practice of the law cannot be exaggerated. The late Judge Townsend, of the United States Circuit Court, once related to the author his experience in preparing himself for the trial of a case wherein a book account of some considerable length was involved. The experience of this bright young lawyer who worked two days and nights consecutively, with the tutoring of an experienced bookkeeper, to master the subject of the method of keeping commercial accounts, has doubtless been duplicated in numberless instances by lawyers whose preliminary education had not included this practical subject.

One of the most important branches of the practice of the law today is that concerned with business enterprises, one branch of which is the conduct of litigation involving commercial matters. In treating this subject the point of view will be from the standpoint of the practicing lawyer.

§ 1. **Accounting, Definition Of.** The term "accounting," as ordinarily used, refers to records of the debits and credits in business transactions. The term "bookkeeping" has a broader meaning and includes the recording of documents, the recording required in the offices of clerks of courts where judgments are recorded and the records required in the offices of municipal corporations generally. For the purpose of this study, we may define accounting as the "method of recording business transactions in a systematic manner."

§ 2. **Systems of Accounting.** There are two systems of accounting in common use. They are called single entry and double entry. Single entry is so called because the record of a transaction may be entered on but one side of the set of accounts. Double entry is so called because each transaction requires an entry, or the equivalent of an entry, to opposite sides of one or more accounts. It is a system of making two entries of every transaction, and has generally supplanted single entry as the latter fails to exhibit at any one time the true financial condition of the business, and is incapable of proof of accuracy.

§ 3. **Debits and Credits.** The entries made upon the respective sides of the accounts are called debits and credits. A debit is value delivered or rendered by the person or company for whom the set of accounts is kept. Debits are always entered on the left-hand side of the account. A credit is value received by the person or company for whom the set of accounts is kept. Credits are always entered on the right-hand side of the account. Derivations from these words indicate the other party in any transaction in which a debit or credit is concerned, namely, debtor and creditor.

§ 4. **A Set of Account Books.** In the evolution of business enterprises the necessity of preserving accurate records of business transactions in the most convenient manner, has resulted in the general adoption of certain methods of procedure in the use of the books rendered necessary so that there has been a practical uniformity of practice in this matter in nearly all parts of the civilized world. The account books comprising a set in its first appearance as a set, so called, are a daybook, a ledger, and a cashbook.

Daybook. Originally, it may be presumed, in bookkeeping, accounts were kept in one book, which contained simply a chronological record of such business transactions as it was desired to preserve a record of in permanent form. For the purpose of our study, we shall not concern ourselves with the period antedating the use of paper or

parchment in accounting. With the methods pursued in the days when accounts were kept upon notched sticks or upon bricks we have not for the purpose of our study any concern. The record book described is called a daybook.

Ledger. From the stage of accounting represented by the one book, it is not a long step to the next stage in which the merchant or trader adds another book in which he copies upon certain pages memoranda of the business transactions with specified individuals. For instance, in his original book he will have, scattered through the course of some period of time a number of charges against John Smith, and perhaps some credits in his favor. It will be very convenient to gather these items upon one page under the name of John Smith, placing charges against him upon one side of the page and credits in his favor upon the other side. When John Smith is ready to compare accounts and make a settlement, the items can thus be readily referred to and checked, and the balance due from John Smith, or in his favor, may be readily ascertained by subtracting the total of the smaller side of the account from the total of the larger side. If the left-hand side is the larger, the balance will be due from John Smith. If the right-hand side is the larger, the balance is in his favor. This page is called a ledger page, and the book in which such a summary of each account is collated is called a ledger. The record upon such a page is called a ledger account.

Cashbook. The next step in the evolution of the set of books takes place when the business man finds that it will be convenient to have two books of original entry instead of one. Heretofore, he has been making all original entries in one book, the daybook. All business transactions may be divided into two classes: *First*, those involving a transfer of cash at the time of the transaction; and. *second*, those not involving a transfer of cash at the time of the transaction. The step now about to be taken in the evolution of the system of accounting is the division of the original entries of the transactions into these two classes. Conse-

quently, another book is added to the set of two, and this third book is called the cashbook. After the addition of this book, all transactions not involving a transfer of cash at the time of the transaction are entered in the daybook. And all transactions involving a transfer of cash at the time of the transaction (that is, all of which it is desired to keep a record), are entered in the cashbook.

The set of books which we have now described, namely, daybook, ledger, and cashbook, compose a complete set of accounting record books, and the set contains all the elements found in the most extensive and complicated set of accounts in use in any business.

§ 5. **Purchase Book.** In the course of time it becomes desirable to further divide the transactions which are entered in the daybook. Another book is added and the items formerly entered in the daybook are now classified into sales and purchases. The daybook now becomes the sales book, and the book just added becomes the purchase book. All sales wherein the price of the goods is not paid at the time of the sale are entered in the sales book, that is, all sales not involving a transfer of cash at the time of the transaction. All purchases wherein the purchase price of the goods is not paid at the time of the purchase are entered in the purchase book.

§ 6. **Daybook, Sales Book, Purchase Book, Cashbook, and Ledger in Practice.** The lawyer finds that in actual practice, in the greater part of all litigation in which business accounts are involved, the sets of accounts which he is called upon to use as evidence, or to cross-examine upon when presented by opponents in court, consist of the books described, namely, the daybook, sales book, purchase book, cashbook, and ledger.

§ 7. **Bills Receivable and Bills Payable Book.** As a business enterprise grows, it is found convenient to add other books. Since promissory notes are used to so large an extent in the carrying on of all business, it has been found convenient to adopt a book specially devised for keeping a record of notes issued by the proprietor of the

business or the company, and of notes drawn by other persons in his or its favor. Notes issued by the proprietor or company are called bills payable, and notes drawn by other persons which are payable to the proprietor or company are called bills receivable. The book in which a record of such notes is kept is called the bills receivable and bills payable book.

§ 8. **Invoice Book.** Another book which it has been found convenient to add is called the invoice book. This usually takes the form of a large scrapbook. In this book are pasted the bills received from the firms of whom goods are purchased, after the goods have arrived and have been examined, the prices found correct, and the extensions proved. There are two methods of keeping this book. The bills may be pasted in chronological order, in which case an index gives ready reference to any particular bill desired, or they may be pasted in so that all the bills from any one firm will be found grouped together. Sometimes it will be found that the purchase book described in a previous paragraph is, in form, this invoice book.

§ 9. **Trial Balance Book.** Another subsidiary book almost invariably found in double entry accounting systems is a trial balance book. In this book are entered the items making up the successive trial balances taken off the books for a given period. The books are so devised that by writing the names of the accounts once, this suffices for a year. The nature of the entries in this book will be explained under the head of the trial balance.

§ 10. **Other Subsidiary Books.** Other subsidiary books have been devised and added to systems in use in various kinds of business establishments, as the need for such books has arisen in the particular business concerned. A lawyer who understands accounting methods need not hesitate to examine upon any such subsidiary books, for a few minutes' inspection will show that they are mere adjuncts to the main books of the system, and a few questions as to the purpose of, and method in which such books are used, will give him all the information required.

CHAPTER II

THE FUNDAMENTAL PRINCIPLES OF ACCOUNTING

§ 11. **Original Entries.** Every business transaction, simple or complicated, may be resolved into one of two classes, namely, value delivered or rendered, or value received. For every such transaction there is an appropriate entry upon the set of accounts. The lawyer will note that under one of the principles of the law of evidence, only original entries are admissible as evidence. Consequently, as will be explained later, it is always necessary, whenever accounts are to be used in courts, to ascertain definitely, in advance, the books required. It is always necessary that the lawyer look after this matter, as clients do not appreciate the rule involved. They generally prefer to bring in only their ledgers containing the full account, almost invariably objecting to bringing in the books containing the original entries, on account of the trouble involved in going through stores of old and discarded books to find the books required, and carting them to court. Nevertheless, despite objection and trouble, the books containing the only evidence which is admissible must be produced.

There is always some book in which, in accordance with the system in use, the original entry of the transaction is made. This book may be a daybook, a sales book, a purchase book, or a cashbook. In the case of records of promissory notes, inquiry is always necessary as to the method adopted, which may be a so-called journal entry upon some book, or an entry in a bills receivable and bills payable book. The author encountered a case recently in which the plaintiff had been in the habit of entering all promissory notes directly upon a bills receivable or bills payable account in a ledger. It is possible that such a bills payable or bills receivable ledger account would be admitted

as lawful evidence, but such a method is not a proper one and the account would always be subjected to a strict scrutiny before being admitted as evidence.

§ 12. **Form of Account Books.** The daybook, sales book, purchase book, and cashbook mentioned above, may be in the form of bound books, or loose sheets held together in a binder, called a loose-leaf system, or may be on cards and handled in trays or drawers in cabinets similar to card index systems. Whatever the form of the book, the principles governing the method of making entries are the same.

§ 13. **Entries in Sales Book.** The sales book is readily understood. The entry states the name and address of the person or company to whom the merchandise is sold, the number of each class of articles, price per article, and total price amount of each class of articles and the total amount of the sale.

§ 14. **Entries in Purchase Book.** The purchase book entry states the name of the person or firm from whom the merchandise is purchased, with an itemized statement of the purchase and price of same, and the total amount of the purchase. Usually the entry in the purchase book is simply a copy of the bill rendered by the firm of whom the merchandise was bought. Or, as stated before, the purchase book may be in form a big scrapbook in which the bills received from the firms supplying the merchandise are pasted.

§ 15. **Entries in Daybook.** Where a daybook is used in place of sales book and purchase book, it is simply a combination of the two and contains entries of both kinds.

§ 16. **Entries in Cashbook.** The cashbook entries are a little more complicated. Cash, in respect to accounting, includes money, money orders, checks, and drafts which are payable on demand. All cash received is entered on the debit side of the cashbook, and all cash paid out is entered on the credit side of the cashbook. The cashbook will usually be found to be in one of four forms in common use. One form is the ordinary journal-ruled book in which

the left-hand dollars and cents column on each page is the debit column, and the right-hand column on each page is the credit column. The second form is also the ordinary journal-ruled book, but the whole left-hand page is taken for the debit side of the account and the right-hand page for the credit side. The third form is that of a ledger-ruled book in which the left-hand side of the page is taken for the debit side of the cash account and the right-hand side for the credit side. The fourth form is that of a book ruled with a date column at the left edge of the left-hand page, a wide space for the entry of the description of the transaction, and the rest of the left-hand page and all the right-hand page are taken up with columns ruled for dollars and cents, arranged for various kinds of entries in order to accommodate requirements of the individual business. The purpose of such a cashbook is to divide and classify the cash receipts and cash disbursements. The cash receipts may be divided into classes or all the cash receipts may be entered in one column, the method adopted in this respect depending upon the requirements of the particular accounting system. Likewise the cash disbursements may be divided and classified or may be entered in one column, in accordance with the requirements of the particular accounting system. The lawyer need feel no hesitation in examining upon a columnar cashbook as the character of the entries in each column will always be indicated by written or printed headings at the top of each column.

§ 17. **Posting.** The process of carrying the items from the original books of entry into the ledger is called posting. Since the entries in the sales book represent value delivered to the persons or firms charged with the merchandise, such entries are called debits and are posted to the left-hand side of the ledger account of such firms. The entries in the purchase book represent value received from the firms therein named, and as such the entries are posted to the right-hand side of the ledger accounts of such firms. Regarding the cashbook entries, it may be taken as a sim-

ple rule that all debits in the cashbook are posted to the credit side of the ledger accounts of the firms or persons who paid cash. And *vice versa*, the credit items in the cashbook are posted to the debit side of the ledger accounts of the firms or persons to whom the cash was paid or the ledger accounts representing the purpose for which the cash was expended, such as furniture and fixtures account, machinery account, real-estate account, stable account, etc.

§ 18. **Double-Entry System.** The foregoing entries comprise the fundamental principles of accounting as employed in single-entry systems. In double-entry systems there is a corresponding entry or its equivalent upon the opposite side of the same or some other account, to balance the entry which has been made upon the debit or credit side of an account in accordance with the foregoing rules. We have seen that in cashbook entries where there is a debit entry on the cashbook, there must be a corresponding credit entry on some ledger account. In double entry this principle is applied to all entries, those in the sales book and purchase book as well as to those in the cashbook. For instance, in double entry there is carried in the ledger an account called merchandise account. At the end of each month, or any adopted period, the total amount of the purchases during such period, as recorded in the purchase book, is posted to the debit side of this merchandise account. It is seen that this debit entry upon merchandise account balances in amount all the entries upon the credit side of the various ledger accounts posted from the purchase book during such period. The total amount of the sales for such period is posted from the footing of the sales book to the credit side of the merchandise account in the ledger. This item upon the credit side of merchandise account thus balances all the entries made upon the debit side of the various ledger accounts in posting the sales during such period. The total amount of the cash sales during the period is ascertained from the cashbook where it appears as a debit, and is posted to the credit side of merchandise account in the ledger, which item thus

balances the same aggregate amount upon the debit side of the cashbook. The total amount of the cash expenses during the period is ascertained from the credit side of the cashbook and is posted to the debit side of expense account in the ledger, thus balancing the aggregate amount of the individual items in that account upon the credit side of the cashbook. All the other items in the cashbook have already been posted to the opposite side of ledger accounts.

For every entry on one side of the set of accounts, there has now been a corresponding entry upon the opposite side. This is double entry bookkeeping. The foregoing comprise all the fundamental principles of accounting. These principles will be found to underlie and govern the conduct of every properly-kept set of accounts.

§ 19. **Trial Balance.** In accounting systems kept by double entry it is customary to draw off at stated periods, usually monthly, a statement of the balances standing upon the open accounts. This statement is called a trial balance. It has been implied in what has already been said, that the cash account is kept in the cashbook and not in the ledger. In some business establishments, a so-called cash account is kept in the ledger, containing only the monthly balances of cash. In taking off the balances of the account, the balance of the cash account is taken from the cashbook, and the other balances from the accounts in the ledger. The statement is headed "Trial Balance" and dated. The balance of the cash account is the balance of cash on hand. In balancing the cashbook it is customary, after finding the difference between the credit and the debit side, to enter upon the credit side in red ink just below the last entry upon that page, the words "Balance Cash on Hand" and in the credit column the amount of such balance. This balance is the first item to go upon the trial balance.

The rule in making the trial balance is that when the balance upon the books is upon the debit side of the account, that is, when the debit side is larger than the credit side,

the balance is entered in the debit column on the trial balance. This is the case where there is a balance of cash on hand, as the debit side of the cash account will be larger than the credit side. Where the credit side of any account is larger than the debit side, the balance is entered in the credit column of the trial balance. Thus, when the trial balance is completed, it will contain a statement of the amount of cash on hand, and the name and balance of every open account in the ledger. Inasmuch as for every entry on one side there has been a corresponding entry on the other side of the set of accounts, it follows that the debit and credit sides of the trial balance should be equal.

The trial balance serves two purposes: It gives to the credit man of the company a monthly statement of open accounts for review and action as needed, and it is assumed by the bookkeeper that if his balance is perfect his postings have been correct. The lawyer will note that when in actual practice he is confronted with a trial balance which apparently shows that the postings have been correctly performed, that the trial balance does not, by any means, prove that such is the fact, even though the trial balance is correct and shows the actual condition of the accounts. This is so for the reason that the trial balance detects only errors in posting to one or the other side, that is, an error in posting an amount wrongly, or in posting an amount to one side when it should be on the other side, or an error in carrying footings from one page to another. If the item of sale for $2,500 to John Smith, was by mistake posted to the debit side of Charles Smith's ledger account, instead of to John Smith's account, the trial balance would not detect such error. It is customary, as has already been stated, to keep the records of the trial balances in books specially devised for this purpose, called trial balance books.

§ 20. Statement of Condition of Business or Balance Sheet. The trial balance above described does not purport to show the condition of the business, for the reason that

there are in the ledger certain accounts called fictitious accounts, and furthermore, it is not customary to take inventory every time a trial balance is made. In preparing for a statement of condition of business or a balance sheet as it is also called, a trial balance is made in order to prove the balance of the books. Then it is necessary to close expense account and any other fictitious accounts in the ledger. There is opened in the ledger a profit and loss account. Expense account is closed into profit and loss account. Other fictitious accounts are closed into appropriate accounts. An inventory of merchandise on hand is prepared and the amount credited to merchandise account in the ledger. Merchandise account is now closed into profit and loss account. The amount which is carried from merchandise account to profit and loss account represents the gross profit or loss during the period. All worthless accounts of customers and all other losses, and depreciations on furniture and fixtures, machinery, and any other like items, are charged off and debited to profit and loss account. The difference between the two sides of profit and loss account now shows the net profit or loss during the period. A statement of condition of business may now be made if it is desired to show the profit and loss account as an asset or liability. If it is desired to dispose of profit and loss account before making the statement of condition of business, profit and loss account will be closed in accordance with one of the following rules: (1) If the business is owned by a single proprietor, profit and loss account is closed into his personal account. (2) If profit and loss account shows a net profit, the amount is carried to the credit side of the proprietor's account. (3) If it shows a net loss the amount is carried to the debit side of his account.

If the business is owned by partners, profit and loss account is closed into their personal accounts, the net profit or loss being apportioned between them in accordance with their partnership agreement. In the case of a corporation it is customary to retain a part of the profits undivided,

and this amount is carried from profit and loss account to surplus account or whatever other name such account may bear; or it may be simply retained in profit and loss account. The amount to be divided among the stockholders is determined by vote of the board of directors. The amount to be disbursed among the stockholders is divided by the total amount, par value, of the outstanding capital stock, and the result is the percentage of the dividend declared. An account is then opened in the ledger for such dividend and headed "Dividend No. ——," numbered consecutively from the first dividend declared. The amount to be disbursed is then carried from profit and loss account to "Dividend No. ——" account. This closes profit and loss account. The checks are made out for the stockholders credited upon the cash account and debited upon "Dividend No. ——" account, which closes that account.

The bookkeeper is now ready to prepare his statement of condition of business, or balance sheet. The assets or resources are all entered together and below them are entered the liabilities. In double-entry accounting the total amounts of the assets and liabilities will always be equal.

CHAPTER III

KINDS OF ACCOUNTS

§ 21. **What Is an Account.** An account, in law, is a statement of debits and credits between parties. "The primary idea is, some matter of debt and credit, or demand in the nature of debt and credit, between parties. It implies that one is responsible to another for moneys or other things, either on the score of contract or of some fiduciary relation of a public or private nature created by a law or otherwise."[1] A definition which has been cited in several decisions with approval is as follows: "Some matter of debt and credit, or of a demand in the nature of debt and credit between parties, arising out of contract, or of a fiduciary relation, or some duty imposed by law."[2] "Account is to be distinguished from balance which is but the conclusion or result of the account."[3]

The lawyer will be helped in many puzzling problems arising in the working out of tangles in business affairs, by adopting as a primary principle in dealing with accounts that in whatever form the account may be presented, or whichever of the various kinds of accounts the one in question may be, and however complicated the situation, at bottom the whole problem is a simple matter of debit and credit and the first step toward its solution the determination of who shall be regarded in the unraveling of the snarl or the analysis of the complication as debtor and who as creditor. Having thus chosen sides, the remainder of the process is one of classification of the items in the trans-

[1] Whitwell v. Willard, 1 Mete. 217, cited in Anderson's Law Dict., art. "Account," p. 16.

[2] Nelson v. Posey Co., 105 Ind. 287, *idem*.

[3] Article "Account" p. 12, Shumaker and Longsdorf's Cyclopedic Law Dictionary, citing 45 Mo. 574.

actions, and grouping of debits and credits. There is no formula which will be of so much service to a lawyer in examining witnesses upon accounts as the simple one already given as the foundation of accounting: A debit is value delivered or rendered by us and is entered on the left-hand side of the account. A credit is value received by us and is entered upon the right-hand side. Debtor is the person or firm to whom value is delivered or rendered; creditor is the person or firm from whom value is received.

"While it is said that the term 'account' has no very clearly-defined legal meaning, the primary idea of account, *computatio,* is some matter of debt and credit, and it implies that one is responsible to another on the score either of contract or of some fiduciary relation of a public or private nature, created by law or otherwise."[4]

§ 22. **Current or Running Account.** A current or running account is one which contains items of debits or credits for which settlement has not been made and to which, in so far as the account is concerned, there is no obstacle to the addition of further items, either to the debit or credit side.

The idea of a current or running account is that entries are being made upon it; in other words, that it represents the situation between persons who are having dealings with each other; who have had them in the past; are having them in the present; and are likely to continue to have them in the future.

A current or running account may be one upon which all merchandise entries appear upon the debit side and only cash payments upon the credit side, as in the case of a customer's account at a store. It may also be a mutual account, as between persons furnishing merchandise to each other, in which case there may be entries of various kinds on both sides of the current accounts.

It is often said that "we have a running account at such

[4] Watson v. Penn, 108 Ind. 21 and Nelson v. Posey Co., 105 Ind. 287, cited in Cyc., vol. 1, art. "Accounts and Accounting," p. 362.

a store", even though at the time we may have paid all that was due, so that we owe nothing. Technically, we have then no running account, but have at the moment rather a right or privilege to open such an account. In other words, it is contemplated, in the use in law of the term "current or running account" that the account is also an open account. When such an account is paid or settled, there ceases to be an account between the parties thereto.

§ 23. **Open Account.** An open account is one in which there are debits or credits unsettled between parties, and the exact amount due from one to the other has not been so ascertained and agreed upon, expressly or impliedly, as to constitute the account an account stated.

The term "open account" has been applied to current or running accounts without distinguishing between them. A single item of indebtedness owed by *A* to *B* would constitute an open account, but if it represented the only transaction between the parties, and no other transactions are contemplated, except payment of the debt, such an account would hardly be termed a current or running account. According to the customary use of the term current or running account, such use would be incorrect. On the other hand, a current or running account may with entire propriety be termed an open account, since it is of the very essence of the current or running account that something be unsettled between the parties. An open account may also be a mutual account in which entries other than of ordinary cash payments by debtor or creditor appear on both sides of the account between the parties. All mutual accounts are also open accounts unless the balance due has been so ascertained as to render the account an account stated.

On the other hand, care must be exercised in bringing a suit as upon an open account, upon a balance due where there has been a written contract between the parties, even although there has been some departure from the terms of the contract, for it may be found that such a situ-

ation will not constitute an open account between the parties, but ground for suit upon the contract.

"A demand cannot be regarded as an open account where there is a contract which is the foundation of the claim, and which, though not fulfilled according to its letter, either as to time or place of delivery, yet with the qualification which the law under such circumstances imposes, determines the respective liabilities of the parties." [5]

An example of an open, current, and mutual account, so designated by the Supreme Court of the United States, is found in the case of Corinne Mill, Canal and Stock Company v. Toponce.[6]

§ 24. **Mutual Account.** A mutual account is one in which there are items on both sides, other than ordinary payments debited or credited in the regular course of business.

An account of a merchant with a customer containing debits of merchandise sold to such customer and credits only of payments of moneys on account, is not a mutual account. If a customer furnished merchandise to the merchant on the account, farm produce, for instance, the respective accounts would then become mutual accounts. The characteristic of the mutual account is the reciprocal debits and credits other than cash payments in the regular course of business. There may be mutual accounts where only cash is involved, as where cash loans were frequently made by two persons to each other and the items carried on ordinary book accounts. In the regular course of business dealings, however, the term mutual account means accounts where there are items on both sides other than of money paid or received on account. The legal meaning of the term has been defined in various ways:

"A mutual account is one based on a course of dealing wherein each party has given credit to the other, on the faith of indebtedness to him. If the items on one side are mere payments on the indebtedness to the other,

[5] R. R. Co. v. Lindsay, 4 Wall. 650.

[6] Corinne Mill, Canal and Stock Co. v. Toponce, 152 U. S. 405.

the account is not mutual. Whether or not the account is a mutual account is a question of fact.'' [7]

The subject of mutual accounts is a very important one, for the reason that it has been held that the items of a mutual account, though more than six years have elapsed, may be presented in evidence notwithstanding the Statute of Limitations.[8]

The theory upon which this exception in favor of the mutual account is made, is stated in the Georgia decision to which reference has already been made:

''The doctrine that the Statute of Limitations does not begin to run against either party until the last just item is obtained on either side, does not rest on the notion that every credit in favor of one is an admission by him of indebtedness to the other, or a new promise to pay, but upon a mutual understanding, either express or implied from the conduct of the parties, that they will continue to credit each other until at least one desires to terminate the course of confidential dealing, and that the balance will then be ascertained, become then due, and be paid by the one finally indebted. Either party may terminate the mutual understanding at any time by actual payment of the balance, by stating the account for that purpose, by demanding a settlement privately, by suit, or by any other act which evinces his determination to deal no longer in that way. Without proof of its determination, the law presumes that such a mutual understanding, once proved or admitted, runs through all the dealings of the parties until the complete bar of the statute has passed.'' [9]

Mutual accounts have been frequently involved in cases in which the question has arisen as to whether or not one or the other of the parties is entitled to claim interest.

''Where there are current, mutual accounts, interest does not run, in the absence of custom or agreement, until a bill is rendered or a demand made. The mere fact that an account is unliquidated is often, though not always, a

[7] Gunn v. Gunn, 74 Ga. 555, 557-568, cited in Anderson's Law Dict., art. ''Account,'' p. 2.

[8] Nichols v. Leavenworth, 1 Day 245; Nichols v. Taylor, *idem*, 250.

[9] Gunn v. Gunn, 74 Ga. 555, 557-568.

decisive objection to the allowance of interest. And the objection is much stronger where no sum has been named by either party as the amount to be charged until after the controversy has arisen." [10]

§ 25. **Account Rendered.** Account rendered is a term applied to a statement of account presented by a creditor to his debtor. The ordinary monthly statements sent out by merchants to their customers showing items of purchases during the month, item of any balance due on the first of the month and the amount due on the last day of the month, are "accounts rendered" within the legal meaning of the term.

It is not essential that there should be more than one item. An ordinary bill giving the item of indebtedness, when presented to the debtor may become an account rendered. When the debtor does not object to the account as rendered, within a reasonable time, the account rendered is to be regarded as admitted by the debtor to be *prima facie* correct.

"The principle which lies at the foundation of evidence of this kind is, that the silence of the party to whom the account is sent, warrants the inference of an admission of its correctness. This inference is more or less strong according to the circumstances of the case. It may be repelled by showing facts which are inconsistent with it, as that the party was absent from home, suffering from illness, or expected shortly to see the other party and intended and preferred to make his objections in person. Other circumstances of a like character may be readily imagined." [11]

"An account current sent by a foreign merchant to a merchant in this country and not objected to for two years is deemed an account stated, and throws the burden of proof upon him who received and kept it without objection." [12]

§ 26. **Account Stated.** "An 'account stated' is an agreement between persons who have had previous transactions,

[10] Clark v. Clark, 46 Conn. 586.

[11] Wiggins v. Burkham, 10 Wall. 131, 132.

[12] Freeland v. Heron *et al*, 7 Cranch 147, 148.

fixing the amount due in respect of such transactions and promising payment." [13]

"It must appear that at the time of accounting there existed some demand between the parties respecting which an account was stated, that a balance was then struck and agreed upon and that the defendant expressly admitted that a certain sum was then due from him as a debt." [14]

Such an account can only be impeached for fraud or mistake.

"When the account is admitted in evidence as a stated one, the burden of showing its incorrectness is thrown upon the other party. He may prove fraud, omission, or mistake, and in these respects he is in no wise concluded by the omission implied from his silence after it was rendered." [15]

Account stated is a very important subject in the handling of accounts as evidence, as the presentation of an account stated obviates the necessity of opening up the whole account as a subject for examination. An open account requires the presentation of item after item singly, with an opportunity of cross-examination upon each item. The account stated does away with all this examination in detail in court, testimony being given upon the agreement of parties, express or implied, as to the amount finally due to one or the other.

The convenience of this method of putting in an account has caused it to be followed whenever possible. Consequently there have been a great many decisions upon cases where the point at issue has been the account stated. The law reports of almost every State will be found to contain decisions by its court of last resort, enunciating its doctrine upon this subject. The leading case is Standard Oil Company v. Van Etten,[16] a case growing out of a contract

[13] Zacarino v. Pallotti, 49 Conn. 36, head note.

[14] *Idem*, citing Abbott's Trial Ev., p. 458 and Chitty on Contr., p. 562.

[15] Wiggins v. Burkham, 10 Wall. 132, citing Perkins v. Hart, 11 Wheaton 256.

[16] Standard Oil Co. v. Van Etten, 107 U. S. 325, citing Perkins v. Hart, 11 Wheat. 237; Toland v. Sprague, 12 Peters 300; Wiggins v. Burkham, 10 Wall. 129; Lockwood v. Thorne, 11 N. Y. 170.

made in 1873 for furnishing lumber for barrel heads. The case went up to the Supreme Court of the United States in 1882, from the Circuit Court of the United States for the Eastern District of Michigan. In August, 1875, the Standard Oil Company made up an account of the lumber received, based upon the count of its inspector, and the amounts of moneys paid the lumber dealers, and rendered that account to the latter. The balance found due was paid and accepted, and no objection made to the statement of the account until January, 1876, when suit was brought on the ground that there was mistake in the account. It was claimed on the trial that the lower courts erred in admitting the introduction of testimony to vary items making up the account, on the ground that the account had become an account stated. It was claimed, and the claim was approved and sustained as being a correct statement of the law, that "an account rendered becomes an account stated, unless objected to within a reasonable time; that what constitutes a reasonable time in such a case is a question of law; and that an account stated cannot be impeached except for fraud or mistake".

The lapse of time between the rendering of the account in September, 1875, and the date of the subsequent demand by institution of suit in January, 1876, without objection, was held to have "converted it into a stated account which could be impeached only for fraud or mistake". Evidence, however, established the fact that the inspector had made serious mistakes in the count upon which the account stated was based, and it was held that this mistake "impeached the account, for it was founded on that count and embodied its mistake".[17]

Another leading case involving the doctrine of an account stated is that of Leather Manufacturers Bank v. Morgan. The doctrine of the stated account was applied to the relation between a depositor and a bank. It has been held in other jurisdictions that the pass book which

[17] Standard Oil Co. v. Van Etten, 107 U. S. 334.

a depositor in a national bank presents to the receiving teller each time a deposit is made, and in which that officer enters the amount of a deposit, constitutes a statement of account between the bank and the depositor, the items of deposits entered constituting acknowledgments by the bank of receipt of the amounts so entered. It has furthermore been held that when the pass book is written up and returned to the depositor with the amount of the balance on deposit stated therein, and the depositor's paid checks as vouchers for the statement of amounts paid out by the bank on the account, that the book with the account therein will become, in effect, an account stated, if the statement as rendered is not examined and objected to by the depositor or his authorized agent within reasonable time. The case above mentioned grew out of a loss sustained by Morgan as a result of payment by the bank on account of Morgan of checks which he claimed had been raised in amount after he had signed the same. The case went up to the Supreme Court of the United States on writ of error to the Circuit Court of the United States for the Southern District of New York. It was held that:

"A depositor in a bank who sends his pass book to be written up and receives it back with entries of credits and debits and his paid checks and vouchers for the latter, is bound personally or by an authorized agent, and with due diligence, to examine the pass book and vouchers and to report to the bank, without unreasonable delay, any errors which may be discovered in them; and if he fails to do so, and if the bank is thereby misled to its prejudice, he cannot afterwards dispute the correctness of the balance shown by the pass book." [18]

As has already been stated, the doctrine of the account stated operates to obviate the necessity of opening up the whole account by the creditor, and precludes the debtor from doing so except on grounds of mistake or fraud. The result is that the account stated becomes, in reality, a new cause of action.

[18] Leather Manufacturers' Bank v. Morgan, 117 U. S. 96.

CHAPTER IV

BOOK ACCOUNTS AS EVIDENCE

§ 27. In Class of Exceptions to Rule Excluding Hearsay. Admissibility of documentary evidence, including entries in account books, is treated as a branch of the subject of exceptions to the hearsay rule.

Admissibility of entries in account books may come under one or the other of two classes of admissible entries, depending for admissibility upon one or the other of two sets of circumstances, namely, entries made by a person since deceased and admissible as entries of a deceased person, or entries made by a party to the action, whose testimony will be given in court.

§ 28. Rule Excluding Hearsay. Rules of evidence require that facts shall be proved by the best obtainable evidence, and that the opposite side shall have an opportunity in open court to test such evidence by cross-examination. *A* has been employed as a bookkeeper for *B,* and as such bookkeeper entered charges in *B's* daybook or sales book against *C,* representing merchandise purchased and received by *C* from *B* which was not paid for. *A* dies before suit is brought by *B* against *C.* On the trial of the suit *B* presents his book account against *C* as evidence of the debt claimed. Under the regular rules of evidence the book account would not be admissible since, so far as it goes, it merely represents that *A* said in writing that certain articles were sold on certain days to *C,* and there being no entries upon the cashbook saying that payment was made by *C,* it is asked that the inference may be drawn that according to *A's* statement, left after his death, *C* owed *B* for such articles of merchandise. Regular rules of evidence say such testimony is inadmissible because it is mere hearsay, that is, *A* says the fact is so, but *A* is not

brought into court to testify to the fact in order that *C* may cross-examine him to test the probability of the truth of the statement. This test of cross-examination would include examination as to *A's* connection with the facts to which he was testifying; his demeanor while testifying, in respect to the impression given of truth or otherwise; questions as to the time and circumstances of making the entries and other matters of inquiry which might be suggested from a personal examination of the witness.

Written statements, as such, are not entitled to admissibility in evidence under the exception to the rule excluding hearsay, any more than oral statements. Certain classes of writings have been admitted on the grounds of necessity or policy. So far as this exception relates to entries in account books, the grounds upon which such favor has been accorded entries of this nature will be explained in this section.

§ 29. History of Rule. Originally, in England, hearsay statements were not excluded. The present rules of evidence were unknown at that time. Questions of fact were put to the jury from early in the fourteenth century. The function of the jury was then, as now, to find the truth of the point at issue. However, they were not, as now, furnished with testimony pro and con in court, upon which they were bound to decide the matter in litigation under rules of law laid down by the judge. Their duty included the taking of testimony wherever it could be found. The jury were taken from the neighborhood where the controversy arose, under the theory that it was likely that some of them at least already had personal knowledge of the facts involved. Under such circumstances, it hardly needs to be said that there was no rule excluding hearsay statements. At that time, entries in account books were admissible. They continued to be admissible without restriction, so far as we know, until the year 1609. During the intervening years there had been a considerable development of rules of procedure in court trials. Experience had shown the value of personal, oral testimony in open court,

where judge and jury could observe the conduct and apparent character of the witness and his testimony could be subjected to the testing of cross-examination. At the commencement of jury trials witnesses rarely gave their testimony in open court. By the year 1609 this custom had changed, so that evidence was laid in by testimony produced in court, as now.

Naturally, precedents were established and rules promulgated for admission of evidence found by experience to be of probable value in aiding the jury in arriving at a true solution of the controversy. During the next sixty or seventy years hearsay statements were regarded as admissible but with some question as to its weight as evidence; and finally we are told that, about the years 1675 to 1690, "by general acceptance the rule of exclusion had now become a part of the law as well as of the practice." [1]

§ 30. First Restriction on Use of Book Accounts as Evidence. In the year 1609, was enacted the statute 7 James I., An Act to Avoid the Double Payment of Debts, of which chapter 12 is as follows:

"Whereas, divers men of trades, and handicraftsmen keeping shop books, do demand debts of their customers upon their shop books long time after the same hath been due, and when as they have supposed the particulars and certainly of the wares delivered to be forgotten, then either they themselves or their servants have inserted into their said shop books divers other wares supposed to have been delivered to the same parties, or to their use, which in truth never were delivered, and this of purpose to increase by such undue means the same debt; (2) and whereas, divers of the said tradesmen and handicraftsmen, having received all the just debts due upon their said shop books, do oftentimes leave the same books uncrossed, or any way discharged, so as the debtors, their executors or administrators, are often by suit of law enforced to pay the same debts again to the party that trusted the said wares, or to his executors or administrators, unless he or they can produce sufficient proof by writing or witnesses, of the said payment, that may countervail the credit of the

[1] 2 Wigmore on Evidence, § 1364.

said shop books, which few or none can do in any long time after the said payment; (3) be it, therefore, enacted by the authority of this present Parliament, that no tradesman or handicraftsman keeping a shop book as is aforesaid, his or their executors or administrators, shall after the feast of St. Michael the Archangel, next coming, be allowed, admitted, or received to give his shop book in evidence in any action for any money due for wares hereafter to be delivered, or for work hereafter to be done, above one year before the same action brought, except he or they, their executors or administrators, shall have obtained or gotten a bill of debt or obligation of the debtor for the said debt, or shall have brought or pursued against the said debtor, his executors or administrators, an action for the said debt, wares, or work done, within one year next after the same wares delivered, money due for wares delivered, or work done.

II. Provided always, that this act, or anything therein contained, shall not extend to any intercourse of traffic, merchandising, buying, selling, or other trading or dealing for wares delivered or to be delivered, money due or work done or to be done, between merchant and merchant, merchant and tradesman, or between tradesman and tradesman, for anything directly falling within the circuit or compass of their mutual trades and merchandise, but that for such things only, they and every one of them shall be in case as if this act had never been made; anything herein contained to the contrary thereof notwithstanding.

III. This act to continue to the end of the first session of the next Parliament and no longer." [2]

By subsequent continuances, this statute has been continued in force, down to the present time.[3] This early Statute of Limitation shows that at that time book accounts were of common use in evidence in the English courts. Doubtless, book accounts were as freely admitted in evidence in the American colonial courts, for in 1645 Plymouth Colony enacted a statute reciting:

"Whereas, many inconveniences, losses, and great controversies have and do daily happen by reason of pretended

[2] See the statute in full in Thayer, "Cases on Evidence" (2d ed.) 507, 508.
[3] *Idem*, 508.

debts, sometimes just and sometimes satisfied, the charge remaining still uncancelled, sometimes upon books, sometimes by papers, whereas in truth there is little or nothing really due or remaining, but through long neglect of demand, and sometimes slow payment made, much contention doth arise betwixt party and party; it is, therefore, enacted by the court, that if any man which either formerly hath dwelt or now doth dwell within this government, have any debts now owing upon book or by papers or such like scrolls, and are not demanded within the space of six months next after the first day of November next, such books, papers, or scrolls shall be no evidence upon trial or recovery of them. And for time to come a book, paper, or scroll shall be evidence for the space of one year after the making of the debt therein specified or written, and no longer, except the same be otherwise proved, but for such as go long voyages to sea to be allowed two years." [4]

In 1682, in the same colony a statute was enacted which is not only a statute of limitations, giving a creditor four years in which to bring his action, but, further, it expressly makes his book account lawful evidence:

"Whereas, divers merchants, shopkeepers, tradesmen, and handicraftsmen have traded, sold, and trafficked their goods, wares, and merchandise in private, and their customers often sending for such things as they need by children and servants under age, etc., whereby such merchants, shopkeepers, and tradesmen have no opportunity to take bonds, bills, or witness of the delivery of their goods, yet, just it is that such dealers should be duly paid for their wares and merchandise. It is, therefore, enacted, that all and every merchant, shopkeeper, dealer, etc., shall keep a book of their dealing and trading, fairly writing down therein both debt and credit, and the said merchants, their factors, or servants, or any of them that shall deliver any such wares or merchandise making oath that the said book of accounts is true both for debt and credit; such book of accounts shall be held sufficient in law for the recovery of any debt within four years after the delivery of any such goods; but if the defendant will take his oath that he had not those goods charged in the book or account, or that he hath paid for the same, then the case shall be tried and deter-

[4] Plymouth Colony Laws, 77, 78, in Thayer, "Cases on Ev." (2d ed.) 516.

mined according to the best and strongest presumptions the parties concerned shall produce."[5]

§ 31. **Rise of Exception to Hearsay Rule in Favor of Book Accounts.** At the commencement of the exception to the rule excepting book accounts from the hearsay rule, there were two grounds upon which such evidence was admitted. First, where a bookkeeper who made the entries had died, it was manifestly impossible for the creditor to have the advantage of his regularly-kept books as evidence in suit upon debts therein recorded, unless presence of the bookkeeper in court to testify to the entries in his handwriting was excused. Real necessity called for some relaxation of the rule in such cases, and the courts responded by prescribing proof of the handwriting of the deceased clerk, of his employment, his duty with regard to making such entries, and affording the defendant an opportunity to examine the account as to its appearance of apparent regularity, etc. Second, since a party could not testify for himself, and it often happened that a shopkeeper would be entirely unable to prove a debt, his own testimony being excluded, unless his account books could come in, a custom arose of admitting the account books of a shopkeeper in his behalf, by allowing the clerk who made the entries to use the books on the witness stand. In England, in the time of Blackstone, while the plaintiff could not testify for himself on the trial, neither could he make evidence in his own behalf by use of account books he himself had kept. But if he had a clerk or a bookkeeper, who made the entries, the books could be used as stated:

"Books of accounts or shop books are not allowed of themselves to be given in evidence for the owners, but a servant who made the entries may have recourse to them to refresh his memory; and if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence; for as tradesmen are often under a necessity of giving credit without any note or writing, this is, therefore, when accompanied with such

[5] Plymouth Colony Laws 196, *idem.*

other collateral proofs of fairness and regularity, the best evidence that can be produced.'' [6]

After the time when plaintiffs were first permitted to testify in their own behalf, by using their accounts to refresh their recollection on the witness stand, the necessity for admissibility of the accounts themselves was obviated wherever plaintiff could personally testify to the items.

In America, from early colonial days, entries in account books have been favored in evidence. Reference has already been made to two early statutes of Plymouth Colony, the earlier of which shows that admission of book accounts in evidence was customary, the latter expressly making such entries admissible.[7] The other Colonies early enacted statutes relating to the same subject. In Connecticut, a special action of ''book debt'' was in use:

''It is a general rule of law that no man shall be a witness in his own case; but to this there are sundry exceptions in civil cases, on the ground of necessity. The parties are admitted as witnesses in actions of book debt by force of statutes.[8] This provision of the statute is grounded on the necessity of the thing for, in many instances, it would be very difficult to obtain any other or better proof; but as this action is very common, and as there is a great danger in allowing a party to support a claim by its own oath, the law has provided every possible check and guard against false accounts, and has restrained the action within the narrowest limits possible. It is confined to such articles as are usually charged on book, and the book ought to be kept in a fair and regular manner and the articles truly entered at the time of the delivery or the performance of the service, so as to be consistent with and support the oath of the party; for the book is to be considered as the essential part of the evidence, and the oath of the party as supplementary to it.'' [9]

[6] Bl. Comm., (Cooley ed. 1884) Book III, 368.

[7] See statutes in Thayer, ''Cases on Ev.'' (2d ed.) 516; Plymouth Colony Laws, 77, 78, 196.

[8] Stats. (Day's ed.) 101.

[9] Swift, ''Evidence'' (1810) 81.

The Supreme Court of Connecticut, speaking upon this subject in 1853, said:

"In this State, from its earliest judicial history in actions on books for the recovery of the price of articles usually sold on credit and charged by merchants, laborers, and farmers on their account books, these books not only have been admitted on the trial, but, omitting exceptional cases, have been required as furnishing the principal and most satisfactory evidence; and this not merely in aid of the recollection of the party or his clerk..... There is a necessity for this, and it has been felt by every business community, as is proved by the laws and usages of various commercial states and nations, by which the books of merchants and others are, to a greater or less extent, relied upon by business men and courts of justice. Bookkeeping, even, has become a matter of study and science, growing out of this necessity and these usages. It is not within the power of memory to recollect the delivery of every article sold and charged on book in the usual course of dealings, and it is not expected either by the vendor or purchaser; and the very fact that the customer of a merchant receives a credit upon his books by way of a known account current, furnishes evidence that he consents that these books shall be used as a sort of record-proof of the sale and delivery of the property charged upon them—a part of the *res gestæ* of the delivery, the credibility of which depends upon the appearance of the entries, the manner and usage of the bookkeeping, and the general correctness of charges as proved by corroborative evidence." [10]

A great American judge has written thus upon the rise of the principle of admissibility of account books as evidence:

"Another exception to the hearsay rule exists in the case of entries made in the shopbook of a party to the suit. This exception is an ancient one and was well known at the beginning of the eighteenth century. It has a history of its own which it is not necessary to give in detail here. From an early period, entries in such books of matters relating to the business or trade of the shopkeeper had been admitted under divers restrictions. At a time when parties to a suit

[10] Butler v. Cornwall Iron Co. *et al*, 22 Conn. 359, 360.

could not be witnesses in it, this kind of evidence was of great importance. During the eighteenth century and the first half of the nineteenth, the reception of such evidence was hedged about with limitations and restrictions which varied somewhat in each jurisdiction. Today this exception prevails almost everywhere in some form or other, although the necessity out of which it grew—the disability of parties to testify in their own behalf—has long since been removed, and most of the limitations that formerly conditioned the reception of such evidence no longer exist. The trend of development in this country, as to this exception, has been steadily in the direction of its enlargement, so as to embrace books of account kept by anyone, and to permit the use of such books in evidence unhampered by technical rules that no longer serve a useful purpose." [11]

Greenleaf bases the reason for admitting such entries upon the *res gestæ* principle:

"Though this evidence has sometimes been said to be admitted contrary to the rules of the common law, yet, in general its admission will be found in perfect harmony with those rules, the entry being admitted only where it was evidently contemporaneous with the fact, and part of the *res gestæ*. Being the act of the party himself, it is received with greater caution, but still it may be seen and weighed by the jury." [12]

§ 32. **Admissibility of Account Books as Evidence.** The question of the admissibility of entries in books of account is always a question of law for the court to decide.

§ 33. **Entries Must Be Made in Regular Course of Business.** The entries must have been made in the regular course of business. The entries must pertain to some business or occupation or transaction wherein records of debits and credits are customarily carried upon book account. The law does not restrict to mercantile transactions the right to use of such entries as evidence, but there are limits within range of which the transaction in question must be classified. There is no question regarding the admissibility

[11] Chief Justice Torrance, "Two Centuries Growth of American Law," Yale Bicentennial Publications, Scrib. (1901) 327, 328.

[12] Greenleaf on Evidence, Vol. I, p. 118.

of items in an ordinary sales and purchase account in store or factory, nor of entries in time-book or other record of services performed. On the other hand, where a written contract is concerned, the contract itself is the proper documentary evidence, and a book account is not admissible. It has been held in some jurisdictions that a book account is not proper evidence in a suit on money loaned, since it is customary to take promissory notes in such transactions, and notes or admissions of obligations should be presented in evidence of such a debt. In regard to such transactions it should be said that in other jurisdictions it has been held that book accounts may be admitted in suits on money loaned. Whenever it is customary to carry on book account records of debits and credits between the parties in such transactions as the one in controversy, and these entries are the only documentary evidence of the debt, such entries may be fairly assumed to be admissible in evidence.

34. Preliminary Proof of Authenticity. Preliminary proof is always required. In some jurisdictions statutes prescribe the nature of this proof. It is always necessary to connect the books with the subject of the controversy. Where the entries were made by a bookkeeper and he is living and available, he will be expected to testify that the books are the regular account books of the party; that they are kept in the regular course of business; that he is the bookkeeper and as such bookkeeper, in the regular course of business and in line of his duty, he made the entries on the account; and that the entries are true and in each instance were made at or near the time of the transaction. In every jurisdiction there develops a sort of stereotyped form of procedure on proof, where it is not specially provided by statute, with which the student should familiarize himself in his own jurisdiction.

§ 35. **Entry Must Be Made at Time of Transaction.** Attention has already been directed to a quotation from Greenleaf,[13] where it is stated that the entry is admitted

[13] *Idem*, footnote 30.

because it was contemporaneous with the fact in issue and a part of the *res gestæ*. It is believed that this criterion will assist the student in determining upon the admissibility of such entries, more than any other test in regard to time when the entries were made. Let us ask: Were the entries, if not made at the moment of the transaction, made at such a near time afterward as to become a part of the *res gestæ*? The rule is, that the entries must be contemporaneous, but this does not mean instantaneous. A leading case often referred to upon this point is Chicago and Northwestern Railway Company v. Ingersoll *et al.*, where the railroad company was sued for non-delivery of a quantity of wheat and barley. The railroad company set up in defense to the claim upon the barley that it was delivered into a grain elevator designated by the agent of the plaintiff in accordance with his instructions on Saturday, Oct. 7, 1871. The elevator was burned in the Chicago fire on Sunday, Oct. 8, or Monday morning, Oct. 9. The success of the railroad company's defense would depend largely upon getting in evidence the entry in the book of the foreman in charge of receiving grain at the elevator on the day it was claimed the grain was delivered. The appellate court held that the entry was admissible. Quoting from Greenleaf on Evidence in regard to entries of the class of the one in question, the court said:

"The other class of entries consists of those which constitute parts of a chain or combination of transactions between the parties, the proof of one raising a presumption that another has taken place. Here, the value of the entry as evidence lies in this: that it was contemporaneous with the principal part done, forming a link in the chain of events, and being part of the *res gestæ*. It is not merely the declaration of the party, but it is a verbal, contemporaneous act belonging not necessarily, indeed, but ordinarily and naturally to the principal thing. It is on this ground that this latter class of entries is admitted; and, therefore, it can make no difference, as to their admissibility, whether the party who made them be living or dead, or whether he was or was not interested in making them, his interest going only to affect the credibility or weight of the evidence when

received. We are of opinion that the evidence offered under the circumstances of this case falls within the latter class defined by Greenleaf, and was admissible for all it was worth. The weight of a piece of evidence offered forms no criterion of its admissibility. If, in any point of view, it has any tendency to prove any point in issue, and is otherwise competent, it cannot be excluded because the tendency is but slight. Many such entries are capable of explanation by applying to them evidence of the usage and customs of the business." [14]

The question of what constitutes such a delay in making the entry after the transaction as to debar the entry from admissibility, is continually arising. Every case is judged by its own circumstances in this regard. What constitutes a reasonable time in one set of circumstances may be unreasonable under other circumstances. In some cases, delay of a day in making an entry has been held not unreasonable. Delay of a week has been held unreasonable and the entry excluded. The digests and law encyclopedias give long lists of cases involving this subject. It is a constantly recurring one, and the most that can be said is that an entry to be admissible should have been made within such a time after the transaction as to give it place among the *res gestæ* of the transaction. There is involved the nature of the transaction, the situation of the parties and their experience and customs in transactions of the nature of the one in controversy; likelihood of a correct entry, and other similar tests.

§ 36. **Must Be Original Entry.** The point here involved is that which under the rule of evidence calls for the best evidence available. The rule in presenting documentary evidence is that the original must be produced if available, and if it is impossible to produce the original, the reason for non-production of the original must be given, in which case secondary evidence which may be admissible or may not be admissible, may be offered with proofs of its correctness.

[14] C. & N. W. R. R. Co. v. Ingersoll *et al*, 65 Ill. 399, 404-405.

The rule is, that in entries in account books the original entry is the only entry admissible in evidence. This entry is usually the entry in the daybook or sales book, where the suit is to recover payment for goods sold and delivered. In business establishments engaged in wholesale trade or manufacturing and employing traveling salesmen, since the adoption of loose-leaf methods of bookkeeping many companies have introduced a form of order blank, supplies of which are taken on the route by the salesman. These sheets are sent in to the company, one sheet for each order, with the blanks filled in by the salesman who took the order, in his handwriting. The order-sheets on arrival are turned over to the shipping clerk who fills the order, checks shipping marks upon the sheet and passes it to the billing clerk who, after making the price extensions and the bill, sends it on to the bookkeeper. Here the sheet is placed in a binder, serial numbers stamped upon it, and the entry is posted to the ledger. Where this system is in use, no question can arise as to what constitutes the original entry of the transaction. The order-sheet becomes successively shipping list and sales book page, and remains the permanent sales book entry of the transaction.

While it is true that only books of original entry are available for use in putting in entries in evidence, yet the ledger may be of use in the court room during the trial, and may be taken upon the witness stand by the bookkeeper as a guide or index to the pages in the book of original entry where the transactions involved are to be found.

The rule requiring that the entry be the original entry, seems to mean that it be the original permanent entry, or the original entry intended to stand as the permanent charge of the item. This point is frequently arising in instances where there was some temporary memorandum made at the moment of the selection of the goods, or performance of the duty or other fact in issue which was later transferred to some book or paper and the original destroyed. There are many suits reported in which one

of the points on which the cases were carried to the appellate courts was on the admission or exclusion of entries which had been copied from original memoranda on boards or shingles or slates or sides of wagons or waste pieces of paper, and the original wiped out or thrown away.

In the decision of this point every case must be governed by its own circumstances. What constitutes admissible evidence is always a question of law for the court to decide. In a Massachusetts case which will be referred to later, teamsters carting sand chalked a mark upon the sideboard of the cart for each load drawn. Each night the number of loads drawn was reported to the owner of the teams. He verified the report by count of the marks on the cart and made a like number of marks in a memorandum book in the presence of the teamsters, and washed off the chalk marks on the cart. The court held that the marks so copied into the memorandum book were admissible as original entries.

There is an interesting case upon this point in the New Hampshire reports, which is frequently cited in briefs on this subject. The quantity of timber which one Ellison drew was in dispute. It was proved that said timber had been got out and molded by a gang of men under one Raitte, and then surveyed by him, and the contents of each stick marked upon the end with red chalk. Ellison testified that in drawing he passed by his own house, and as he drew each load he took down upon a slate the quantity in each stick, and added up the several quantities and gave their sum to his wife or daughter, who entered it in his presence upon a memorandum book, and he then looked at the entry upon the book and saw that it was correct. Eight loads were thus entered upon the book, three by his daughter and five by his wife. He could not recollect the amount in either load. The court ruled that the entries in the book were competent, and they were read to the jury. The wife and daughter were afterward introduced, and they confirmed the testimony of Ellison and testified that they put down the sums as he gave them,

and after each entry compared it with the slate and found it to agree with the slate. It appeared that the figures upon the slate were not preserved, but were rubbed out after their sum had been carried to the book. The appellate court held that the memorandum book was admissible. "It was so far an original entry as not to be objectionable on account of the transfer of the entries from the slate." [15]

§ 37. **Form of Entry.** Technical accuracy in form of entries is not required for their admissibility as evidence. Obviously, it would be impracticable to insist upon certain forms, or even upon a general following of some system of entry, as cases are constantly being tried in which the party had no other bookkeeper and knew nothing about approved methods of bookkeeping.

The most that can be required in all cases is that the entries be such that they are intelligible to the court and jury in the light of the explanations given by the party offering the same. Courts take judicial notice of the varying degrees of education of our people. A manifest regularity and apparent honesty of intent in making the entries is of more importance than anything else. There is an interesting case in the Massachusetts reports illustrating this point. Miller made a contract to furnish Shay sand to be used in building. The suit was to recover for two hundred and fifty-three loads of sand. Miller was unable to write and could read but little. He delivered some of the loads of sand himself. He offered in evidence a memorandum book. He testified that each time he delivered a load of sand to the defendant he made a mark in his book. Two teamsters working for him also delivered some of the loads, and he and they testified that when each load was delivered by them they made a chalk mark upon the side of the cart and at night reported the number of loads to Miller and he made a mark for each load in his book. The court holding that the entries in the book were admissible rendered the following opinion:

[15] Pillsbury v. Locke, 33 N. H. 97, 103.

"The small account book kept by the plaintiff showing the number of loads of sand delivered, was properly admitted in evidence. It was a rough and imperfect book of account, but it was honestly kept and was the record of the daily business of the plaintiff, made for the purpose of establishing a charge against another. Such a book, supported by the oath of the plaintiff, is competent, though the account was kept only by marks, the plaintiff being unable to write. These entries are intelligible and no more liable to fabrication than other entries. It is a book of original entries, though the marks were transferred from marks made on the cart by the servants of the plaintiff who delivered the sand." [16]

In the lower courts this matter is continually arising where suits are being tried involving small amounts, such as actions on grocery bills, on wages due, moneys due for job work, etc. The parties are often unable to speak our language very well or to write it, sometimes unable to write in any language except such as that used in the book in the Massachusetts case above referred to. It is the duty of our courts to give parties the benefit of all the legal remedies they are in justice entitled to. Sometimes resort must be had to an interpreter to translate spoken language in order that the entries offered may be understood as the party intended. If they appear to have been honestly made, and if they constitute a series of charges against another person and are relevant to the matter in issue, they will not be excluded simply because of the fact that the maker did not understand the science of bookkeeping.

In a Delaware case, a notched stick was held to constitute a sufficient account to be entitled to admission in evidence.[17] Marks on boards, shingles, slates and book covers have been admitted in evidence. In one opinion in a case where this subject was involved, the court said that there was no apparent reason why the side of a barn door might not be admitted if it showed numbering marks of loads

[16] Miller v. Shay, 145 Mass. 163.

[17] Rowland v. Burton, 2 Harr. (Del.) 288.

delivered into the barn, and testimony to the accuracy of the marks were properly presented.

§ 38. **Delays in Making Entry.** In this connection attention should again be drawn to the requirement which has already been explained in section 35. When the form of the entry is such that it has apparently been transferred from other memoranda, the question always arises as to the time when the transfer was made and the likelihood that as transferred it constituted a correct statement of the original charge. In this, as in other matters involved, every case must be judged by its own circumstances. Certainly, an entry prepared for use in court and made after the controversy had arisen, would be excluded. It is contemplated in allowing the use of written memoranda that at the time it was made it represented the charge by one party against another, uninfluenced by an immediate purpose to use it as evidence in a suit at law. Delay of a few hours may be ground for excluding entries; delay of two or three days has been held in some cases not ground for excluding the entries. The first entry made must always be so near the time of the fact in question as to come within the *res gestæ*. The effect of lapse of time before a copy offered in evidence was made from the first entry, is a question to be decided by the court in view of all the circumstances in each case.

§ 39. **Erasures and Alterations.** Erasures and alterations in an account offered in evidence will not necessarily require exclusion of the entries from admission in evidence, but they create a suspicion as to the honesty of the entries, and may lead the jury to throw such accounts out of consideration as unworthy of any weight as evidence. If the account has been so altered as to be apparently dishonest, it is not admissible. If there are many erasures and the account appears to be made up anew, even although the plaintiff testifies that the changes are only corrections in errors made in entering the items, the better course seems to be to draw the line of exclusion and require the party to prove the facts by other testimony.

In this connection it is of assistance to remember that the law requires that the entry be the original permanent entry. If a party has corrected his original entry, or has altered it so that it is no longer the original entry, he has no one else to blame if his account is excluded by the court. Where there are errors in the original account, the proper way in which to handle the situation is to let the entries stand as they are originally made, and when the account is laid in evidence the errors may be pointed out and allowances made for the same in the amount claimed. An attorney should never suggest nor allow any changes of any kind whatever to be made in a book account after the same has been submitted to him for use in court. It is better that there be some involuntary error which must be called to the attention of the court and jury on the trial, than that the account be submitted showing erasures and alterations.

Wherever there are erasures or alterations in an account they may be inquired upon by the opposite side. An erasure capable of being explained in such a way as to take away suspicion of its honesty will not operate to the exclusion of the account. Where such erasure was made by suggestion of the attorney for the party, or with his knowledge, and after the controversy has arisen, it throws a color of suspicion on the whole account, and places the case of the party in suspicion with the jury. In many of the larger business establishments, there is a rule that there shall be no erasures of any sort whatever upon any book accounts. If a bookkeeper makes an error in entering an item, writes a word or enters some figures wrongly, instead of erasing the wrong word or figures, a red line shall be drawn through the erroneous entry and the correct word or figures interlined just above the wrong entry. This method obviates the necessity for erasures, and the account shows on its face the whole entry with all changes. Any alteration in an original entry gives rise to questions concerning the integrity of the testimony offered, and counsel should fortify their evidence in such cases, where possible

and desirable, by personal testimony to the facts in question.

§ 40. **Form of Account Book.** It is not required that the account book offered be of any stated form, nor that the ruling on the pages be such as is customarily used and under the rules of proper bookkeeping would be used, for such entries as are offered in evidence.

The cases upon this subject lay down the rule that the book must be the account book of the party. But just what constitutes an account book is a subject on which there is a great deal of diversity of opinion, and cases will be found where memoranda in similar situations have been admitted in some courts and excluded in other courts. Memorandum books have been frequently excluded on the ground that they were not account books. In other cases they have been admitted on the ground that they were account books. As has been stated, even entries on shingles and boards have been admitted. The test seems to be as to the honesty of the entry, and the intent to constitute it the record of a charge against another party. Ordinarily, the book of original entry, sales book or cashbook contains pages ruled in what is known as journal ruling, having a head line at the top of the page, date columns at the left, and dollars and cents columns at the right of each page. This is the ruling of the daybook which was the original of the original entry books. However, if the account book offered was without ruling on the pages, or if the ruling was that known as ledger ruling, it would not, on this account, be excluded. "It is not necessary that a book account should be kept in any particular form, though it may affect its credit that it is kept in such form." In this case a lawyer's account book was offered after his death in proof of his claim against the defendant. It was objected to, on one ground, that it was kept in ledger form. The appellate court held that it being a book of original entry, it was admissible.[18] On the other hand, an account offered in ledger form, if not shown to be an original entry,

[18] Wells v. Hatch, 43 N. H. 243.

is not admissible. "Standing alone, and unsupported by any other testimony, the so-called book account against Oscar Huston as contained in the ledger of Robert Huston" was incompetent. "It does not purport to be a book of original entry."[19] Whenever a question arises as to the admissibility of entries in books not customarily used for such purposes, it would seem that the test might be laid down as follows: Are the entries in this book such in all respects, that if presented in such form as such entries are customarily made, they would be admissible? If so, it would seem that they should be admitted, whether the book be in form a daybook with journal ruling, a ledger used for original entries, or any other ruling, or no ruling at all.

The question arises again in another manner when the form of the book itself is objected to. This objection is directed toward the use as an account book of anything except a bound book. Loose sheets of paper have in some instances been admitted as an account book; in other cases they have been excluded. When the present day loose-leaf systems of bookkeeping came into general use in the early '90s, contests were waged everywhere regarding the admissibility of entries on original charge sheets simply retained in binders. It was contended that admissibility was granted original entries because an opportunity of cross-examination was afforded as regards regularity of entry, and there was no safeguard against insertion of sheets at any time in such loose-leaf binders. However, the courts held that such entries were subject to the same tests on cross-examination as those in permanently bound books, and held that the fact that the book of original entry consisted of loose leaves held together in a binder, did not deprive it of the character of an account book which was admissible in evidence. Comparison of the paper in color and appearance with the other sheets in the binder; comparison of the ink upon the entry offered with the other entries; comparison of handwriting, and other tests have been deemed sufficient

[19] Huston's Estate, 167 Penn. St., 219.

to guard against abuse of the privilege of placing such account books in evidence.

On the other hand, it will sometimes happen that an account book with entries presenting every appearance of genuineness and good faith, will be successfully attacked upon some extraneous ground. The writer tried such a case a few years ago, in which his client presented an account book containing more than a hundred pages of accounts, apparently in proper form in all respects, and nothing about the accounts to create suspicion. The client told the writer the story of a daughter in the family acting as bookkeeper, making the entries in this book each evening on reports to her from her father. The writer went into court without any idea that the book was other than as represented. The opposing attorney was advised by his client that to his knowledge the plaintiff had no account of the sort a few months previous to institution of the suit, and certainly the account was written up long after the transactions occurred. The defendant brought an expert blank-book maker into court, who examined the book during recess, and declared that to his personal knowledge the book was not in existence at the time of the transactions purporting to be recorded therein. On the witness stand the expert showed comparisons in natural discoloration of leaves in books of the same kind used in substantially the same manner as it was testified the book in question had been used, comparisons of wear and tear on the cover and binding, and finally wound up by testifying that he worked in the paper factory making the paper composing the pages at the time the water-mark therein was used, and that that mark was not used until at least two years after the time covered by the entries in the book. The writer procured another expert to rebut these statements, who instead of contradicting them, in private consultation confirmed everything the other expert had said. The writer's client lost his case. After the trial, the writer learned that the book had been bought in a department store a few months before the trial and the entries written

in at different times so that there might be a variation in the color of the ink on the pages to give the entries the semblance of genuineness. Clients do not generally willfully mislead or deceive their counsel in such matters, but this incident has been related here to illustrate a word of caution which it is deemed necessary to give in regard to the handling of accounts as evidence. Counsel should carefully examine the books and entries before the day of the trial and thoroughly examine his client as to the persons who have made the entries, their present whereabouts, their availability to give personal testimony in court, or the necessity for taking their depositions elsewhere. Accounts, attempted to be laid in as evidence and excluded by the court, do more harm than any benefit from their presentation can offset, and should be kept out of court. No words of advice in giving this word of caution could be too strong. More cases are lost through inefficient and faulty preparation than from any other one cause, and documentary evidence of any sort in the hands of the adversary becomes a dangerous instrument if there are in it vulnerable points.

§ 41. **Admissibility of Testimony of Expert Accountant.** It frequently happens that a cause of action involves a large number of transactions, extending over some considerable period of time, bringing under review mutual accounts running back several years. In such instances, the trial of the case might consume an unreasonably long time if the parties were to be obliged to present their evidence on book accounts in open court, item by item. The court has power to admit testimony of a qualified expert accountant in cases where such procedure seems warranted by the circumstances.

"When the facts sought to be proved are of such character (such as could have been ascertained by books of account), and the books or accounts are voluminous, so that the examination of each item during the trial would consume much time and it would be difficult for the jury to understand the accounts, or make the necessary computation, the court in its discretion may permit a competent witness who has

examined the books with reference to the point sought to be established to testify to the result of such examination, or to present schedules verified by his testimony, showing the details of the computation to be made. But in such cases, unless there is some legal excuse for not producing the books of account from which the witness has obtained the results testified to, they must be produced, if required by the opposing party, for examination, or to enable him to cross-examine the witness." [20]

§ 42. **Depositions on Book Accounts.** By statute, provision is made for taking depositions in cases where witnesses live more than a stated distance from the place of trial, and a deposition is sometimes resorted to in cases where a former bookkeeper's testimony is desired and it is doubtful as to whether or not he can be had at the trial. Where such a deposition is taken, either the deposition must be relied on for that testimony, or the bookkeeper's presence in court must be procured. Both cannot be used. "A deposition giving testimony regarding accounts on book is not admissible where the witness himself is present in court, ready and willing to testify in the case." [21]

§ 43. **Entries Made Admissible by Statute.** Where the person who made the entries has since died, provision is everywhere made by statute allowing such entries to come in as evidence as memoranda left by deceased persons. In a case illustrating the working of such a statute it appeared that the deceased made a memorandum on a slate two days after a conversation regarding the matter in issue "and subsequently made another upon paper, which is the one offered in evidence. The statute (in Connecticut) is quite comprehensive; it puts no limit to the number of memoranda which a man may make and leave behind him concerning a particular transaction. As many as he leaves are admissible in evidence, each for what it weighs. Every memorandum so left is an original and it is admissible by reason of its own existence; not because it is the first of a series, nor because it is a copy of a pre-

[20] Elmira Roofing Co. v. Gould, 71 Conn. 631, 632.

[21] Handy v. Smith, 77 Conn. 166.

vious one, but simply because the deceased made and left it. If there be several memoranda concerning the same transaction, and each varies from every other, or if all are in exactly the same language—all are alike admissible and counsel will draw such inferences from and base such arguments upon the variance or the coincidence as the facts will support. Therefore, as the relation of original and copy is not established by statute between the memorandum on the slate and the one upon paper which was offered in evidence, the law which governs that relation is not applicable here. Nor does the statute put any limit to the length of time which may elapse between the doing of an act and the making of a memorandum concerning it. Days, weeks, even years may intervene. If made and left, it must be admitted and weighed in view of all the circumstances attending it." [22]

Statutes similar to the one in Connecticut under which the Craft's case just referred to was decided, are now in existence in most of the States. The rule admitting memoranda of deceased persons is well settled in the law of evidence.

§ 44. **Entries May Be Used to Refresh Party's Recollection.** Much of the discussion found in the decisions of cases involving the admission or exclusion of accounts is now obsolete, as the privilege of a party to testify for himself wrought an entire change in the situation as regards the getting of his book accounts into evidence in court. He can now take his accounts upon the witness stand and refer to them "to refresh his recollection".[23] Instead of asking their admission as a privileged class of exceptions under the hearsay rule, he now verbally testifies to the transactions, incorporating in his testimony all that his accounts contain that is relevant to the issue. The cross-examination covers any or all parts of his testimony including that part relating to the account. Instead of standing at the bar, excluded from the privilege of saying a word in his

[22] Craft's Appeal from Probate, 42 Conn. 146, 153, 154.
[23] 2 Wigmore on Evidence, § 1560.

own behalf in regard to the merits of the controversy, praying that his book accounts may be received to speak for him, the party now enforces and supplements all that his books can do for him by his own statements and explanations, and has the opportunity of using all the evidence he has in book accounts, where such accounts are apparently honest and kept in the regular course of business.

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The theoretical man knows *why*. The practical man knows *how*. The man who would lead must know why *and* how.