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BAR EXAMINATION REVIEW

BY

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PREFACE.

The purpose of the present book is to serve as a final review for a student about to take a state bar examination. The student studying this book is, therefore, supposed to have had a regular course in all the subjects upon which the bar examination is to be based. It is believed that all the subjects upon which questions are asked in the bar examination of any state (with the exception of Louisiana, whose system of law presents striking differences to those of all the other states) are here treated. Some of the subjects upon which examinations are only given in a few states have been treated more briefly for this reason.

The author has particularly endeavored to discuss such points of law as his ten years' experience in preparing students for bar examinations has taught him are the most essential to the student at this time. The greatest amount of space has, in the main, been given to those subjects where a student is most apt to be deficient.

The form of questions and answers used in this book is believed to be the only form in which printed questions and answers can be of real benefit to the student. The teaching of the text by questions and answers and the necessary repetitions connected therewith involve an unnecessary waste of time and space, while the natural result of following questions with the answers on the same page is almost invariably to give the student a much higher idea of his knowledge of a subject than is justified by the facts, resulting in the majority of cases in a real injury to the student rather than benefit.

The Appendices, in the volume, all contain matter which should be reviewed by the student at this time.

ALBERT H. PUTNEY.

Chicago, August, 1910.

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PUTNEY'S BAR EXAMINATION REVIEW

CHAPTER I.

CONTRACTS.

Blackstone defines a contract as "an agreement, upon sufficient consideration to do, or not to do, a particular thing." This definition was adopted by Chief Justice Marshall of the Supreme Court of the United States.

The following five requisites are necessary for the creation of a binding contract:

- (1) Competent parties.
- (2) An agreement between these parties reached by an offer made by one and accepted by the other.
- (3) This agreement must be for a lawful purpose.
- (4) It must be based upon a consideration, and,
- (5) It must be made with all the formalities required by law.

Parties to a Contract.

There must be at least two parties to every contract, and there may be any larger number. Any person can enter into a contract who does not fall within one of the classes of exceptions. The following classes of persons lack the power of contracting either wholly or in part:

Minors.

Persons who are insane or otherwise of unsound mind.

Drunken person.

Spendthrifts, for whom guardians have been appointed.

Married women.

A minor is a person who has not reached the legal age fixed by the law of the state or country in which he lives. Under the Common Law, this age was twenty-one years, and the same age is still fixed for males in each of the

states of this country. In the case of females the legal age is eighteen years in some of the states, and twenty-one in the balance.

In general, the contracts of a minor are voidable. The old doctrine that certain of the contracts of an infant were absolutely void has now been abandoned. It is generally said that an infant is liable on his contracts for necessaries. In reality, however, an infant is not liable, in such cases, on the contract which he has made but on a quasi contract for what the goods were reasonably worth. The contract price is *prima facie* the value of the necessaries purchased, but this may be rebutted. The term necessaries is a variable one, its exact limits varying according to the situation in life of the particular infant; in general a rather liberal interpretation will be given to the term. An infant is also liable on all quasi contracts and on contracts made in settlement of any tort which he has committed, provided the settlement is a fair one. An infant is bound on a contract of enlistment in the army, on a bastardy bond, on a contract of marriage (provided he was over the age of consent)—but not upon a promise to marry.

At common law married women had no power of contracting. Equity first gave them this power in a limited degree with relation to their separate estates, and by statute nearly all disabilities in this line have been removed. In Illinois at the present time, a married woman has full power of contracting, except that she cannot enter into a contract of partnership without the consent of her husband. In some other states a married woman may make any contract except that of suretyship.

The contract of an insane person is, in general, void unless made in a lucid interval. A contract made with an insane person before he was adjudicated insane, will generally be upheld where no unfair advantage was taken of such insane person, and his condition was unknown to the person dealing with him. Contracts of persons not adjudicated insane, but who are of unsound mind, are generally held to be voidable. Any insane person is liable (on an

obligation on a quasi contract) for the necessaries furnished to him.

A contract is voidable when one of the parties thereto was so drunk at the time of the making of the contract as not to understand the nature of his act.

Contracts with aliens are binding, subject to being suspended by the breaking out of war between the countries of which the different parties to the contract are citizens.

Offer and Acceptance.

A contract can only be made by means of an offer on one side followed by the acceptance of such offer on the other. An offer may be either express or implied. An offer after being made may be withdrawn at any time by proper notice, unless a consideration was given for the holding the offer open for a certain period. If any offer is not withdrawn it remains open until it is accepted or rejected, or until the expiration of the time for which, by the terms of the offer, it was to remain open; or until the expiration of a reasonable time, if no time was specified during which such offer was to remain open.

The acceptance of an offer, which is still open, completes a binding contract. It is too late to withdraw an offer after it has been accepted. Acceptance may be either express or implied. An acceptance of an offer in order to complete a contract, must be of the exact terms of the offer. A modified acceptance is in reality a rejection of the first offer, and the making of a new offer in turn.

When an offer is made by mail or telegraph the acceptance may be by the same instrumentality, and the mail or the telegraph company is considered the agent of the party making the offer. When a contract is made by mail the contract is completed (except in Massachusetts) as soon as the letter containing the acceptance has been mailed.

Illegal Contracts.

A contract must be for an object permitted by law. The law will not enforce an agreement for the accomplishment

of an object which the law prohibits. The most important illegal contracts, or contracts against public policy, are the following:

Usurious contracts.

Wagers.

Sunday laws.

Agreements in restraint of trade.

Ultra vires agreements.

Agreements which tend to prejudice a nation in relation with other nations.

Agreements which tend to injure the public service.

Agreements which tend to encourage litigation.

Agreements which tend to obstruct justice.

Agreements which involve immorality.

Agreements in restraint of marriage.

Agreements, lawful in themselves, which tend to further an unlawful purpose.

A usurious contract is one calling for the payment of more than the rate of interest permitted by law. The legal rate of interest, the highest permissible rate, and the penalties for usury are fixed by statute and vary greatly in the different states.

It is not usury to charge bank discount, nor (according to the weight of authority) to charge compound interest. Interest laws do not apply to loans of chattels.

Gambling contracts were legal and enforceable at common law, but are now made illegal by statutes in the different states. In a very few states such contracts have been declared illegal independent of statute.

Agreements in total restraint of trade are invalid as against public policy. Agreements in partial restraint of trade, however, may be upheld provided the restrictions are reasonable as respects limits of time and space. What will constitute such reasonable limits must depend upon the facts of each particular case, and upon the nature of the trade or occupation concerned. The courts are now much more liberal than formerly in upholding such agreements.

Contracts to be binding must be based upon some con-

sideration. An exception to this rule is found in the case of contracts under seal, which are enforceable without proof of a consideration. This is sometimes explained by the statement that the seal purports a consideration. This is incorrect. The right to enforce a sealed contract by means of the old action of covenant, was fully established centuries before the doctrine of the necessity for a consideration came in with the action of assumpsit. The extension of the scope of this latter action carried with it this necessity for a consideration, but as assumpsit never was extended to cover the field of covenant, the necessity for a consideration never became applicable to the case of sealed instruments.

The various forms which a valid consideration may take are thus outlined by Mr. Street in his work on "Foundations of Legal Liability":

"With the death of Elizabeth (1603) the formative period in the history of consideration came to a close and English contract law was ready to enter upon its modern career. It will be noted that several forms of consideration had now appeared. First in importance is that detriment to the promisee (1505) which is necessary to give validity to the simple unilateral promise. This is the original form of the assumptual consideration, and is the type which all other forms of consideration are commonly but erroneously supposed to be resolvable. Next in importance is the consideration of mutual promises (1588). Least notable of the three different types of the assumptual consideration is the consideration of legal duty or precedent debt. (Cir. 1550.)

"It is not possible by any valid process to resolve these different sorts of consideration into one. No present detriment to the promisee is found either in the consideration of legal duty or in mutual promises. In the one case the detriment is past, having been incurred when the debt was created. In the other there is a contemplated detriment to both parties, i. e., future performance of the respective promises; but the contract is valid from the time the mu-

tual promises are made. It is indispensable that consideration in the sense of detriment should concur with the promise.

“Of the recompense, or benefit, to the grantor of real property, which is necessary to pass the use in equity to a stranger; and of love and affection, which is sufficient to support a covenant to stand seized to the use of one closely related by blood or marriage, we take no further account, as these are not assumptual considerations.”

A mere benefit to the promisor by itself, is not sufficient to constitute a valid consideration.

Mutual promises are each the consideration for the other. Forbearance from exercising a legal right is a valid consideration, but forbearance from doing something which the party has no right to do, or a promise to do what one is already bound to do are neither of them a valid consideration. The payment of a part of an undisputed debt is not a valid consideration for the discharge of the whole debt.

Moral obligation is not a valid consideration. The theory upon which a promise to pay a debt barred by bankruptcy, or by the statute of limitations, is enforced, is not that the moral obligation to pay such a debt constitutes a consideration, but is based upon the ground that such promise waives a personal defense, which the law allows the party, but does not compel him to take advantage of.

Marriage is a valuable consideration, and will uphold a promise under the same circumstances and conditions that other valid considerations will.

Statute of Frauds.

A contract to be valid, or at least to be enforceable at law, must be made with all the formalities required by law. By far the most important of these requirements are those contained in the Statute of Frauds, requiring certain contracts to be in writing. The original (i. e., the English) Statute of Frauds was passed in 1676 to go into effect in 1677. The two important sections of this act are the 4th and 17th, the text of which 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; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; (5) 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.”

“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 of payment, or that some note or memorandum in writing be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”

Practically all the states in this country have adopted the fourth section of this statute (either verbatim or in substance) and a majority of the states have provisions in their own Statute of Frauds similar to the seventeenth section as above quoted. Illinois is one of the states which have not adopted the seventeenth section. The English Statute of Frauds and the Statute of Frauds in nearly all of the states, merely provide that contracts of the classes referred to shall be unenforceable unless in writing. In a few states, however, it is provided that the contracts mentioned, unless in writing, shall be void. The distinction is of importance under some circumstances.

Contracts can bind only the parties who have assented thereto, either personally or by their proper representative. The nearest exception to this rule is found in the case

where by the terms of a contract property is transferred to a third person, who without his consent finds himself in the position of a trustee.

A contract may confer enforceable rights upon a third party. The method of enforcing such rights will vary according to the conditions of the case and the practice of the state.

If a contract was entered into in reliance upon the personal skill or character of one of the parties thereto, it cannot be assigned; otherwise it may be.

Conditional Contracts.

A conditional contract is one which only becomes operative upon the happening or not happening of a certain event, or which is terminated by the happening or not happening of some event.

Conditions may be either (1) precedent, (2) concurrent, or (3) subsequent. A condition precedent is one which must be performed before a contract becomes operative. Conditions concurrent are conditions on each side which must be performed simultaneously. Conditions subsequent are those, the breach of which will terminate the liabilities under a contract of the person for whose benefit the condition subsequent was inserted, or terminate the rights of the other party to said contract.

Defences.

Among the important defences which may be set up against suits on contracts are mistake, fraud, duress and undue influence. Mistake renders a contract void, while fraud, duress or undue influence renders it voidable. (Mistake, fraud, duress and undue influence will be more fully treated in the Chapter on Equity Jurisprudence.)

Discharge of Contracts.

A contract may be discharged, either wholly or in part, either by act of the parties or operation of law. Discharge by act of the parties takes place either when a contract is

performed according to its terms by both parties; or when a new contract or agreement is made between the parties. This new agreement may either take the form of mutual releases or the substitution of a new contract. Where one party to a contract repudiates it, or renders it impossible for the other party to perform it, such other party thereto is released from all liability thereunder.

Contracts may be discharged by operation of law by (1) death, (2) judgment, (3) bankruptcy, or (4) lapse of time.

Contracts of a special personal character are discharged by death, but not those involving property rights.

By a judgment on a contract the contract becomes discharged and merged in the judgment.

Bankruptcy discharges debts, not contracts; when, however, the obligation of a contract is solely to pay a certain sum of money, a discharge in bankruptcy will discharge the contract.

Under the statutes of limitation in the several states, liabilities arising under a contract will be discharged (or perhaps better, rendered unenforceable) after the lapse of a certain period of time, during which there has been no payment made, or promise to pay given.

CHAPTER II.

AGENCY.

Agency is the legal relation created by contract (either express or implied) between two parties, by virtue of which one party—the agent—is employed and authorized to represent and act for the other—the principal—in dealings with third persons.

The distinguishing features of an agent are (1) his representative character, and (2) his derivative authority. In these respects an agent differs from a servant.

Classes of Agents.

A universal agent is one who is authorized to transact all of the business of his principal of whatever kind.

The authority of a general agent is limited to the representation of his principal in business of a particular kind, or in a particular place.

A special agent is only authorized to represent his principal in a particular transaction.

An actual agent is one appointed as such by the principal.

An ostensible agent is one whose authority the principal is estopped to deny.

A *del credere* agent is one who guarantees the payment to the principal of accounts due to the principal, arising out of contracts made by such agent.

An auctioneer is a person whose business it is to sell property at public sale to the highest bidder. An auctioneer furnishes, to a certain extent, an exception to the rule that no person can act as agent for both parties to a contract.

Brokers and factors represent other persons in bargaining for the sale or purchase of property. A factor has the goods in his possession, while a broker does not.

A *supercargo* is an agent who accompanies a cargo on its voyage with authority to sell such cargo. He also, gen-

erally, has the authority to purchase a cargo to be taken back by the ship on its homeward voyage.

An attorney at law is an agent who represents his principal in the trial of cases in court, and in other legal matters.

Creation of Agency.

Any person who has the general power of contracting may appoint an agent. Any act which a person may legally do himself, he may do through another, except in those cases where the right of the principal to do a certain act is one personal to himself, e. g., the right of an attorney at law to try a case in court. Generally a person cannot delegate to another a power which has been delegated to him. Thus an agent cannot appoint a sub-agent unless the duties to be performed by the sub-agent are either (1) ministerial, or (2) technical and of a character for whose performance the original agent is not competent.

An agent may be appointed in several ways:

(1) By express appointment. This appointment may generally be either written or oral. If the agent cannot possibly carry out the terms of his agreement in one year, the contract creating the agency must be in writing. If the agent is to execute a sealed instrument, his appointment must be under seal.

(2) By authority of law, e. g., the authority of a wife or child, deserted by the husband or father, to bind such husband or father for necessaries furnished to them.

(3) By necessity; e. g., the power of a ship's master to bind the owner of the vessel by contract for necessary repairs.

Furthermore, even although the relation of agency does not in fact exist, the alleged principal may be estopped from denying the existence of the relation, when he has held out the alleged agent as being in fact his agent, or where he has allowed such alleged agent to represent himself as his agent, without objection.

A person may also ratify the acts of another person,

who has held himself out as being an agent of such first person, after the acts have taken place.

The act ratified must be one that the principal could have done, and could have delegated to another, at the time it was done. Torts and voidable acts may be ratified, but, void acts or illegal acts cannot be ratified. One partner may ratify for the firm. A corporation may ratify the act of an agent. An infant cannot ratify the act of one claiming to be his agent.

The conditions of ratification have been thus summarized:

“(1) Principal must be identified. (2) Principal must have been in existence when act ratified was done. (3) Principal must have had power to do the act ratified and still possess such power. (4) Act must have been done by the assumed agent as agent and not as principal. (5) Principal must have knowledge of material facts; unless he intentionally and deliberately assumes the contract without inquiry. (6) Principal must ratify whole transaction. (7) Rights of third party must be prejudiced when conduct of principal is sought to be construed as a ratification. (8) The burden of proof is upon the party alleging a ratification.” (Mining and Lackner's Analysis of the Law of Agency.)

A ratification may be either express or by implication. An implied ratification will take place, when the principal accepts the benefits resulting from the acts of the agent, or sues on the contract made by the agent, or acquiesces in the use of his name as principal by the agent.

An express contract of agency may be proved in the same manner as any other species of contract. The existence of an agency cannot be proved by the declaration of the agent, but the agent can testify in court, as to the existence of the agency, the same as any other person.

Rights, Duties and Liabilities of Principal and Agent.

The agent occupies a fiduciary relation towards his principal and it is his duty to exercise the highest possible degree of honesty and good faith towards him. Thus, the

agent may not act both for principal and third party without the consent of each; if he is authorized to purchase he does not have the right to purchase from himself; nor if he is authorized to sell or lease may he become purchaser or lessee.

An agent must exercise a reasonable, or average, degree of ability and carefulness. If the agent holds himself out as an expert in a certain line, he is bound to exercise the average degree of ability to be expected from an expert in such line.

An agent must account for all money, and other property of his principal which come into his possession, and when necessary must keep accurate books of account showing the business of the agency.

An agent must also give notice to his principal of all facts material to the agency which come to his notice, and must obey all the lawful instructions of his principal as to the agency.

An agent is liable to third persons for all torts which he may commit, and all misrepresentations which he may make. The principal is also liable for all the torts or misrepresentations of the agent, which take place in the regular course of business of the agent.

If the agent contracts in his own name he may sue the other party to the contract in his own name and such third person may sue the agent. If the third person, however, discovers who the undisclosed principal was, he may sue either the agent or the principal.

The agent is entitled to be reimbursed by the principal for all the expenses properly incurred in the course of the agency, and also to be paid for his services unless there was an express agreement that such services were to be rendered gratuitously. If there is an agreement as to what the agent is to be paid, he is to be paid according to the terms of such agreement; if there is no such agreement the agent is entitled to receive what his services are reasonably worth. If the agent is prevented from completing his agency through some wrongful act of the principal he may

either: (1) consider the contract as rescinded, and sue for the reasonable value of his services; or (2) bring an action for damages for breach of contract; or (3) wait until the expiration of the time, during which the relation of the agency was to continue, and then bring an action for the actual damage sustained.

An agent cannot recover for his services if (1) he wrongfully abandons his employment, or (2) if he acts for both principal and third party, without the knowledge and consent of both, or (3) if the object of the agency was unlawful.

Termination of Agency.

An agency may be terminated either in accordance with the terms of the original agreement or by the after acts of the parties, or by operation of law.

A contract of agency is terminated according to the terms of the original agreement, either when the time during which the agency was to continue has expired, or when the purpose of the agency is accomplished.

An agency is terminated by the acts of the party either when the agency is revoked by the principal, or renounced or abandoned by the agent, or terminated by the mutual consent of the parties.

A principal has always the power, though not always the right, to revoke an agency at any time unless the agency was coupled with an interest or given for a valuable consideration. If a principal without right revokes an agency he is liable in damages to the agent.

An agent can always renounce the agency; but if he does so contrary to the terms of the contract he is liable in damages to the principal. An agent may abandon the agency if required to do an illegal act.

An agency is terminated by operation of law in several different ways.

The death of either party will terminate an agency, except where it is coupled with an interest, or where (in the case of the death of the principal) the contract is entire and has been partly executed.

At common law, the marriage, of a single woman, will terminate any contract of agency to which such woman was a party.

The insanity of either party suspends the operation of the relation of agency during the continuation of such insanity.

War, between the country of the agent and the country of the principal will terminate a contract of agency.

The bankruptcy of the principal will not ipso facto terminate a contract of agency, but it will be a ground which will justify the agent in terminating it, and the agent can do no act relative to the estate of the bankrupt during the continuation of bankruptcy proceedings.

The bankruptcy of an agent will not terminate the agency, unless such bankruptcy will interfere with the proper performance of his duties as agent.

CHAPTER III.

PARTNERSHIP.

Partnership is the relation existing between two or more persons, who have contracted together to carry on some business or enterprise in common.

Attempts have often been made to lay down some one, always present, characteristic as the distinguishing mark of a partnership. This, however, is impossible. There is no one element always to be found in the case of every partnership. Common ownership of the firm's property, and sharing of profits and losses are common characteristics of partnership, but are sometimes lacking. The most important general characteristic of a partnership is that of the mutual agency of the partners, and, in fact, the law of partnership is often referred to as a specialized branch of the law of agency; but, in the case of a special partnership, a special partner is not an agent of the partnership or of the other partners.

“The existence of a partnership is to be proved like any other competent evidence and subject to the usual rules of evidence. * * * Proof of such a contract is, of course, proof of partnership. As hereinbefore seen, the ultimate fact to be proved is a common ownership or joint proprietorship of a business and its profits. Any evidence having a legitimate tendency to explain the nature and ground of profit sharing is admissible as tending to prove or disprove partnership.

“A person alleging partnership between himself and other persons is held to a stricter degree of proof than when the question arises as between alleged partners and third persons, as partners are presumed to have the means of proving their own partnership. A partnership between third persons may, of course, be proved in the same manner as a partnership is proved between the partners themselves,

but as a stranger has not the same means of knowledge, he is not held to the same strictness of proof as in establishing his own partnership. Thus, much is admissible to establish a partnership in favor of third persons which would be wholly inadmissible to prove a partnership *inter se*, and much, if not most, of that which would be equally admissible for either purpose, such as acts of the parties, will have much more decisive weight and significance to prove a partnership against defendants than to prove the like partnership in their favor if plaintiffs. So a third person seeking to hold one liable as a partner need not prove an actual partnership, but it is sufficient to show a liability as partner by holding out." (American and English Encyclopedia of Law.)

A true partnership can only arise from a contract between the partners. Each partner must contract with each other partner, and must agree to the admission of each other partner into the partnership. From this grows the rule of law known as *delectus personarum*, which prohibits one partner from assigning his interest to a third person so as to make such person a member of the partnership. This rule of *delectus personarum* does not apply in the cases of mining partnerships or of joint-stock companies. Nor is this rule violated by the formation of a subpartnership, by which one partner makes a contract with a third person, by which contract he agrees to divide his profits from the partnership with such third party.

Firm Property.

Firm property includes all property, either real or personal, owned by the partners as a firm, as distinguished from that owned by the partners individually. Whether particular property is firm property depends upon the intention of the partners. Property bought with the profits of the partnership is presumed to be firm property. The legal title to real property must be held in the name of one or more of the partners individually. The interest of a partner in firm property is an anomalous one, he has no

title to any particular piece of firm property, while the partnership continues, but only a right to his proportionate share of the excess of the assets over the liabilities, upon the dissolution of the partnership. The respective rights of the partners in firm property is to be determined by the partnership agreement. The presumption is that each partner has an equal interest. If a partnership was to continue for some specified time, one partner cannot insist on the sale and division of the partnership property before the expiration of this time except for some good cause, as, for example, misconduct of his partner. A partner may give the partnership the use of certain property, without transferring the title to it. There may be a partnership without any firm property.

Profits and Losses.

Under the typical partnership agreement, all of the partners share both in the profits and in the losses of the partnership. Profit sharing or loss sharing, however, does not necessarily exist among partners; and, on the other hand, because parties share in the profits or losses of a certain transaction or business, it does not necessarily follow that they are partners. The whole question of the division of profits and losses is one which can be arranged, in any manner desired, by agreement between the parties interested.

The Contract.

A contract of partnership is governed by the general rules governing contracts. This contract need not be in writing. Any person who has general power of contracting may enter into a contract of partnership. Restrictions are still placed upon the power of a married woman to enter into this species of contracts; for example, in Illinois, a married woman cannot make a contract of partnership without the consent of her husband. Unless such a power is conferred by its charter, a corporation cannot enter into a partnership.

Kinds of Partners.

The various kinds of partners are as follows:

- (1) Ostensible—one held out to the public as such.
- (2) Secret—one whose connection with the partnership is concealed from the public. Such a partner, if his connection with the firm is discovered, may be held liable for the debts of the firm, the same as any other partner.
- (3) Active—one who takes a part in the management of the firm.
- (4) Silent—one who takes no part in the management and merely receives his share of profits.
- (5) Limited or special—one whose liability to the creditors of firm is restricted. (This can only be done by strict compliance with statutory provisions on this subject, in the laws of the different states.)
- (6) Dormant—one who is both a secret and a silent partner.
- (7) Nominal—one who is an apparent but not a real member of the partnership. Sometimes a nominal partner is some one who lends the firm the use of his name so that they may obtain credit.
- (8) Incoming—one who enters a previously existing firm. This can only be done with the consent of all the previous partners, and in such a case there is in reality a dissolution of the old partnership and the creation of a new one.
- (9) Retiring—one who leaves a firm.
- (10) Liquidating—one who winds up the business of a dissolved partnership.

Rights and Liabilities of Partners.

The rights and liabilities of partners inter se, are determined, in the main, by the terms of the articles of partnership. Except in the cases of silent or special partners, each partner has a right to a share in the management of the firm's affairs. In the absence of any special agreement to the contrary, the decision of the majority of the partners controls in all matters arising in the ordinary

course of the partnership business, provided the majority act in good faith.

Every partner owes to the partnership the duty to exercise the highest degree of good faith in all matters relating to the partnership. No partner has the right to obtain for himself profits or benefits arising from a transaction concerning firm interests. A partner has no right to carry on any business which competes with the business of the firm, but, in the absence of any agreement to the contrary, he may carry on a non-competing business.

A partner is entitled to be indemnified by the firm for all proper payments and disbursements made by him on account of the firm.

Proper accounts of the business of the firm should always be kept, and each partner is entitled to access to such accounts.

A firm, and all of its members are bound by the contracts and acts of any party within either the actual or apparent scope of the agency of such partner. In general a partner has the authority to bind the firm by all acts necessary for carrying on the partnership business in the usual way. The particular acts which will fall under this description depend upon the nature of the business in which the partnership is engaged. Even if a partner makes a contract in his own name, the other members of the firm are personally bound thereby if such contract was in reality made for the firm. An exception to this rule is found in the case of sealed instruments.

A firm is liable for the torts of one partner, in the course of the firm's business, but not for his crimes.

In a limited partnership the liability of one or more of the partners is limited to a certain maximum amount, while the liability of the other partner, or partners, is that of an ordinary partner under common law principles.

Limited partnerships are not recognized at Common law, and can only exist in virtue of express statutory provisions. Statutes authorizing limited partnerships provide for various preliminary steps of advertising, etc., to be

taken in the formation of such partnerships, and a failure to strictly follow such provisions will render the limited partner liable as a general partner. In most states the contribution of the limited partner to the firm must be in actual cash.

Dissolution.

A partnership may be dissolved either (1) by the terms of the partnership agreement, (2) by act of parties, (3) by operation of law, or (4) by decree of court.

A partnership is terminated according to the terms of the original agreement when the time for which it was agreed that the partnership was to continue has expired, or the purpose for which the partnership was created has been accomplished.

A partnership may be dissolved by acts of the parties (1) by a mutual agreement to this effect between the parties, (2) by notice of dissolution given by one partner, when no special time was agreed upon during which the partnership was to continue, (3) by the transfer of the interest of one of the partners.

A partnership will be dissolved by operation of law, (1) by the death of a partner, (2) by the insolvency or bankruptcy of the firm or of an individual partner, (3) by the marriage of a single woman who is a partner (this is changed in some states by statute), or (4) by the continuance of the partnership becoming illegal.

A court of equity has the power to dissolve a partnership in proper cases. Among the grounds for such action are, fraud in the formation of the partnership, insanity or misconduct of one of the partners, and the hopelessness of success by the partnership.

CHAPTER IV.

SALES.

A sale of personal property consists in the transfer of the legal title thereto, in return for a money consideration. The possession need not pass, although in many states it is provided, by statute, that the title shall not pass as against third persons, unless there was a transfer of possession, or unless such third person had actual or constructive notice of such sale.

The general principles of contract law cover contracts of sale. In most states the Statute of Frauds requires contracts for the sale of personal property, to the value of fifty dollars, to be in writing; but the Statute of Frauds of some states (including Illinois) contains no such provision.

Either corporeal or incorporeal personal property may be the subject of a sale. Among the species of incorporeal personal property which may be sold are the good will of a business stock, promissory notes, etc.

Fruetus industriales are personal property, and may be sold as such; but *fructus naturales*, until severed from the soil, are considered real property. Property not yet acquired by the vendor, but which he expects to acquire, may be sold, and upon the acquisition of the title by the vendor, it will at once pass to the vendee.

A somewhat difficult question arises where a person agrees to furnish both the labor and the materials for the manufacture of some new article.

The modern English cases hold that if the contract when completely carried out, will result in the sale of a chattel, the contract is one of sale. A few states follow this English rule, but a majority of the states of this country follow either what is known as the New York rule, or what is known as the Massachusetts rule.

The New York rule is that unless the goods are already

made up and on hand, the contract is not one of sale, but one for labor and materials.

The Massachusetts rule is midway between the English rule and the New York rule. Under the laws of this state, if the goods to be made are such as are generally kept for sale by the person who is to make them, the contract is one of sale; but if such goods are not ordinarily kept for sale by such party, the contract is not one of sale.

An unconditional contract of sale (as distinguished from a contract to sell) conveys to the vendee the immediate right both to title and possession. Unless there is an agreement to give credit, however, there is also the duty imposed upon the vendee to make immediate payment, and the vendor may refuse to deliver the property until payment is made therefor.

Passing of the Title.

The time when the title to the goods sold, passes, is primarily determined by the intention of the parties.

The law presumes that the title does not pass while something remains to be done in order to put the goods in shape for final delivery. The fact that the price has not been fixed, however, is not of itself, sufficient to prevent the title from passing.

If the contract of sale of certain property is a conditional one, all conditions precedent must be performed before the title will pass; but the fact that the seller retains the goods in his possession for security does not affect the presumption of sale.

The title to goods to be grown or manufactured does not pass until the goods are in condition for delivery to the vendee, and have been appropriated by the vendor for this purpose. "The weight of authority is, that the appropriation by the seller of the article when completed in accordance with the terms of the contract, passes the title without the subsequent assent of the purchaser, and an action for the agreed price can be maintained." (Colorado Springs Live Stock Co. vs. Godding, 20 Colo., 249.)

Delivery.

Unless there is an agreement to the contrary, the title to the goods sold passes in the place where they are at the time of the sale, and it is the duty of the vendee to remove them. If the vendor agrees to make delivery he must deliver the goods at the place specified, or if no place was specified, then either at the home or place of business of the vendee. The question as to whether delivery to a carrier is a delivery by the vendor, depends upon whether, under the terms of their contract, such carrier is to be considered as the agent of the vendor or of the vendee.

If a time is specified, within which delivery must be made, it must be made before the expiration of such period. If no time is specified it must be made within a reasonable time. The goods delivered must correspond, both as to quantity and quality, with the terms of the contract.

Delivery (when required from the vendor) must ordinarily be performed as above stated, but any action by the vendee in violation of the terms of the contract will excuse non-delivery by the vendor.

Acceptance.

When there is a valid contract of sale, and a proper delivery, it is the duty of the vendee to accept the goods. The vendee, however, is excused from the necessity of accepting the goods when the vendor is in any way at fault.

Warranties, Conditions and Representations.

A warranty is a collateral contract annexed to the main contract. A breach of a warranty does not affect the validity of the main contract, but renders the party liable in damages on the collateral contract.

A condition is part of the main contract. A breach of a condition will prevent a contract from taking effect, or will terminate such contract.

A representation is a statement made as an inducement to a person to make a contract. The remedy, if a representation is false, is a suit *ex delicto* for deceit.

Rights of Unpaid Vendor.

If the goods have been delivered and not been paid for, the vendor may sue for the contract price. If the vendee refuses to take the goods after the contract of sale has been completed, the vendor may sue for the breach of the contract; the measure of damages being the difference between the contract price, and what the vendor can sell the goods for to some one else.

If the vendor has not yet delivered the goods, he has a lien on such goods for the purchase price.

The right of stoppage in transitu, is an extension of this right of the vendor's lien. This right exists when the vendor discovers the fact of the insolvency of the vendee, while the goods are in process of transit to him.

Rights of Vendee.

If the vendor refuses to deliver the goods after the making of the contract, the vendee may sue for the breach of the contract, the measure of damages being the difference between the contract price and what the vendee must pay to secure similar goods elsewhere.

In some cases the vendee may secure the specific performance of the contract through a court of equity. (See Chapter XIV on Equity Jurisprudence.)

Uniform Sales Act.

The first tentative draft of the Uniform Sales Act was prepared in 1902-3, by Professor Samuel Williston of the Harvard Law School, at the request of the Commissioners of Uniform Laws in National Conference. The final draft was adopted by the Commissioners of Uniform Laws in 1906. This act has to date, been enacted in Arizona, Connecticut, Massachusetts, New Jersey, Ohio, and Rhode Island. The text of the act will be found as Appendix F to this volume.

CHAPTER V.

BAILMENTS.

A bailment involves the separation of the right of property and the right of possession. It generally arises by the owner of personal property delivering such property to some party to hold for a limited time for some particular purpose; but may arise by the owner of property transferring the title to property while still keeping its possession.

The modern law of bailments is mainly based upon the decision in the case of *Cogg vs. Bernard* (2 Ld. Raymond 909.)

The classification of bailments which has grown out of this decision is as follows:

- (1) Bailments for the sole benefit of the bailor.
- (2) Bailments for the sole benefit of the bailee.
- (3) Bailments for mutual benefit.

The first class includes the depositum and the mandatum of the Roman law classification. The second class includes the commodatum and the third class the pignus and the various forms of the locatio.

In bailments of the first class the bailee is only required to use a slight degree of care, and is only liable for gross negligence.

In bailments of the second class the bailee is required to use the highest degree of care, and is liable for slight negligence.

In bailments of the third class the bailee is required to use ordinary care, and is liable for ordinary negligence.

Any kind of personal property may be the subject of a bailment.

Any person having contractual power may become a bailee.

Both bailor and bailee have a certain right in the bailed

property (the one a general right and the other a special right), and either may bring an action against any third person who injures the property. A recovery by one will be a bar to a recovery by the other.

Inn-Keepers.

An inn-keeper, on account of the quasi-public character of his business, is held to an extraordinary degree of bailment liability.

The old common law rule was that an inn-keeper was liable as an insurer, for the goods of his guest, against all losses except those occasioned by the act of God, of the public enemy, or of the guest himself.

The inn-keeper is now allowed to limit his liability either by contract with his guest, or by general notice. For example, the inn-keeper may, after giving proper notice, refuse to be liable for valuables which are not given to him for safe keeping. An inn-keeper, however, cannot exempt himself from liability for damage or loss occasioned by his own negligence or that of his servants.

Common Carriers.

A common carrier is one who holds himself out to the public as engaged in the business of transporting property. A common carrier is obliged to receive all goods offered him for transportation, and not to discriminate between different consignors. The following exceptions to this rule, however, are to be noted: (1) A common carrier may limit the scope of his business, either as to the places to which goods are carried, or the class of goods carried, provided, that such limitations are uniformly enforced.

(2) A common carrier is not obliged to receive dangerous goods or goods improperly packed.

(3) A common carrier may demand payment for his services in advance and refuse to carry goods if this demand is not complied with.

After receiving goods, a common carrier must not discriminate between them, but should transport them in the

order in which they were received, except that he may give preference to perishable goods.

A common carrier is an insurer of the goods delivered to him, except as to damages caused by the act of God, or of public enemies, or occasioned through the fault of the shipper himself, or because of some inherent defect in the goods themselves.

A common carrier may limit his liability by special contract, or by public notice shown to have come to the notice of the shipper. Such limitations, however, cannot affect the case of damage occasioned by the negligence of the common carrier or his employees. It is held, by the weight of authority, that the only public notice, not called to the notice of the shipper, which will bind the latter, is one to the effect that unless the true value of all articles shipped is declared at the time of shipment, the carrier will be liable only for the apparent value of such articles.

The exceptional bailment liability of the common carrier terminates when the goods have reached their destination, and the consignee has had a reasonable time in which to remove the goods. At the expiration of such time the common carrier becomes, merely, a warehouseman, and his liability is that of a bailee for mutual benefit.

Carriers of Passengers.

The liability of a carrier of passengers for injuries received by the passengers, while being transported, is substantially that of a bailee in a bailment for mutual benefit.

The liability of a carrier of passengers for damage to the baggage of the passengers is substantially that of a common carrier. A carrier of passengers, however, is only responsible for loss of, or damage to, such property as a passenger would naturally need to use on his journey, and such carrier may also fix a reasonable maximum amount beyond which he will not be liable for such loss or damages.

CHAPTER VI.

BILLS AND NOTES.

“Law merchant, *lex mercatoria*, is a term in use wherever the English language prevails, to designate certain branches of law imported at different times into England, and matriculated there, from the Continent of Europe, where they formed part of the modern Roman or Civil law. We are concerned with a branch which deals with the law of bills, notes, and cheques. This branch of the law merchant has retained throughout its life, to the present day its essential characteristics, clearly marking it off from the common law, while other branches have differed so little from the common law or have become so far assimilated to it that the fact is all but forgotten that they are not of the common law stock. The result is that the term law merchant at the present time usually suggests the law of bills, notes, and cheques.

“The common law, on the other hand, was a native of England, already venerable when the law merchant crossed the English Channel. Before that time the common law had defined and settled the conception of contract for England.

“The law merchant was no part of the law of England for generations after it had followed trade, in a private capacity, to the British Islands. Unlike admiralty and equity, it was for centuries a sort of tolerated outlaw, living only as the merchants could keep it alive in those self-governing and self-supporting tribunals of theirs called the pie-powder or dusty-foot courts, and carrying out its judgments only by pressure upon those who came within its extralegal jurisdiction. But it lived in England as elsewhere upon the vital principle of determined usage in business, and hence was not foredoomed to die.

“The time came when it must take its place, even if

piece-meal, by the side of the common law, and of admiralty and equity, in the jurisprudence of England. With sound credentials in hand, it knocked for admission; and it knocked at the gates, not of its ancient kinsmen, equity or admiralty, but of the common law which claimed the land." (Bigelow on Bills, Notes and Cheques, Section 1.)

The common law courts gained jurisdiction of cases of this character in the seventeenth century, by extending the scope of the action of *assumpsit*.

Negotiability.

The most striking characteristic of bills and notes is that of negotiability. This is the principle under which a bill, note or check, may pass from one person to another in such a manner as to enable a holder in due course to take the paper free from all defences thereto. A holder in due course, or a bona fide holder for value, is one who takes the paper, for value, before maturity, without notice of any defence thereto, or a person who took the paper from a holder in due course. The decisions of the different states are in conflict on the subject as to whether or not a person who takes a bill or note in payment of a pre-existing debt, is a holder in due course. Bills and notes were not originally negotiable, and even to-day negotiability is not essential to the validity of a bill or note. A bill or note to be negotiable must be made payable "to order" or "to bearer."

Closely allied to this subject of negotiability is the principle that a consideration is implied in the case of all negotiable paper. Between the immediate parties to the contract the lack of consideration can always be shown but not where the rights of a bona fide holder for value intervene.

No bill or note can be held to possess the peculiar characteristics of such instruments, unless its terms are absolutely certain in all respects. There must be no conditional or optional provisions. It is sufficient if certainty can be attained from a study of the face of the instrument.

Thus it is not necessary that the amount of the bill or note should be set out, if the instrument contains data from which it may be determined. It is not sufficient, however, that it will be possible to determine the amount of such bill or note at the time of its maturity.

A bill or note must be payable in money. In a few states this was changed by statute, but the Uniform Negotiable Instrument Act has gone back to the old rule.

Delivery is necessary to the validity of a bill or note. Delivery may be either: (1) by intention, (2) by agency, or (3) by negligence. The defendant may also become estopped to deny delivery.

Days of Grace.

Days of grace are three additional days given to the party primarily liable on a negotiable instrument within which to make payment. Days of grace were at first only granted to the drawer of a foreign bill of exchange, but were later extended to other parties liable upon negotiable paper. Recently days of grace began to be abolished, or restricted, in their application, by statute, and they are not allowed under the Uniform Negotiable Instrument Act.

Acceptance of Bills of Exchange.

The acceptance of a bill of exchange is an agreement generally on the part of the drawee, but sometimes on the part of some other party to pay the bill absolutely according to its tenor, or according to special terms contained in the contract of acceptance. The holder of a bill has the right to demand a general and unqualified acceptance in writing upon the bill itself, and may refuse to accept any qualified acceptance.

The drawee of a bill of exchange is under no legal obligation to accept a bill, even if he has funds of the drawer in his possession, unless he has agreed, for a valuable consideration, to accept such bill. Such agreement to accept may be either express or implied. Even in case of such an agreement, the payee has no right against the drawee until

acceptance has actually been made. When the drawee has agreed to accept a bill he is liable to the drawer, if he fails to accept, in damages for the breach of his contract, the measure of damage being the inconvenience and loss caused to the drawer by the drawee's failure to accept.

When a bill has been accepted the acceptor becomes the primary debtor, while the drawer is only secondarily liable for the payment of the bill.

The drawee of a bill, by accepting it, admits everything essential to the validity of a bill, including the existence of the drawer, the genuineness of the signatures, the inviolacy of the body of the bill, the capacity of the parties, the authority of the parties, and that there were funds of the drawer in the hands of the acceptor. None of the facts thus admitted can be disputed in a suit by a bona fide holder for value, but as between the immediate parties to the instrument the true state of facts can be shown.

Acceptance can ordinarily only be made by, or in the name of, the person upon whom it is drawn. If a bill is drawn upon two or more persons, it may be accepted by either of them.

Where the acceptance, or payment of a bill has been refused, or neglected, any person may accept it *supra protest*, or for the honor of, any person whose name appears upon the bill. In such a case, if the acceptor *supra protest*, pays the bill, he can recover on the bill. This is one of the very few cases where a person, solely by his own act, may make himself a creditor of another person.

An express acceptance may be either orally or in writing. No particular words are required to make an acceptance. Such words as "Seen," "Presented," or simply the name of the drawee written upon the face of the bill, are sufficient. An acceptance on another piece of paper, however, must be full and unequivocal.

An acceptance may be either absolute or qualified, but the holder of a bill may refuse to accept a qualified acceptance.

A bill may be accepted before it is drawn, or after its maturity. A bill may also be accepted by implication.

“Indorsement is an act whereby a person, not being acceptor or quasi-acceptor, surety or guarantor proper, writes his name upon the back or face of a duly executed, negotiable bill of exchange, promissory note, or cheque, with or without terms of contract or liability, according to the law merchant, or writes an equivalent contract on a separate paper, annexed to the bill, note or cheque; to which act the drawing of a bill of exchange is, for the purpose new in hand, an equivalent.” (Bigelow on Bills and Notes, Chapter VIII, Section 1.)

If the indorser of a bill or note is the holder thereof, the contract which he makes is a double one: there is first an executed contract transferring the title and right to the bill or note, and, second, the collateral executory contract guaranteeing that the bill or note will be paid at maturity.

If the indorser has no interest in the bill or note, he is called an anomalous indorser, and becomes practically a guarantor.

There are a number of different methods of indorsement.

An indorsement in blank consists merely of the signature of indorser. The bill or note, with such an indorsement, is payable to the holder, and may be transferred indefinitely without any further indorsement.

An indorsement in full is one containing the name of the new payee. The paper can only be transferred again by a further indorsement.

An indorsement “without recourse” is one where the holder transfers a bill or note without guaranteeing its payment at maturity. Such an indorser, however, guarantees the genuineness of the signature to the paper.

A restrictive indorsement may be one, either,

- (1) for collection, or
- (2) to be held by the payee in trust, or,
- (3) which prohibits further indorsement of the paper.

Presentment.

Presentment and protest are the steps necessary to charge the parties who are secondarily liable on a bill or note.

In the case of a bill of exchange there must be two pre-

sentments, one for acceptance and one for payment. If, however, presentment for acceptance is delayed until the day of the maturity of the bill the two presentments are merged together, as is also the case when the bill is payable on demand. Only one presentment is necessary in the case of a promissory note—that for payment.

Presentment must be made by the holder, or his authorized agent, to the drawee, or his authorized agent. A bill upon a partnership may be presented to any of the partners, but a bill drawn upon several persons, not partners, must be presented to each.

Presentment should be made at the regular place of business of the drawee, or if he has no regular place of business, at his domicile. Presentment should be made during reasonable business hours; but the hour of presentment is important only when no answer is received.

If the acceptor of a bill or the maker of a note is dead, presentment should be made at the place where the bill or note is payable, or if not payable at any specific place, then at the last domicile of the deceased.

Failure to present a bill or note for payment, at the proper place, upon its maturity will release the parties secondarily liable upon the paper, but will not affect the liability of persons primarily liable, except, under certain circumstances, as to further interest.

If presentment has been made and the paper dishonored it is the duty of the holder of the paper to give notice of such dishonor to all the parties secondarily liable on such paper. Failure to do this will relieve the parties secondarily liable, from liability.

Where the parties secondarily liable live in the same place as the holder, he may notify them of the dishonor either orally or in writing. Persons living elsewhere must be notified in writing. Notice must be given or sent within twenty-four hours. The notice must contain a statement that the bill or note has been dishonored, and that the holder of the paper looks upon the party receiving the notice for payment.

Presentment, protest or notice, may be waived by the party who would be charged by such acts; waiver by drawee, acceptor, or maker is not sufficient.

Presentment, demand and notice may also be excused by war, riots, or anything which causes a complete cessation of business, or by death or extreme illness. In such cases, however, the proper steps must be taken as soon as possible.

An indorser who indorses a void note does not escape liability through the failure of presentment, demand, or notice.

Protest.

“A foreign bill of exchange that has been dishonored must be regularly protested as a preliminary to the sending out of the notice of dishonor, therefore its presentment must be made by one who is a notary public, as the certificate of the protest of the notary is recognized as satisfactory proof of the statements that the certificate should properly contain, and the act of the notary in so acting is universally recognized. Where a foreign note has been indorsed, the protest of the note by a notary is necessary, according to the weight of authority. An inland bill or note, unindorsed, need not be protested by a notary, but the statutes, however, permit the notary public to protest the inland bill and note, after the same fashion as in writing up his certificate of protest on a foreign bill. It is a common custom, therefore, of banks and other handlers of negotiable paper to employ a notary public as their agent to act in the particular of presenting negotiable paper and where it is dishonored of protesting and sending out the notice of dishonor to persons secondarily liable. The employment of a notary in such a case, while sanctioned, is not made necessary; it is done as a matter of convenience. Nor is it necessary that the notice of dishonor be sent out by the notary, although this is customarily a part of the duties of his office by the private arrangement of his employers. The notary's certificate contains his declaration in formal language, usually, and under a written copy of the note or bill in question stating that he has made presentment and

demand of payment, and that the payment has been refused, together with the reasons for the refusal, time, and the fact that he therefore protests the paper. The notary then attaches his seal of office to the certificate of protest and signs the same. The main purpose served by the certificate is to afford the holder the legal testimony on the facts properly contained therein, in an action on the paper against those secondarily liable." (S. B. Neltner in Law Library.)

Defences to Bills and Notes.

Defences to bills and notes are either,

1. real, or
2. personal.

Real defences include the cases of the incapacity of the maker of the instrument, forged signatures, and of bills and notes declared void by statute.

Among the personal defences are those of fraud, failure of consideration and payment.

The Uniform Negotiable Instrument Act.

The Uniform Negotiable Instrument Act is an act, mainly based upon the English Bills of Exchange Act which has now been adopted in the great majority of the states of this country. The text of this act will be found in full in Appendix D to this volume.

CHAPTER VII.

GUARANTY AND SURETYSHIP.

Contracts, both of guaranty and of suretyship, are agreements to answer for the debt or promise of some other person. There is a distinction, however, between these two species of contracts.

A surety, in general, is a party to the original contract of the principal, and the consideration for the contract of the principal is also the consideration for the contract of the surety. The surety, therefore, is not entitled to notice from the obligee of the contract, of any default on the part of the principal debtor, and is not relieved from liability on account of the failure of the obligee to give such notice. The contract of a surety is primary and direct.

The promise of a guarantor is generally made at a different time and by a different instrument than that of the principal. The guarantor is only liable after the default of the principal; he is entitled to notice of such default, and is released from liability if such notice is not given him by the principal creditor. In case of a conditional guaranty there must be both a default by the principal and a fulfillment of the contract by the creditor to fix the liability. The contract of a guarantor is both collateral and secondary.

Formation and Requisites of Contract of Guaranty or Suretyship.

A contract of guaranty or suretyship must possess all the requisites of an ordinary contract. As in all contracts there must be a consideration, but the consideration need not take the form of a benefit to the guarantor or surety. A detriment to the promisee is sufficient. If the contract of the guarantor or surety is made at the same time as that of the principal no additional consideration is necessary to

support the promise of such guarantor or surety. If, however, the contract of the guarantor or surety, is made at a later time, an additional consideration is necessary. Contracts, either of guaranty, or of suretyship, are required by the Statute of Frauds, to be in writing. In general, anyone with the general power to contract may become either a surety or guarantor. In some states where married women have been given the general power to contract, an exception has been made as to these classes of contracts.

Classification of Suretyship.

Suretyship may be either voluntary or involuntary. Where the chief object of the contract was to create the relation of suretyship, the suretyship is a voluntary one; where the primary object of the contract was to accomplish some other purpose, but which indirectly involves the creation of this relation, the suretyship is classed as an involuntary one.

Suretyships are also either personal or real. In a personal suretyship the surety is personally liable for the debt; in the case of a real suretyship certain property is put up by the surety, but the surety can not be personally sued on the debt.

Classification of Guaranties.

Guaranties are classified along several different lines of demarkation.

The first classification is that into continuing or open, and non-continuing or limited guaranties. A continuing guaranty covers a succession of dealings or an indefinite time, while a non-continuing or limited guaranty only relates to a single transaction.

Guaranties are also divided into :

General and special guaranties;

Commercial and non-commercial guaranties; and

Revoeable and irrevocable guaranties.

Liabilities and Rights of Surety.

“The principles of law and statutory provisions governing the liability of obligors on joint, and joint and several obligors, apply to such as are executed by sureties. While a court of equity, in the case of principals, will ordinarily presume that a contract, in form joint, was intended to be joint and several, in the case of a surety, nothing will be presumed beyond what the positive facts substantiate, and if the contract is in form joint, it will not be presumed to have been joint and several unless upon distinct and satisfactory proofs to that effect.” (Amer. and Eng. Ency. of Law, Vol. XXVII, p. 452.)

The principal defences which may be set up by a surety are as follows:

(1) Any material alteration of the principal contract. Here would be included such changes as the addition of new parties, a change in the duties of the principal, an extension of credit, etc. It is even held that an alteration of the principal contract will release the surety from liability, when such alteration is beneficial to the surety. This is on the ground that no person can be bound to accept a new contract, even a beneficial one, against his will.

(2) Any change in the relation between the principal and the creditor, which, although without any change of contract, increases the liability of the principal, will release the surety. An illustration of this is found in the case where an increase in the capital stock of a bank was held to release the surety of the cashier.

(3) An agreement made for a consideration to extend the time of payment, for some definite period, to the principal, releases the surety. Payment of interest in advance will constitute a sufficient consideration. A contract to extend the time of payment, however, will not be implied from the creditors accepting collateral securities maturing at a later time.

An extension of time to one co-surety will release another co-surety, to the extent of the contributory share of the surety release.

By the weight of authority, a surety is discharged by an agreement made by the creditor not to sue the principal debtor for a certain time. Mere delay, on the part of the creditor, in suing the principal, will not relieve the surety.

(4) If the creditor releases securities furnished by the principal debtor, or is negligent in reducing them into possession, the surety is released *pro tanto*.

(5) Any cause which will be sufficient for the annulment of the principal contract, will be sufficient to annul the contract of the surety.

(6) Any fraud on the part of the creditor, which affects the making of the contract of the surety, will release the surety. Fraud on the part of the principal, unknown to the creditor, will not release the surety.

(7) Where the contract of suretyship is executory, it is not binding upon the surety until it has been acted upon by the creditor, and until that time can be revoked by the surety.

Ordinarily the fact that a contract of suretyship absolute on its face was in fact conditional, cannot be shown by parol. A failure of consideration, however, may be shown by parol.

The rights of a surety under the principles of subrogation, exoneration and contribution are discussed under the chapter on Equity Jurisprudence.

Liabilities and Rights of Guarantors.

“The principal field of this branch of suretyship is that of sales wherein letters of credit or guaranty constitute the inducement for the owner of merchandise to part with his possession and ownership to another. It also includes transactions whereby credit is obtained for the maker of negotiable paper. This class of mercantile instruments are useful and important mediums of commercial intercourse and a spirit of liberality pervades the law of this subject to the end that these convenient aids of commerce may not, by reason of strict and technical constructions, become obstacles and hindrances to business transactions rather than a benefit.

“Letters of credit are frequently executed without the aid of legal counsel, and the extent to which the guarantor is bound or the seller protected is many times not easily determined from the language employed.

“These contracts also often lack the evidences of deliberation which characterize some other forms of suretyship, such as bonds or covenants under seal, and are frequently interspersed with signs and trade expressions which can be interpreted only by careful attention to the circumstances under which the transaction arises.” (Stearns on Suretyship, Par. 48.)

A guaranty may be either general or special. A general guaranty is one addressed to all persons, or to whom it may concern, and may be enforced by any person who acts upon it.

As before stated, a contract of guaranty is a collateral contract. No privity of contract is necessary between principal and guarantor. There may be a binding contract of guaranty without the knowledge of the principal debtor.

“If the liability of the promisor is fixed by the mere default of the principal it is an absolute guaranty but if the promisor’s liability depends upon any other event than the non-performance of the principal it is a conditional guaranty.

“Contracts of guaranty endorsed upon promissory notes are the most common forms of absolute guaranty. The time and amount of payment are fixed, and the liability of the guarantor depends upon no other condition than that of non-payment by the maker. If the guaranty is absolute the holder is not required to make demand upon the maker and give notice to the guarantor of the default.

“It is not necessary to first pursue and exhaust the principal before proceeding against the guarantor in cases where the guaranty is absolute.

“Where credit is extended for a definite amount, and for a definite time, no condition is imposed other than the default of the debtor, and the liability is absolute, whether the transaction is a sale or whether it arises in the course of the negotiation of a bill or note.

“A guaranty of a debt upon the consideration of an extension of time to the debtor places the transaction upon the same basis as an absolute guaranty of a note. In either case it is a guaranty of payment at maturity. The guarantor has the means of knowing in advance the exact amount of his contingent liability, and the exact time it will fall due, and no conditions of demand and notice enter into such contract.” (Stearns on Suretyship, Par. 61.)

There must be a consideration for the contract of guaranty, and unless the guaranty is made at the same time as the principal contract, the consideration for this collateral contract must be distinct from the consideration for the original contract.

CHAPTER VIII.

INSURANCE.

“Insurance is a conditional contract, whereby one party undertakes to indemnify another against loss, damage, or liability arising from some specified but contingent event.” (Vance on Insurance, p. 1.)

A contract of insurance, while on its face a wagering contract, is in its effect the exact opposite of this, being entered into for the purpose of doing away with the chance of severe loss, by dividing the loss which would otherwise fall upon a few, among a large number.

The oldest form of insurance is that of marine insurance. The other two most important forms of insurance are life insurance, and fire insurance.

Insurable Interest.

No person can recover on an insurance policy either on a life, or on property, unless such person had an insurable interest in the life or property insured.

In the case of property insurance (either marine or fire) the insurable interest must exist at the time of the loss, but need not have existed at the time the contract of insurance was made. In the case of life insurance, the exact opposite is the rule: the insurable interest must exist at the time the contract of insurance was made, but need not necessarily exist at the time of the death of the party insured. Any person can insure his own life to any amount he may choose, and may make any person the beneficiary.

Premiums.

Premiums are the present payments made by the insured as consideration for the contingent future payment by the insurer.

The non-payment of a premium will terminate the rights

of the insured under the policy, unless credit is given or unless there is a valid excuse for non-payment by the insured. The principal recognized excuses are: insolvency of the insurer; refusal of tendered premium; some wrongful act of insurer preventing payment; waiver of prompt payment; war in some jurisdiction; and, want of notice when it is the duty of the insurer to give notice. Except where required by statute, the insurer is not required to give notice of premiums falling due.

In Mutual Benefit Associations, dues and assessments take the place of premiums.

Warranties and Representations.

In the contract of insurance the highest degree of good faith is required from both parties. It is the duty of the insured to inform the insurer of all the facts material to the risk which the insurer assumes. Failure to disclose such facts constitutes a misrepresentation by concealment.

It is generally held that a misrepresentation will not render an insurance policy void unless it is material, but that a breach of warranty on the part of the insured will render the policy void, whether the warranty is material or not. In some states, however, it is provided by statute that a policy shall not be forfeited by a breach of warranty, unless such warranty was material.

Waivers and Estoppels.

A waiver arises in insurance where the insurer voluntarily and expressly waives a known right.

Estoppels in insurance are governed by the general law on the subject.

Insurance Agents.

Insurance agents are always the agent of the insurance company; and the insurance company cannot make them the agent of the insured by any wording of the contract which may be adopted.

CHAPTER IX.

CRIMINAL LAW.

A crime is a wrong against the public. Crimes are defined, and their punishments fixed, both by the common law, and by statutory law. Criminal law in this country is mainly regulated by statute. In some states, only statutory crimes are recognized. In other states a common law crime may serve as the basis of an indictment.

Both the Federal and State Courts have criminal jurisdiction in this country. The criminal jurisdiction of the Federal Courts is limited by the grants in the United States Constitution.

Every crime must contain the element of wrong to the public. Generally there must be both a criminal act and a criminal intent, but the criminal intent is not always necessary to the existence of the crime.

“Moral obliquity is not an essential element of crime, except so far as it may be involved in the very fact of the violation of law. What, therefore, is criminal in one jurisdiction may not be criminal in another; and what may be criminal at a particular period is often found not to have been criminal at a different period in the same jurisdiction. The general opinion of society, finding expression through the common law or through special statutes, makes an act to be criminal or not according to the view which it takes of the proper means of preserving order and promoting justice. Adultery is a crime in some jurisdictions, while in others it is left within the domain of morals. Embezzlement, which was till within a comparatively recent period a mere breach of trust, cognizable only by the civil courts, has been nearly, if not quite, universally brought by statute into the category of crimes as a modified larceny. The sale of intoxicating liquors is or is not a crime, according to the

differing views of public policy entertained by different communities." (May on Criminal Law, Sec. 7.)

Parties to Crimes.

A person to be guilty of a crime must have both mental and physical capacity. A child under the age of seven years is conclusively held to be incapable of committing a crime. A child between the ages of seven and fourteen years is presumed to be incapable, but in this case the presumption may be rebutted by the prosecution. A child above the age of fourteen is presumed to have the mental capacity necessary to be guilty of a crime. A boy under the age of fourteen is conclusively presumed to lack the physical capacity to commit the crime of rape.

A married woman is *prima facie* held to be acting under the coercion of her husband, when she commits a crime in his presence, and not to be herself guilty of such crime under such circumstances. The woman is not herself exempt, however, in cases of treason, murder and, perhaps, some other crimes.

An insane person cannot be held capable of committing a crime. The test of insanity, generally in criminal cases, is as follows: If the offender has sufficient mental capacity to know that the act which he is about to commit is wrong and deserves punishment, and to apply that knowledge at the time when the act is committed, he is not in the eye of the criminal law insane, but is responsible. "Irresistible impulse" and "emotional insanity," while they have been recognized as good defenses by some courts, are very dangerous theories.

In some states it is held that on the question of a defendant's sanity, the burden of proof is on the prosecution, while in other states the opposite rule prevails.

Drunkenness is never a defense to a criminal prosecution, but *delirium tremens* may be.

Criminals are divided into principals and accessories. Principals are subdivided into those in the first degree and those in the second degree.

A principal in the first degree is the actual perpetrator of the crime. A principal in the second degree is one who is present at the time the act was committed, aiding and abetting in such commission.

Accessories are subdivided into accessories before the fact, and accessories after the fact. An accessory before the fact is one who procures, counsels, or commands another to commit a crime, but who is not himself present at the time the act is committed.

An accessory after the fact is a person, who knowing a crime to have been committed, assists the criminal to escape or to conceal the crime.

Classification of Crimes.

Crimes are divided into treason, felonies and misdemeanors.

Treason, the highest of all crimes, involves an attack upon the government itself.

At common law, felonies were such crimes as, upon conviction, involved the forfeiture of the convicted party's estate. Felonies, at this period were generally punishable by death. The principal common law felonies were: Murder, manslaughter, mayhem, arson, rape, burglary, and robbery.

The laws of the different states are not uniform at the present time as to what constitutes a felony. The most common rule is to consider as felonies all crimes which are punished by death or by imprisonment in the penitentiary.

Misdemeanors include all crimes which are neither treason nor felonies.

Treason.

At an early period in English history a large number of different acts were each held to constitute treason, and the exact boundaries of this crime were very uncertain. By Stat. 25, Edw. III, c. 2 (confirmed by Stat. 57, Geo. III, c. 6), the acts which constituted treason were defined and limited.

The 3rd Section of Article III of the United States Constitution treats of the subject of treason as follows:

“1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

“2. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

“3. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.”

There may be treason against an individual state, as well as against the United States.

Misprision of treason consists of the concealment, by anyone having knowledge thereof, of any treason committed or contemplated.

Murder and Manslaughter.

Murder and manslaughter both involve the unlawful taking of human life. Murder is the more criminal of the two, consisting in the unlawful killing of a human being with malice aforethought, either express or implied. Murder may be either in the first degree or the second degree. In order for the killing to constitute murder in the first degree it must have been committed with deliberately premeditated malice aforethought, or in the commission of a felony, or committed with extreme cruelty.

Malice is always an essential element in the crime of murder. Death must result within “a year and a day” from the day upon which the injury was inflicted; in computing such time the day on which the injury was inflicted is counted as the first day.

One who aids or abets in a suicide is guilty of murder.

Manslaughter is any unlawful killing without the element of malice aforethought; as where death results from an assault without the intention of the party making the assault, or where one person kills another in the heat of passion or upon great provocation.

Mayhem.

Mayhem is an old common law felony which consisted in depriving another of any part of his body which was of use to him in fighting. In this country, this crime (if recognized at all as a distinct species of crime) is generally a misdemeanor.

Robbery.

Robbery consists in the taking from a person personal property, by force and violence and putting in fear. It is the crime of larceny with the addition of the following elements: (1) the taking from the person, (2) the use of force, and (3) the putting in fear. Robbery is always a felony, both at common law and by statute.

Burglary.

Burglary at common law consisted in the breaking and entry of another's dwelling-house in the night time, with intent to commit a felony therein. By statute the scope of this crime has been generally so extended as to include cases of breaking and entry into buildings other than dwelling-houses.

The breaking may be constructive, instead of actual, as where fraud or threats are substituted for force. The breaking must either be of some part of the actual enclosure which constitutes the dwelling house, or of some interior door or partition in the house when entry into the house was obtained without a breaking.

The entry of the whole person within the house is not essential to the commission of this felony.

The "night-time" during which this crime could take place was held, at the common law, to extend through such period of time as the face of a person could not be discerned by the light of the sun. This question of time is regulated in some states by statute.

Rape.

The elements necessary to constitute the crime of rape, are carnal knowledge of a woman (actual penetration

though not emission being necessary) against her will, such carnal knowledge being secured either by force or fraud. Sexual intercourse with a female under the age of consent, either with, or without her consent, is also rape.

Arson.

Arson is the intentionally unlawful burning of another's dwelling-house. By statute the scope of this crime has been generally extended to cover the burning of buildings other than dwelling-houses.

Larceny and Embezzlement.

Larceny is the felonious taking and carrying away of the personal property of another. Larceny is either grand or petty, according to the value of the property stolen. At common law the crime was grand larceny if the value of the property exceeded twelve pence. The dividing line is at present fixed by statutes in the different states.

There cannot be larceny of real property, but portions of realty which become detached, as blinds from a house, may be the subject of larceny. Wild animals, in a state of nature, are not the subject of larceny.

Embezzlement was not an offense at common law, but has now been made so by statute in every state in this country. This crime consists of the fraudulent appropriation of another's goods by one who has the lawful possession. A distinction must be drawn between the case of one who has the possession of goods and that of one who merely has the custody. A person who merely having the custody of goods converts them to his own use is guilty of larceny. Thus, while an agent who misappropriates the goods of his principal is guilty of embezzlement, a servant who misappropriates the goods of his master is guilty of larceny. By statute, in some states (e. g., Illinois) all distinction between larceny and embezzlement has been abolished.

Forgery.

Forgery consists of the fraudulent making or alteration of a writing to the financial injury of another. The word

“writing” here is held to include either printed or engraved matter, but not a painting.

A false letter of recommendation for a salaried position may constitute a forgery, but not a mere social letter of introduction.

A very slight alteration in a writing will not be sufficient to constitute this crime; the forgery must be material. There may be a forgery, however, without any false signature.

The intent to defraud is a necessary element in the crime of forgery.

Filling in a blank in a writing, or falsely indorsing another’s name on the back of a promissory note, may constitute forgery.

Counterfeiting.

Counterfeiting consists in the making of a false coin in the likeness of the genuine, with intent to defraud. Counterfeiting, in the United States, is a crime against the National Government only. A state, however, may punish the passing of counterfeit coins. Counterfeiting and passing counterfeit coins are entirely distinct crimes.

Miscellaneous Crimes Against Property.

Obtaining goods by oral false pretenses was not originally a crime at common law. A crime of this nature, however, was soon found necessary to supplement the crime of larceny and it was provided that designedly obtaining money, goods, wares, or merchandise by false pretenses with intent to defraud any person, should be indictable. The following elements must exist in order to constitute this crime: (1) The pretense must be false; (2) there must be an intent to defraud; and (3) there must be an actual perpetration of the fraud, (4) by means of the false pretense.

Mere “puffing” of the value of goods owned by the accused is not sufficient to constitute false pretenses. The false pretenses, however, may be either express or implied.

The crime of cheating consists in the pecuniary injury

of another by some token, device, or practice of such a character as is calculated to deceive the public.

Receiving stolen goods was not originally a substantive offense; the receiver of stolen goods being only punishable as an accessory after the fact to the crime of larceny. This condition of the law has been changed, both in England and in this country, and the person who receives stolen goods, either for the purpose of aiding the thief, or to obtain a pecuniary benefit for himself, is guilty of the crime of receiving stolen goods. A person has received stolen goods when they have come under his control. To constitute this crime, it is not necessary that the person receiving the goods should have had positive knowledge that they were stolen; it is sufficient if he had reasonable ground for believing them to be stolen.

Malicious mischief to personal property was a crime at common law, but the subject is now mainly regulated by statute. Under the modern statutes certain injuries to real property fall within the scope of this crime.

The malice required to complete this crime was defined by Blackstone as a "spirit of wanton cruelty, or black and diabolical revenge."

Certain Offenses Against the Person.

The principal offenses against the person, not already treated, are assault and battery, and false imprisonment. These crimes are also important torts, and the elements necessary to constitute them are treated in the chapter on Torts.

The crime of kidnapping is similar in most respects to that of false imprisonment; by statutory requirements in most states, however, an intention to unlawfully transport or conceal the person abducted is essential to constitute the crime of kidnapping.

Offenses Against the Government.

The most serious of all offenses against the government, that of treason, has already been considered.

Bribery, is an old common law misdemeanor whose scope has been greatly extended in recent times. This crime now covers every case where any undue reward (i. e., any reward not authorized by law) is offered, solicited, or received, as a consideration for the discharge of any public duty. Strictly speaking, the bribe must be actually received for the crime to be consummated; in other cases falling within the above definition there is an attempted bribery. Both the person who receives a bribe, and the person who gives a bribe, are guilty of this crime of bribery.

Extortion consists of the demanding and taking an illegal fee, under color of office, by any public official.

Any abuse of discretionary authority by a public officer from an improper motive, which does not amount to extortion, will constitute the crime of oppression.

Barratry, champerty, and maintenance are three kindred offenses not generally enforced at the present time.

Champerty arises where a stranger in interest takes part in the prosecution of a suit under an agreement by which he was to have part of the proceeds therefrom; while maintenance consists in officiously and without just cause intermeddling with the prosecution or defense of a suit. Habitual champerty or maintenance constitutes barratry.

“Perjury, by the common law, seemeth to be a wilful false oath, by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely, in a matter of some consequence, to the point in question, whether he be believed or not.” (1 Hawk P. C., 8th Ed., 429.) The requisites of the crime are: (1) An oath duly administered; (2) in a judicial proceeding; and (3) wilful falsehood; (4) on a material point.

Subornation of perjury consists in procuring false testimony by another.

Contempt of court is a common law crime, and is indictable, but is generally punished in a summary manner by the judge before whom, or against whom, it is committed.

Embracery consists of any attempt, whether successful or not, to corruptly influence a juror to give a certain verdict.

Prison breach consists of a forcible breaking out of his place of confinement by a prisoner. Escape consists in a prisoner unlawfully, but without the application of force, leaving his place of confinement. Rescue consists in the forcibly and knowingly freeing of a prisoner, from arrest or imprisonment, by some other person.

Offenses Against Public Tranquillity, Health, Etc.

Affray consists in the fighting, by mutual consent, of two or more persons in some public place to the terror of the public. "A riot is a tumultuous disturbance of the peace, by three or more persons assembling together of their own authority, with an intent to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act itself be lawful or unlawful. A riot is a similar meeting upon a purpose which, if executed, would make them rioters, and which they actually make a motion to execute. It is an attempt to commit a riot." (May on Criminal Law, Section 165.)

Slander and libel are explained in the chapter on torts. Libel is a crime as well as a tort, while slander is only a tort.

The exact scope of the crime of conspiracy has never been clearly defined, and varies in the different jurisdictions; in general it consists of an agreement to do an unlawful act.

Other crimes (either common law or statutory) falling under this classification are: Foreible entry and detainer; eavesdropping; committing nuisances; engrossing; forestalling; and regrating (the last three offenses consisting in various methods of artificial enhancement or depression of prices).

Offenses Against Religion, Morality and Decency.

The crimes of apostasy and blasphemy were crimes of an ecclesiastical character, of considerable importance at an earlier period, but now practically obsolete.

The crimes against sexual morality are: Adultery, bigamy or polygamy, fornication, sodomy, seduction, abduction, abortion, and lasciviousness.

The crime of adultery consists of illegal sexual intercourse between a man and a woman, at least one of whom is married. In some states if either is married both are guilty of adultery; in other states if one party is married and the other unmarried, the married party is guilty of adultery, and the single party only of fornication; in still other states if the woman is married, both parties are guilty of adultery, but if the man is married and the woman single, then the man is guilty of adultery, and the woman of fornication.

Fornication is illegal sexual intercourse by an unmarried person. A simple act of fornication constitutes a crime in only a very few states.

A person is guilty of bigamy who is married to two persons at the same time. Strictly speaking, the term polygamy implies a marriage to more than two persons, but the terms bigamy and polygamy are often used interchangeably.

Sodomy, also called bestiality, buggery, or the crime against nature, consists either of unnatural sexual intercourse between two men, or between a human being and a beast.

Seduction consists in inducing a woman to submit to unlawful sexual intercourse by artifice or deceit.

Abduction originally consisted only in the forcibly taking away of a woman for the purpose of marriage or illegal sexual intercourse. The scope of this crime has been extended so that now it covers all cases where children are stolen away from their parents or other proper guardians.

Abortion covers all cases where the miscarriage of a woman is brought about either by an operation, by drugs, or in any manner whatsoever.

Lasciviousness covers all cases of indecent or obscene actions.

Criminal Procedure.

Criminal proceedings may be instituted in several different ways. The accused may be arrested and brought before a magistrate for a preliminary hearing; or the proceedings may be begun by indictment; presentment, or information.

Arrest may be either by an officer or by a private citizen. Either an officer or a private citizen may arrest a person whom they have seen commit a felony. An officer may also arrest without a warrant when he has reasonable ground to believe that a felony has been committed. An officer who arrests on a warrant is protected if the warrant is valid on its face.

On a preliminary hearing a magistrate may release the prisoner, or bind him over for trial.

Any prisoner (except in a few cases, principally those where the prisoner is accused of a capital offense), when his preliminary hearing is postponed, or when he is bound over for trial, is entitled to be released on bail.

An indictment is a formal charge against a person brought by a grand jury, based upon evidence presented to such jury. A presentment is like an indictment except for the fact that it is brought by the grand jury based upon their own knowledge or information. A majority vote, only, of the grand jury is required to adopt either an indictment or a presentment.

An information is a criminal charge filed by the prosecuting attorney or other proper official. A complaint is a criminal charge filed by a private person. The question of what criminal action may be commenced by information or complaint is regulated by statute in each state.

The Trial.

Arraignment consists in calling the prisoner to the bar of the court to answer the charge against him. A general plea is either "guilty" or "not guilty." The accused, however, may enter a plea to the jurisdiction, a plea in abate-

ment, or a special plea in bar, which goes to the merits of the indictment.

The accused may also demur to the indictment, or move to quash. Both of these actions raise the same questions. In state courts the method of procedure is generally a motion to quash, but in the Federal courts a demurrer to the indictment is the proper step, except where the objections to the indictment do not appear in the indictment. Both of these methods of procedure raise the question of the sufficiency of the indictment, both as to substance and as to form.

At common law there were a number of methods of trying a criminal case, but at the present time there are practically only two: By the court, and by the jury.

Trial by jury in a criminal case is similar to that in a civil case, which is discussed in the chapter on Common Law Pleading.

Criminal Evidence is treated in the chapter on Evidence, and the various protections given to the accused in the chapter on Constitutional Law.

After Trial.

After a verdict of acquittal in a criminal case no further steps can be taken by the prosecution. After a verdict of conviction the accused may make a motion for a new trial, or a motion in arrest of judgment, to the trial court; or may take the case to an Appellate court by a writ of error. In some states there may be an appeal from an inferior trial court to a superior trial court where the case will be tried de novo.

CHAPTER X.

TORTS.

“A tort is a breach of duty, fixed by municipal law, for which a suit for damages may be maintained.”

More specifically, a tort is a violation of some one of those general rights which are secured to the individual by the laws as against all other members of the community; as contradistinguished from those special rights, which arise out of contracts, and only exist against the other parties to such contracts.

Every person may be held responsible for torts, although the liability of certain classes of persons is limited. An infant, while in general responsible for his torts, cannot be held liable for a tort where malice or negligence is a necessary element until he has arrived at years of discretion. The age of fourteen years is sometimes taken as being, *prima facie*, the dividing line in such cases. At common law the husband and wife were jointly liable for all torts committed by the wife except when a tort was committed by the wife in the presence of her husband, or with his assistance, in which cases the husband alone was responsible. This has been almost entirely changed by statute in nearly all the states. A lunatic is liable for his torts except those involving malice.

A parent is responsible for any tort of his child when said tort was committed under his instructions, with his connivance or consent, in his presence without objection, under circumstances from which it may be inferred that he had knowledge of the act and made no effort to avert it, or where the tort would not have been committed except for his negligence or refusal to take proper precautions to prevent an act of which he may be said to have had constructive notice. In the absence of such special circumstances the father is not liable for the torts of his child.

A master is liable for the torts of his servant committed in the regular course of his employment. The same rule applies in the case of principal and agent.

The field of torts overlaps that of criminal law on the one side and of contracts on the other. Most crimes which inflict some special injury on an individual are also torts against such individual. In England the doctrine was held that where a tort amounted to a felony, the felony swallowed up the tort. This doctrine was never adopted in this country, except in a very few states, and in nearly all of such states it has now been abandoned. The same transaction may often give rise to an action either of tort or of contract, at the option of the injured party. Thus, where a person is induced to enter into a contract by fraud, he may either sue on the contract, or if he prefers, sue in tort in an action for deceit.

There are no common requisites which must be present in the case of every tort. The necessary elements of a tort of one kind differ very materially from those of another. The study of torts, therefore, is mainly the study of the various individual species of torts.

Deceit.

In order to sustain an action for deceit, each of the five following elements must be present:

(1) There must be a misrepresentation of a material fact;

(2) The defendant (in the action for deceit) must have known the statements made to be false;

(3) The plaintiff (in the action for deceit) must not have known the statements made to be false, but must have believed them to be true;

(4) The defendant must have made the statement with the intention of having it acted upon; and

(5) The plaintiff must have actually acted upon the statements made by the defendant, and as a result have been damaged thereby.

The misrepresentation by the defendant may be made

either (1) by express words, (2) by actions, or (3) by silence when it was his duty to speak.

The element of the defendant's knowledge of the falsity of the statement can be proved by showing either:

(1) That the defendant actually knew the statement to be false;

(2) That he made the statement recklessly, without taking pains to ascertain whether it was true or false;

(3) That he made the statement positively, when in fact it was only a matter of opinion; or

(4) That the defendant stood in such a relation to the subject-matter that it was his duty to know the truth concerning the matter.

The primary purpose of the action of deceit is compensation for the injured party instead of punishment for the guilty one; therefore if the false representations do not lead to any action by the party to whom they are addressed, or if he acts and is not injured there can be no recovery. Again, it must be noted that only the damage due to the misrepresentation can be recovered for, not necessarily all the damage resulting from the whole transaction.

It is necessary that the defendant should have made his statement with the intention of having it acted upon, but he may have made such statement with the intention of influencing either (1) a particular person; (2) any one out of a particular class; (3) any member of the public. The last would be the case in the case of a newspaper advertisement.

Assault and Battery.

Blackstone's definition of assault and battery is as follows:

“Assault, which is an attempt or offer to beat another, without touching him; as if one lifts up his cane, or his fist, in a threatening manner at another; or strikes at him, but misses him; this is an assault insultus which Finch describes to be ‘an unlawful setting upon one's person.’ This also is an ‘Inchoate violence’ amounting to considerably higher than bare threats; and, therefore, though no

actual suffering is proved, yet the party injured may have redress by action of trespass *vi et armis*; wherein he shall recover damages as a compensation for the injury. * * *

Battery, which is the unlawful beating of another. The least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in even the slightest manner.''

There must be an actual application of force, however slight, in every case of a battery. In every case of an assault there must be a threat. Such threat may be, and often is, by act rather than by words. There must be present apparent ability to carry out the threat. There also can be no assault without motion of some kind; it is unnecessary, however, in an assault that the force should reach the person at whom it is directed.

An aggravated assault or battery is either one which occurs in the commission of some other, and more serious offense, or one done under circumstances, or in a manner which adds to the enormity of the act. The following are examples of what have been held to be aggravated assaults or batteries:

An assault by an adult on a child, or an assault on a decrepit person.

An indecent assault.

An assault with a deadly weapon.

An assault committed in a court of justice, or in the house of a private family.

An assault committed in such a way as to inflict disgrace, as by horsewhipping the party injured.

An assault by cutting or shooting.

Any assault which results in serious injury.

A justifiable assault or battery is one committed under such circumstances as to relieve the party committing it from all liability therefor, either civil or criminal. The following are justifiable assaults:

Those committed in the exercise of proper governmental authority;

Those committed in the exercise of what may be described as quasi public authority, such as the right of railway officials to keep order on their property;

The forcible restraint of a madman;

Aid extended to a sick or drunken person;

Moderate punishment of children by parents or by those in loco parentis;

Accidental physical contact in a crowd;

Physical contact in the course of any lawful game;

Any assault or battery committed in the defense of one's person or property, or in the defense of the person of near relatives, or of a master or servant.

In cases of self-defense the force exercised must not be out of proportion to the threatened injury. Furthermore the party whose person or property is threatened must resort to all other reasonable methods of protection, before he himself resorts to force. It was formerly said that before resorting to force in self-defense the party must "retreat to the wall or ditch." A more liberal view is held at present, however. When a party is assaulted and uses unreasonable force in return, the two parties may be held guilty of mutual assaults. The right to use force in defense of property is somewhat more restricted than in the defense of one's person.

False Imprisonment.

False imprisonment is the unlawful total restraint of the liberty of a person. The prevention of a person from going in a certain direction or to a certain place will not constitute the tort. False imprisonment may either be under improper legal proceedings or entirely without legal process.

Torts Against Real Property. Trespass, Waste and Nuisance.

The torts which affect real property, are trespass, waste and nuisance. In trespass the injury is committed on the

property by a person who has neither the ownership nor the right of possession. Waste is committed on the property, by a person, other than the ultimate owner, who has the right of possession. Nuisance is committed off the premises.

Trespass.

The law against trespassing upon real property is (theoretically at least) very strict. Any unauthorized entry upon the lands of another is a trespass, whether any damage is inflicted or not. Authority to enter upon the lands of another can be acquired in three general ways: (1) By express license of the owner, (2) by implied license of the owner, and (3) by license of law. The law makes very liberal presumptions as to the authority of the second class. A person is in general presumed to extend an implied license to enter upon his property to anyone who desires to see him for any proper business or social purpose.

The classes of cases where a person may enter upon the land of another under license of the law are numerous and of very different characters.

Public officers may enter to serve legal papers, preserve the peace, or to perform any other proper governmental functions. Entry may be made by an adjoining landowner to abate a nuisance.

Persons who have or desire to have, business dealings, with them may enter under license of the law, the property of those engaged in a quasi public business (e. g., common carriers and innkeepers).

A creditor may enter the property of his debtor to demand payment.

The owner of property may enter it to see if his tenant is using it in a proper manner.

When the personal property of one person gets on the land of another, without the fault of the owner of such personal property, he may enter to recover such goods.

Necessity may justify such entry, as where a person is chased by a dangerous animal and is seeking a place of refuge.

Many other illustrations of entry under license of the law might be given.

When a person rightfully enters upon the property of another, under license of the law, and then commits a trespass upon such property, he becomes a trespasser *ab initio*.

Waste.

Waste was originally redressed by the old real action of waste, and when this action became obsolete, trespass on the case became the remedy. This is the only case (independent of recent statutes) where trespass on the case lies in the case of a direct application of force.

Nuisance.

An action *ex delicto* (trespass on the case) will always lie in the case of a private nuisance. A nuisance is a private one as regards any particular individual when that individual suffers some special damage in addition to the general damage suffered by such member of the community. In such a case the party injured may also abate the nuisance, or, in proper cases secure an injunction against the act constituting the nuisance.

Trespass to Personal Property.

Trespass against personal property may consist either in the taking away of the property (*trespass de bonis asportatis*), the destruction of the property, or the damaging of the property. It was only at a comparatively late period in the history of the common law that an action began to be permitted for the last mentioned species of trespass.

A *trespass de bonis asportatis* is now known by the name of conversion. Actual taking of the property from the owner's possession is not necessary to constitute a conversion. Every act of control over personal property without the owner's authority and in violation of his rights, is a conversion.

In order to maintain an action for trespass to personal

property of the plaintiff must either have the actual possession of the property or constructive possession, with right to immediate possession. Bare possession is sufficient to sustain an action against anyone but the rightful owner; while, on the other hand, the right of the general owner to bring such action is barred by outstanding possession in another.

Indirect Trespass.

Indirect trespass consists of those injuries not inflicted directly by the tortfeasor, but committed through the action of some agency or instrumentality under his control. Under this heading are included injuries inflicted by agents or servants, by animals, or by inanimate dangerous objects.

The liability of a person for torts committed by his agent has been already discussed in the chapter on Agency.

In considering the question of the liability of a person for injuries occasioned by animals of which he is the owner, a distinction is to be here observed between injuries occasioned by wild animals, and those caused by domestic animals. Violence being the natural disposition of the former, their owners are absolutely liable for damage which they may occasion. In the case of domestic animals the owner is not liable for the damage which they may occasion in the absence of knowledge on his part of the vicious propensities of the animal. Dogs occupy an intermediate position between other domestic animals and wild animals. At common law, the rule governing liability for injury caused by dogs was the same as in the case of other domestic animals but by statute in nearly all the states, a higher degree of liability has been imposed upon the owners of dogs.

A person owning or controlling dangerous objects, or elements, must take proper precautions for their safe keeping or he will be liable for any damage resulting therefrom. Among the objects and elements coming under this head are fire, explosives, dangerous accumulations of water, etc.

Under the early common law when an animal or an in-

animate object occasioned death, liability for such injury was escaped by surrendering the animal or thing causing the damage. Such animal or thing was known by the title of a "deodand."

Seduction.

Seduction consists in inducing a woman to submit to unlawful sexual intercourse by the means of some influence, promise, act or enticement which overcomes her scruples or reluctance. There must be something more than a mere appeal to the passions of the woman, and mere praise or flattery are not sufficient to constitute the tort. As the woman herself consents to the act she herself can never bring the suit. If the father of the woman is alive he is the proper plaintiff. The ground of his action is based upon his loss of the services of his daughter, and some service from the daughter to the father must be proved before there can be any recovery. Such services, however, may be very slight. After the loss of some service has been proved additional damages may be given to the father for the disgrace, damage to his feelings, expense of caring for his child, etc. The right exists in the father even if the daughter is an adult, if she still lives with him, and there are cases where recovery has been allowed where the daughter was living away from her father's at the time of the seduction, but thereupon returned home.

After the death of the father the mother may sue for the seduction of her daughter, and the action may also be brought in proper cases by persons standing in loco parentis. A master may recover damages for the seduction of his female servant upon the proof of actual damage to himself.

Malicious Prosecution.

The most important tort action involving malice, is that of malicious prosecution. "Malicious prosecution, regarded as a remedy, is a distinctive action ex delicto for the recovery of damages to person, property, or reputation, shown to have proximately resulted from a previous or criminal proceeding, which was commenced or continued without

probable cause, but with malice, and which has terminated unsuccessfully. Regarded as a specific tort, it is the wrong so committed." (26 Cyc., p. 6.)

The following are the essentials to be proved in an action of malicious prosecution: (1) The commencement or continuation of an original criminal or civil judicial proceeding; (2) its legal causation by the present defendant against the plaintiff; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceedings; (5) the presence of malice therein; (6) damage conforming to legal standards, resulting to plaintiff.

An action for malicious prosecution is almost invariably based upon a previous criminal prosecution, but may be based upon a previous civil suit in which there were special circumstances of oppression; as by the improper use of such legal actions and proceedings as attachment, garnishment, forcible entry, and detainer, replevin, and ejectment.

Want of probable cause and malice must each be proved. Proof of want of probable cause makes out a prima facie case of malice, but proof of malice does not make out even a prima facie case of want of probable cause. In determining whether a person had reasonable and probable cause for instituting an action the question must be answered on the basis of the information possessed by the prosecutor at the time of the institution of the original suit; liability can neither be imposed or escaped on account of the additional information which may come to his knowledge later.

A person may be liable in an action of malicious prosecution either on account of instituting the original action, of advising it, or of continuing it after the want of probable cause has been shown.

In cases of criminal prosecution there must always be a termination of such proceedings in favor of the defendant therein, before an action for malicious prosecution will lie, except in the case of *ex parte* proceedings. A number of cases, however, have held that a termination of a suit of a

civil nature is not necessary before an action of malicious prosecution, based thereon, can be brought. In cases of attachment the defendant will not be barred from bringing an action for malicious prosecution by the fact that he paid the plaintiff's claim, as the release of the attached property may have been imperative to him.

Malicious Interference With Contracts.

The old action for malicious interference with contracts is now practically obsolete. It was mainly used by a master against any one who enticed away his servant.

Conspiracy.

The civil action of conspiracy has a somewhat wider scope than the criminal one. Conspiracy by itself is not a cause of action. If an act is lawful it cannot be made unlawful by a number of persons uniting to do it. (There are perhaps some exceptions to this rule in the case of contracts in restraint of trade.)

When the mischief contemplated is accomplished the conspiracy becomes important, as it may affect the means and measure of redress. It may be pleaded and proved as aggravating the wrong of which plaintiff complains, and to enable him to recover against all the defendants as joint tort-feasors. The party wronged may look beyond the actual participants in committing the injury, and join with them as defendants all who conspired to accomplish it.

Slander and Libel.

Slander is defamation conveyed to the ear of some third person, and libel is defamation conveyed to the eye of such third person. Libel, in some cases, is a crime as well as a tort, while slander can never be.

Libel is always actionable per se (i. e., without proof of special damage), while slander is only actionable per se in the following classes of cases:

(1) Where the charge, which is the basis of the action, imputes to the plaintiff the commission of an indictable offense involving moral turpitude:

(2) Where it imputes that the plaintiff has a contagious or infectious disease of a disgraceful kind;

(3) Where the charge is one tending to injure the plaintiff in respect to his office, business or occupation; and,

(4) Where the charge is one tending to disinherit the plaintiff.

In order to sustain an action for either slander or libel there must be a publication of the defamation. By publication is meant the communication of the defamation to some third party. Words spoken to the plaintiff himself and without the hearing of any third party can never constitute slander, no matter what charges or accusations may be made. Similarly it is not libel to send a letter containing charges about a certain person to that person himself, unless the circumstances were such as to render it probable that the letter would be opened and read by some third person. The publication of a libel contained on a postal card is completed as soon as the postal card is mailed. Merely writing defamatory statements without the intention to let them pass out of the possession of the writer does not constitute a publication. It is certain that the dictation of defamatory matter to a stenographer constitutes slander, and some decisions have held that an action for libel can also be brought in such a case.

The two principal defenses against suits for slander or libel are truth and privilege.

At common law the truth of a statement is a defense to any prosecution, either civil or criminal for either slander or libel, and the purpose or motive of the defendant is immaterial. In many states it is now provided, either by the State Constitution or by statute, that truth shall only be a good defense when published with proper motives.

Privileged communication may be either absolutely privileged or only qualifiedly privileged. Statements made in the course of legislative or judicial proceedings are absolutely privileged. No action for slander or libel can be based upon statements made in such places, even although such statements were both known to be false and mali-

ciously spoken. The rule as to the absolute protection of statements made in the course of judicial proceedings is qualified by the rule that such statements, in order to enjoy this absolute protection, must be material and pertinent to the controversy before the court.

Qualifiedly privileged communications are those held to be privileged in the absence of malice. Qualifiedly privileged communications have been held to include: proceedings in a church, lodge, or other meeting of a quasi public character; official communications, reports of public committees; mercantile reports; communications as to character of suitor or lover when made by a near relative of the party concerned; communications made in the course of a mutual controversy or at the request of the party defamed; and communications relative to the appointment of public officers; relative to the appointment of school teachers; or regarding liquor licenses.

The bad character of the plaintiff in an action for slander or libel is not a complete defense, although it may be shown in mitigation of damages. It is no defense that the defendant believed the charges which he made to be true, if they were in fact false. Neither is it a defense that the charges were made under the influence of sudden passion, or that there had been a prior publication of the libel by a third person, or that there were reports and rumors previously existing.

Negligence.

Negligence is not a distinctive tort in itself, but rather an element towards fixing liability in a number of different torts. The loss occasioned by negligence may take the form of either damage to the person, of damage to real property, or of damage to personal property. Before liability can be imposed on the ground of negligence the violation of a duty must be proved. The duties which may be violated by negligence are: to do all acts in a careful manner; not to do any act which will wrongly expose the person or property of another to danger; and to do certain acts necessary to protect the persons and property of others

from danger. In other words, negligence may consist either: in doing a certain thing at all; in not doing something; or in doing anything in a negligent manner.

Where the negligence of the party damaged has contributed as an appreciable cause to the result there can be no recovery.

CHAPTER XI.

DOMESTIC RELATIONS.

Marriage.

“Marriage is a mutual agreement of man and woman to live together in the relation and under the duties of husband and wife, sharing each other’s fate or fortune for weal or woe until parted by death.” (Lewis vs. Amis, 44 Texas, 319.)

The contract of marriage differs from all other contracts in the fact that it cannot be rescinded by the mutual consent of the contracting parties.

Besides being a contract, marriage is also a status. By entering into a marriage contract the parties thereto, in addition to assuming certain rights and liabilities towards each other, assume a new relation towards society in general. It is on account of the existence of this status that the law undertakes to regulate the marriage contract more closely than any other species of contract.

The age of consent is the age at which a person can make a valid contract of marriage. At common law it is fourteen years in the case of males, and twelve years in the case of females.

By statutory provisions, in the several states, the consent of the parents of minors, even although over the age of consent, to his or her marriage is generally required.

The disregarding of such statutory requirement will not invalidate the marriage, but the minister or public official celebrating the marriage renders himself criminally liable. Such marriage may be disaffirmed at any time before the party reaches the age of consent or upon reaching such age; it can only be ratified after the party has reached the age of consent.

The right to disaffirm such marriage is personal to the party under the age of consent at the time the marriage was contracted.

Physical disability is the inability to perform the act of sexual intercourse. This, if incurable, is a ground for the dissolution of the marriage, but to have such effect it must have existed at the time the marriage was contracted.

The mental incapacity of one of the parties to a marriage contract will render such contract void, as will also the drunkenness of one of the parties to a marriage, if to such a degree as to render him unconscious of what he was doing.

Bigamy is the entering into of the marriage contract by a party already having a legal wife or husband, alive and undivorced. A bigamous marriage is void.

Where a valid marriage is once shown to exist, all presumptions of fact, especially in criminal cases, will be indulged to uphold the marriage. The law will also make such presumptions of facts as will tend to uphold the innocence of the parties or the legitimacy of children; thus the presumption of the law as to death, marriage or divorce may be different, even on the same state of facts, in different classes of cases.

Marriages are voidable if entered into when under a duress of sufficient force to destroy the free will of a person of ordinary bravery and fortitude.

Divorce.

At common law there were two kinds of divorce: A *vinculo matrimonii*, or absolute divorce, and a *mensa et thoro*, which nearly corresponded to our separate maintenance. In the United States there is but one kind of divorce—an absolute release from the marriage relation.

A marriage license is a permit which parties desiring to marry are required by law to take out from the proper officials. Marriage entered into without such license, even where it is required by law, are nevertheless binding. The parties to the marriage and the minister or public official performing the marriage are, however, criminally liable. Marriages solemnized by a civil officer outside of his jurisdiction have no effect whatever.

Under the common law a marriage could be entered into

by an agreement between the parties to that effect, without any ceremony taking effect. Such a marriage was called a common law marriage. Such a marriage might be either "per verba de praesenti," which became binding at once, or "per verba de futuro cum copula," which only became binding when consummated. Common law marriages have now been abolished in nearly all of the states in this country.

Husband and Wife.

At common law the husband was liable for all the antenuptial debts of his wife. He could, however, set up as a defense to such debts any defense which could have been personally set up by the wife, including the infancy of wife.

The death of the wife released the husband from all liability for any debt of the wife which had not been reduced to judgment against the husband during the coverture.

A wife was not liable for the debts of her husband.

At common law by marriage all the personal property of the wife passed to her husband who was also entitled to the rents and profits of her real estate during coverture.

Under modern statutes a husband may make a gift of any property which he desires to his wife, and such gift will be upheld if not in fraud of creditors. There is no need of any valuable consideration, the good consideration of love and affection is sufficient.

Where the husband purchases property with his own money and takes the title in the name of his wife, the presumption of the law is that the intention was to make a gift of the property to the wife.

A husband has a right of action against any person guilty of criminal conversation with his wife, or who alienates his wife's affections or entices her away from him. In all such cases he is entitled to recover not only for the loss of his wife's services, but also for the loss of her affection and society, and the shame, mortification and disgrace brought upon him.

At common law a wife could not sue for the alienation of her husband's affection but she has the right by statute at the present time to sue in such cases.

By marriage the domicile of the wife becomes the same as that of the husband.

The better rule is that when a wife is properly living apart from her husband, that the place of his domicile does not determine hers and that she may make her domicile where she desires. It has been held, however, that nothing short of a decree of divorce can give such right of selecting her domicile to the wife. Where the justification of the wife in living apart from her husband is in dispute she can acquire a separate domicile to enable her to sue for divorce, but for no other purpose.

At common law a husband was liable for all torts committed by his wife. The wife herself was jointly liable for such torts, unless they were committed jointly with the husband or in his presence, in which case the husband alone was liable.

The common law disabilities of a married woman have now been almost entirely done away with. This subject is entirely regulated by statute and varies greatly in the different states.

Parent and Child.

The right to the custody of a child is primarily in the father; after the death, or desertion of the father, the right to the custody of the child passes to the mother.

A father may surrender his right to the custody of his child by emancipating him, but such emancipation is revocable.

A parent is liable for the support of his minor children, and if he fails to furnish necessaries to his minor child, a third person who supplies such necessaries may recover from him. The estate of a deceased parent cannot be held for the support of his minor child.

In case of a divorce, the custody of the children will be determined by the court. The governing consideration will be the best interests of the child.

Bastards and Adopted Children.

A bastard is a child born out of lawful wedlock. At common law such a child was not made legitimate by the

after marriage of the parents, but the opposite rule prevails in this country to-day. At common law a bastard could inherit from no one. To-day a bastard may inherit from, or through, his mother and from his own descendants.

Adoption was not recognized at common law, and is entirely regulated by statute. A bastard may inherit from, but not through, his adopting parents, and may also inherit from his natural parents. Adopting parents cannot inherit from an adopted child, except property which such child has received from them.

CHAPTER XII.

REAL PROPERTY.

Two difficulties are encountered at the very outset, in the study of the law of real property. The first of these arises from the fact that the distinction between real and personal property under the common law, is a very technical one. In the second place, confusion often arises from the fact that the term real property is applied both to the physical, tangible portion of the earth's surface, and to certain interests, possessed by individuals in such property. The distinction between real and personal property grew out of the feudal system. Under this system only certain estates were considered as freeholds, or estates which were of sufficient dignity to be held by a freeman; all estates less than a freehold are only considered as personal property. Or, put in another way, estates of freehold (i. e., estates of inheritance and estates for life), and none other, are real property. In some states this is modified by statute, and estates for a term of years, extending beyond a certain period, are made real property.

In most books on this subject real property is said to include lands, tenements and hereditaments. We find here a rather confusing mingling of the tangible property itself and of interests therein. Land includes the soil of the earth, and all things naturally annexed to it. It also includes everything above and below the surface, "from the center of the earth to the highest heavens." The authorities and decisions are in conflict as to whether the term land is broad enough to include holdings annexed thereto. Tenements include anything which might be held under a feudal tenure. Hereditaments is the broadest term of all and includes everything which can pass by inheritance.

Hereditaments are divided into corporeal and incorporeal hereditaments. The distinction between the two generally

given is that a corporeal hereditament is the thing itself, and an incorporeal hereditament merely some interest in, or concerning it. This distinction is inaccurate, as both classes of hereditaments are merely interests in the property. The true distinction is that corporeal hereditaments are interests in property which amount to the general right of ownership or possession, while incorporeal hereditaments consist of special rights in such property. In early times corporeal hereditaments were created by livery of seisin; and incorporeal hereditaments by grant. The principal species of incorporeal hereditaments were: advowsons, tithes, commons, ways, offices, dignities, corodies, annuities, franchises, and rents.

Fixtures.

The meaning of the word "fixtures" in the law, is a doubtful one. By some writers, and in some decisions, the term is applied to such personal property as does not become real property by being annexed to real property. The more correct usage, however, is to give the term "fixtures" an exactly opposite meaning, and to apply it to such personal property as does become real property by such annexation. The question is merely one as to name, the law on the subject being clear. The rule is that, in general, personal property becomes real property by being annexed to real property, but, an exception is made in the case of personal property, used for trade, domestic, or agricultural purposes, annexed to the land by one rightfully in possession, but not the owner of such real property. In such cases the removal of such property is permitted, provided it can be done without any serious injury to the realty, and provided also, such property is removed before the expiration of the term of the estate of the person owning the personal property, if his estate is one of definite duration, or within a reasonable time after the expiration of such estate if it is one of indefinite duration. In case a tenant holding a lease for a year, during such period annexes some trade fixtures to the property, and later, but before the expiration of his first tenancy, takes a new lease for a second year,

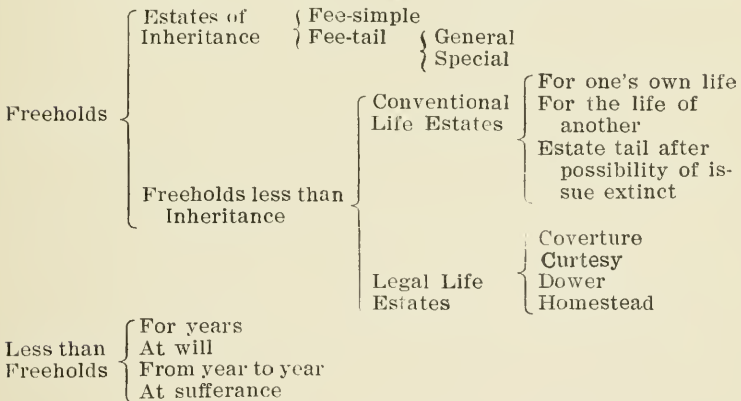
he must in such lease reserve the right to remove such property or he will be unable to do so at the termination of his second lease.

Estates.

An estate is the degree of interest which a person holds in property. Estates are classified both as to their quantity, quality, time of enjoyment, and number of owners. Every estate falls somewhere under each of the four classifications:

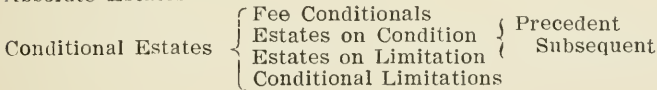
The following charts show the general outlines of these classifications of estates:—

I. Classification of Estates as to Quantity.



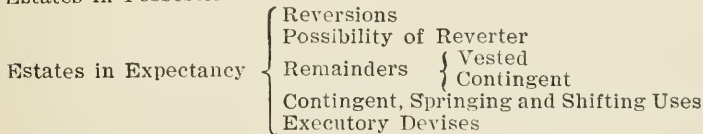
II. Classification of Estates as to Quality.

Absolute Estates



III. Classification of Estates as to Time of Enjoyment.

Estates in Possession



IV. Classification of Estates as to the number of owners.

Estates in Severalty

Joint Estates	}	Joint Tenancies
		In Common
		In Entirety
		In Co-parcenary
		Partnership property
		Community property

Classification of Estates as to Quantity.

By the quantity of an estate is meant the time during which it is to (or may) endure. Estates under this classification are divided into estates of freehold, and estates less than freehold. The term "freehold" is a product of the feudal system, and was first used to designate those estates which a freeman might hold, as distinguished from the unfree tenures, by which the great mass of the population of the early Middle Ages held.

At the present time estates of inheritance and estates for life are freeholds, while all other estates are classed as less than freeholds. An estate for a certain number of years, no matter how many, is considered as less than a freehold. In some states this rule is modified by statute.

There are two species of estate of inheritance: estates in fee simple, and estates in fee tail. An estate in fee simple is the highest estate known to the law. Its owner (unless he falls within one of those classes of persons who do not have the power to contract) may freely alienate it either during his lifetime, or, by will, after his death. If such owner dies intestate the property may descend to any of the heirs of the deceased, either lineal or collateral. An estate in fee simple could formerly only be created by the use of the word "heirs," for which there was no possible substitute. If no words of limitation were inserted in a deed, the early rule was that the grantee took a life estate. This rule has been changed, and at the present time, where there are no words of limitation, the grantee takes a fee simple, or the entire interest of the grantor if such interest is less than a fee simple.

An estate in fee tail is one limited to a certain person "and the heirs of his body." Such an estate could only descend to the lineal descendants of the first taker, it, however, might descend to a collateral relative of the last holder, provided such relative was a lineal descendant of the first taker. Estates in fee tail may be either general or special. A fee-tail general may descend to any of the descendants of the first taker; while a fee-tail special can only descend to his (or her) descendants by a particular designated person as wife (or husband). There may also be an estate-tail male, or an estate-tail female, limited respectively to the male or female descendants of the first taker. Estates in fee-tail are practically obsolete in this country. In most states they are abolished entirely, while in the few states, where they exist at all, it is in a modified form. Thus, in Illinois, if an estate-tail is created the first taker has a life estate, and after his death his descendants (if he leaves any) take an estate in fee-simple.

Life estates are either conventional or legal, the former being created by acts of the parties, and the latter by act of law. Conventional life estates may be either for the life of the holder or for the life of another (*per auter vie*). A peculiarity of the rule of common law as to the disposition of an estate of the latter character is found in cases where the tenant survived the *cestui que vie*. At common law such an estate could not descend to the heirs, for the law of descent applies only to estates of inheritance. It could not pass to the executor or administrator, for they could take only chattel interests, and this estate was a freehold. At common law it was permitted for the one who first took possession to hold such estate, and he was called the general occupant. This right of general occupancy could only be exercised where there were no persons designated in the grant who could take as special occupants, if the grant was to the taker of the estate, and his heirs during the life of the *cestui que vie*, the heirs would take as special occupants, to the exclusion of the general occupant. This principle has now been done away with, and such an estate

descends to the heirs of the tenant for life, who hold it during the lifetime of the party for whose life the estate was limited.

The legal life estates are those of coverture, curtesy, dower, and homestead.

Coverture was the life estate, which, at common law, a husband had in all the real property of his wife during the continuance of the marriage.

Curtesy is the estate which a husband has in the real estate of his wife after her death. The requisites for an estate in curtesy are: (1) legal marriage; (2) birth alive of issue capable of inheriting; (3) actual seisin during marriage, and (4) death of wife. Curtesy exists in all the estates in real property of the wife both legal and equitable, except in such estates as terminate with the death of the wife. In many states curtesy has been abolished by statutes, for example, in Illinois, curtesy has been abolished and the husband been given an estate in dower.

Dower is the life estate which the wife has, after the death of her husband, in one-third of all the real estate held by her husband at any time during marriage (and in which she has not released such right of dower) which any issue whom she might have had, might have inherited. Actual birth of issue is not necessary. Neither is actual seisin during marriage required, the right to immediate seisin is sufficient. At common law, dower did not exist in equitable estates. In Illinois, by statute, both husband and wife have dower interests in the equitable estates of the other (i. e., where the husband or wife is cestui que trust). A husband cannot transfer any of his real property, so as to deprive the wife of her dower right, unless she joins in the conveyance. If the husband exchanges one piece of land for another, without the consent of the wife, she can elect which parcel of land she will claim dower in. It is possible for two or more persons to have dower rights in the same property at the same time.

Homestead is the right which the head of a family has to hold real property up to a certain value, free from the

liability of its being taken on execution for a debt. This estate is, in reality, an exemption rather than a true estate.

The estates less than freehold are four in number: (1) for years, (2) at will, (3) from year to year, and (4) at sufferance. An estate for years is one which is to continue for any definite period. An estate at will is one which can be terminated at any time at the will of either party. This estate occasions many inconveniences and has been in the main superseded by estates from year to year. Estates at will still exist, however, (1) where the property is leased for an indefinite period without any reservation of rent, or (2) where although rent is reserved it is expressly provided that the estate shall be one at will. An estate from year to year is one which can be terminated at the end of any year, but, which if not so terminated will continue for another year. Instead of an estate from year to year there may be one from month to month; or the period which is the unit of occupation, may be for a longer period than one year—such as a two year period. In tenancies from month to month, a month's notice is required to terminate it. In the case of a tenancy from year to year the length of notice required is generally fixed by statute (e. g., sixty days in Illinois). An estate at sufferance exists where a person, rightfully in possession, continues to occupy the property after his term has expired, and where the conditions are not such as to make him a tenant from year to year.

Estates Classified as to Quality.

By the quality of an estate is meant the certainty, or uncertainty, of its continuance. In this respect estates are divided into absolute estates and conditional estates. An absolute estate is one which is certain to continue for the full period for which it was originally granted. A conditional estate is one whose commencement, continuation, or termination depends upon the happening, or not happening, of some event.

The various classes of conditional estates (sometimes referred to as base, determinable, or qualified estates) are:

fee-conditionals, estates on condition, estates on limitation, and conditional limitations.

A fee-conditional was a life estate, which upon the birth of issue to the holder was enlarged into a fee-simple. This estate was abolished by the statute of De Donis in 1285 (13 Edward I), at the time of the creation of estates tail.

An estate on condition is one which is created, enlarged, or defeated by the happening, or not happening of some event. Conditions are either precedent or subsequent. A condition precedent is one which must be fulfilled before an estate can rest. A condition subsequent is one the breach of which will terminate the estate. If a condition precedent is illegal, or against public policy, the estate can never vest; if, however, a condition subsequent is illegal, or against public policy, such condition will be disregarded and the estate become an absolute one. The condition, upon which an estate depends, may be an event which depends upon the will of the holder of the estate, or an event which is entirely beyond his control. The courts at the present time look with a great deal of disfavor upon conditions subsequent; and in their place restrictions are now being generally used. A breach of a restriction will not work a forfeiture of the estate, but such breach may be restrained by injunction, or a suit for damages may be brought against the party violating the restriction. Courts of equity may disregard restrictions, upon the ground of changed circumstances affecting the property; as where the restriction was that no building except a private residence should be built upon the property, and the locality has ceased to be a residential one.

An estate on limitation is one created to continue until the happening of a certain event, or during the continuance of a certain state of affairs. In the creation of an estate upon limitation the words which mark the termination of the estate are words of limitation, and are used in connection with the words of grant. Estates upon limitation are generally created by the use of such words as "while," "as long as," etc.

An estate upon limitation differs from an estate upon conditions subsequent in three respects: (1) No act of the reversioner is required after the termination of an estate upon limitation, while there must be an entry after a breach of a condition subsequent in order to work a forfeiture; (2) there may be a remainder after an estate upon limitation, but not after an estate on condition subsequent; and (3) results which cannot be attained by means of conditions subsequent, on account of such conditions being illegal or against public policy, may be attained through the use of estates upon limitation. Thus an estate to A "as long as he remain single" will terminate upon the marriage of A; but if the grant is "to A for life, on condition that he does not marry," the condition is held to be against public policy, and A will retain the estate for life, even although he marries.

A conditional limitation was the last of the conditional estates in point of time to come into existence. It is a future estate granted to take effect upon the breach of the condition subsequent and therefore an estate which could not be good as a common law remainder.

Estates Classified as to the Time of Their Enjoyment.

Under this classification estates are primarily divided into estates in possession and estates in expectancy. Estates in expectancy, are estates which are to begin in the future, and include reversions and remainders.

A reversion is a future estate and will "revert" back to the grantor or his heirs. If such reversion may, or may not, take place the estate instead of being a "reversion" is called a "possibility of reverter." After a life estate the future estate will be a reversion; after a fee-tail, or a conditional fee-simple it will be a possibility of reverter. There can be no future estate after an absolute fee simple.

A remainder is a future estate created in favor of some third person. There are four important general rules governing all remainders, which should be carefully remembered. These four rules are as follows:

- (1) Every remainder must have a preceding estate to support it;
- (2) A remainder must be created at the same time, and by the same instrument, as the preceding estate;
- (3) A remainder must take effect immediately upon the termination of such preceding estate, and
- (4) A remainder must not take effect in derogation of the preceding estate.

The first rule means that the owner of property cannot grant an estate to begin in the future, reserving the property himself until such future estate begins. Thus A cannot deed certain land to B, the conveyance to take effect ten years from the date of the deed.

Under the second rule a person cannot convey to A a life estate in certain property today, and then tomorrow, create a remainder to B to take effect after the death of A.

The third rule needs little explanation. Where an immediate estate is granted to A, followed by a remainder to B, there must be no hiatus between the termination of A's estate, and the commencement of B's. If there should be, there would be a reversion to the grantor, and then the remainder to B could not take effect. There can never be a remainder after a reversion, although there may be either a reversion, or another remainder, after a remainder.

The fourth rule means that a remainder cannot take effect before the expiration of the full period for which the preceding estate was granted. It is because of this rule that there cannot be a remainder after an estate on condition subsequent.

“Remainders are either vested or contingent. Vested remainders, or remainders executed, are those by which a present interest passes to the party, though to be enjoyed in future and by which the estate is invariably fixed to remain to a determinate person after the particular estate is spent. As if A, be tenant for years, remainder to B in fee: hereby B's remainder is vested, which nothing can defeat or set aside. The person entitled to a vested remainder has an immediate fixed right of future enjoyment, that is, an

estate in presenti, though it is only to take effect in possession at a future period. And such an estate may be transferred, aliened, and charged, much in the same manner as an estate in possession.

“A remainder is contingent when it is limited to take effect on an event or condition, which may not happen or be performed, or which may not happen or be performed till after the determination of the preceding particular estate; in which case such remainder can never take effect. It is not, however, the uncertainty of ever taking effect in possession, that makes a remainder contingent, for to that every remainder for life, or in tail, expectant on an estate for life, is and must be liable as the remainder-man may die, or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent.” (Note to Thomas’ Edition of Cokes Institutes.)

Two additional rules must be remembered in the case of contingent remainders: (1) the preceding estate must be a freehold, and (2) the contingency must not be illegal, against public policy, double or too remote.

Contingent, Springing and Shifting Uses, and Executory Devises.

The law is much more liberal in its provisions relative to future estates created by will, or by way of use, than it is with relation to legal estates created by deed.

The term contingent use is limited in its application, to such future uses, as would be good as contingent remainders if they were transformed into legal estates.

Neither springing nor shifting uses would be good as legal remainders, as they each violate one of the rules governing remainders. A springing use has no preceding estate to support it, and a shifting use vests in derogation of the preceding estates.

Executory devises are such estates as are good if created

by will, but which cannot be created by deed; they cover practically the same ground as springing and shifting uses.

Estates Classified as to the Number of Owners.

Every estate is either an estate in severalty or a joint estate. An estate in severalty is one owned by one person; a joint estate is one owned by two or more persons. The various species of joint estates are: joint tenancies, tenancies in common, estates in coparcenary, estates by entirety, and partnership estates.

A joint tenancy is one where the interest of all the parties are equal, and were created at the same time by the same instrument. A joint tenancy possesses the four unities of time, title, interest, and possession. Another peculiarity of joint tenancies is the right of survivorship. When one joint tenant dies his interest in the property goes to the other joint tenants, instead of to the heirs of the deceased. This right of survivorship may be defeated, however, by the transfer of the interest of one joint tenant to a third person. The four unities no longer exist in this case, and the new taker is a tenant in common. If there are three joint tenants, A, B and C, and A transfers his interests to D, while D is a tenant in common, the transfer does not affect the relations between B and C. They are joint tenants between themselves, in an undivided two-thirds of the property, and tenants in common with D. The law formerly favored joint tenancies, and the presumption was that a joint estate which possessed the four unities was a joint tenancy. At present joint tenancy is not favored, and in order to create such an estate it must be expressly stated to be such, in the deed creating it.

In an estate in common the only (necessary) unity is that of possession. The interests of the parties need not be equal, and such interests may be acquired at different times and by different instruments.

An estate in coparcenary was the joint estate which according to common law, was vested by descent in the heirs of an intestate. Such estates were like tenancies in common in that the doctrine of survivorship did not obtain, but the

respective shares of the tenants in coparcenary were inherited by their heirs. The doctrine of coparcenary has never prevailed in this country except in the single state of Maryland. Coparcenary arose where a person who was seised in fee simple or in fee tail died and his next heirs were two or more females, his daughters, sisters, aunts, cousins, or their representatives. It also extended in gavelkind to all the males in equal degree as sons, brothers, uncles, etc. In either of these cases, all the coparcenaries put together made but one heir. The right of partition first existed in the case of estates of this character.

An estate by entirety can only arise where a husband and wife acquire interests in land by the same conveyance. Each is held to hold the entire estate at the same time. The survivor of the two takes the entire estate. This right of survivorship could not (as in the case of estates in joint tenancy) be defeated by one party conveying his interest. In Illinois, and some other states, however, it was decided that a decree of divorce would convert an estate by entirety into an estate in common. A number of states have held the law to be contrary to this. Estates by entirety have been abolished by statute in most states.

Although all land owned by a partnership must be held in the name of one or more of the partners, nevertheless, the interest of the partners is inferior to that of the partnership, and the creditors of the partnership. The interest of a partner in land held by the partnership is an anomalous one, being in reality, one in the excess of the assets of the partnership over the liabilities, rather than in any specified piece of property.

Titles.

The title to a piece of property, is the method by which it was acquired or the authority under which it is held.

Titles are divided into original titles and derivative titles.

The original title to a piece of property, is the one upon which all subsequent titles are based, and beyond which it is not necessary to go in an investigation of the validity of the title to any piece of land.

Original titles are always held by some government. In

this country the original title is in the state governments in the thirteen original states, in states formed out of these states (as Maine from Massachusetts or West Virginia from Virginia) and in Texas; and in the United States government, in the remaining states, and in all the territories and colonies. Where territory is acquired by one country from another, the title to all public lands passes to the new sovereign power, but the validity of existing land titles are generally recognized. As a result of this principle, the original title to many individual pieces of land in this country is that of some foreign government, which previously held the particular section of the country, and by whom a grant was made to the first individual owner of the property. Thus, in Illinois, many titles run back to and depend upon, old French grants.

Original title may be acquired by discovery, occupancy, conquest, or cession. Discovery, however, must be followed by settlement, to create a title. Occupancy, consists in the taking possession of land not previously occupied by any civilized nation.

Derivative titles are divided into titles by descent and titles by purchase.

Title by Descent.

Titles by descent are limited to cases where a person takes land from a relative who has died intestate.

The following are Blackstone's famous seven canons of descent:

(1) Inheritances shall lineally descend to the issue of the person who last died actually seised, but shall never lineally ascend. Actual seisin is necessary. Thus, if A should die leaving two sons, B, the elder, C, the younger, and B should die, never having been actually seised, C, the younger son, would inherit to the exclusion of B's heirs, as being the heir of A, the person last actually seised.

(2) Male issue shall be preferred to female. A dies leaving three daughters and one son. The son inherits the whole estate to the exclusion of the daughters.

3. Where there are two or more males in equal degree,

the eldest only shall inherit; where there are two or more female heirs in the same degree, they take as co-partners, share and share alike.

(4) The lineal descendants of any person deceased shall represent their ancestor, i. e., shall stand in the same place that the person himself would have stood, had he been living.

(5) On the failure of lineal descendants of the person last seised, the inheritance shall descend to his collateral relations.

(6) The collateral heir of the person last seised must be his next collateral kinsman of the whole blood. The half-blood, at common law, could never inherit.

(7) In collateral inheritances, kindred derived from male ancestors, however remote, shall be admitted before those derived from female ancestors, however near.

Some of these canons, particularly the first three and the last, have been changed by statute in many of the states, the subject of descent now being entirely regulated by state statutes in this country.

A person's relatives by consanguinity are of two classes—lineal and collateral. Lineal relatives are those who are descended one from the other. Collateral relatives are those who are not descended either from the other, but who are descended from some common ancestor.

If a person who dies intestate leaves descendants all of his property (except the share given by law to a surviving husband or wife), both at common law and by the terms of the various statutes, goes to such descendants. Ascendants were excluded absolutely from inheriting by the common law, and if there were no descendants the property went to the nearest collateral relatives. In most of the states, by statute, the ascendants now inherit after the descendants, either completely, or together with the brothers and sisters of the deceased. If there are neither descendants nor ascendants the property of the deceased goes by descent, to his collateral relative or relatives, in the nearest degree.

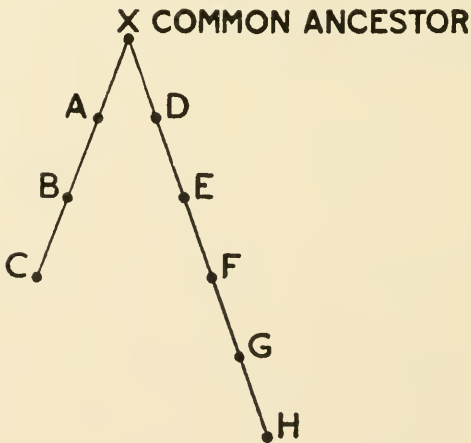
It is always a simple matter to determine the degree of

relationship between two lineal relatives, as each generation between the two counts one degree—father and son being related in the first degree, grandfather and grandson in the second degree, etc.

It is a somewhat more complicated matter, however, to reckon the degree of relationship between two collateral relatives. Two methods of determining such degree of relationship have been used. One is the method both of the Common law and of the Canon law; the other is the Civil law method which is today used in this country.

Under the Common law method the nearest common ancestor of the two relatives is found and the number of generations which each of the relatives is removed from such common ancestor is next ascertained. The number of generations in the longest of these two lines is then taken as the degree in which the two are related.

Under the Civil law rule, the nearest common ancestor is found, and the number of generations from such common ancestor to each party then found. The number of generations in each line are then added to give the degree in which the two collateral relatives are related. The application of these rules will be seen by the following chart.



			Under Common Law rule.	Under Civil Law rule.
A	related to	D in	1st degree	2nd degree
A	“	E “	2nd “	3rd “
A	“	F “	3rd “	4th “
A	“	G “	4th “	5th “
A	“	H “	5th “	6th “
B	“	D “	2nd “	3rd “
B	“	E “	2nd “	4th “
B	“	F “	3rd “	5th “
B	“	G “	4th “	6th “
B	“	H “	5th “	7th “
C	“	D “	3rd “	4th “
C	“	E “	3rd “	5th “
C	“	F “	3rd “	6th “
C	“	G “	4th “	7th “
C	“	H “	5th “	8th “

The right of representation is the right which persons, whose parent is dead, has to take the share, which such parent would have taken if living, in the estate of some deceased relative. This right is never extended further than to cover the cases of descendants of the deceased intestate, or descendants of the brothers and sisters of such deceased. The principle is also only applied in cases where some of the same generation as the deceased parent, of the persons taking by right of representation, are still living. Thus, if a man (A) has three children, B, C, and D, and B also has one child (E), C has two children (F and G) and D three children (H, I and J); if A died intestate, leaving all his descendants living except D, then B and C will each take one-third of A's estate, while H, I and J will divide the one-third that would have gone to D, and take one-ninth of A's estate each. So, again, if both B and D died before A, then C would take one-third of A's estate, E would take the whole of B's share, while H, I and J would each take one-ninth of the estate as before. Thus, E a grandchild, would take three times as large a share

as either H, I or J, also grandchildren. If, however, B, C and D all die before A, then the estate is divided equally between the six grandchildren.

Title by Purchase.

Title by purchase includes all methods of acquiring property other than by descent, it may arise either by act of the parties or by operation of law.

Title by act of the parties is divided into title by grant and title by devise.

A grant is either public or private. A public grant is one from the public. A public grant must rest upon the authority of the legislative department of the government. The legislative department of a government may provide for the grant of land in either one of two ways: first, it may pass a special act providing for the transfer of certain specified land to certain specified parties; or, second, it may pass a general public land act, by the compliance with the provisions of which an individual may acquire land from the government. Nearly all of the public land of the United States has been disposed of in the second manner. In such cases a "patent" is given to the grantee, signed in the name of (although not by) the President of the United States.

A private grant is one by a private person, and may be either by deed, or by dedication. A deed is used where property is transferred from one individual to another. A dedication is a grant from a private person to the public.

There are two forms of dedication—common law and statutory. In the former method no particular formalities are required. In the latter method the formalities are prescribed by the statute, and must be closely adhered to. If a dedication, however, fails as a statutory dedication it may still be good as a common law dedication. A dedication may be either in fee or for a special purpose. In the latter case the fee remains in the grantor, and the public only takes an easement, and if the public ceases to use the property for the purpose for which it was granted, it reverts to the grantor.

Title by devise is title by will. The right to dispose of real property by will, which existed in England in Anglo-Saxon times, was taken away at the time of the Norman Conquest, and was only restored by the Statute of Wills in 1540. This right was not complete until 1660. The required formalities of a will are fixed by the statutes of each state.

Title by Operation of Law.

Title by operation of law arises in the following cases:

- (1) Cases arising from natural causes:
 - (a) Accretion, which is the increase of land by the gradual and imperceptible additions thereto caused by the washing of the sea or adjacent stream.
 - (b) Reliction, which is the gradual subsidence of water leaving dry land where there had formerly been water.
(Avulsion is the sudden removal or deposit of land by the perceptible action of water; this cannot change the title to land.)
- (2) Cases arising from civil or political relations:
 - (a) Eminent domain.
 - (b) Escheat.
 - (c) Confiscation.
 - (d) Forfeiture.
- (3) Cases arising from public policy:
 - (a) Prescription.
 - (b) Limitation.

The effect both of prescription and of the statute of limitation is the same; namely, to prevent the bringing of an action after the lapse of a certain period. The theory in the two cases, however, is different. In the case of prescription the law presumes that there was a transfer of the property to the present holder, or to the person under whom the present holder claims, while in the case of the statute of limitation, without making any presumption, it prohibits any action to be brought, in order to restrict litigation within proper limits.

Conveyancing.

In early times land could only be transferred by livery of seisin, which must take place on the land before witnesses. Later it became possible to transfer real property without going on the land, but land could not be transferred merely by a written deed until after the passage of the Statute of Uses. This statute revolutionized the method of transferring land, but this was an entirely unexpected result of the statute.

Prior to the enactment of this statute it was possible to transfer the equitable title, or the beneficial use to land by the holder of the property executing a deed of trust declaring that he held the property as trustee for the benefit of some other party. After the passage of the statute, the legal title would follow the beneficial use, through the operation of this statute.

The complete title, both legal and equitable, was thus transferred without the necessity of livery of seisin; the beneficial use was transferred by the written instrument, and the legal title by the operation of this statute.

Early deeds are classified as follows:

Original Common Law Deeds.

- (1) Feoffment.
- (2) Grant.
- (3) Gift.
- (4) Lease.
- (5) Exchange and partition.

Derivative Common Law Deeds.

- (1) Surrender.
- (2) Release.
- (3) Confirmation.
- (4) Defeasance.
- (5) Assignment.

Deeds Operating Under the Statute of Uses.

- (1) Bargain and sale.
- (2) Covenant to stand seized.

- (3) Lease and release.
- (4) Deeds to declare a use.
- (5) Deed of revocation of uses.

The two important modern forms of deeds are warranty deeds, and quit claim deeds.

In a warranty deed the grantor warrants the title. In a quit claim deed the grantor merely transfers what interest he has (except that he is liable for any incumbrance which he himself has put upon the property and which is unknown to the grantee). The difference in effect between a warranty deed and a quit claim deed is not one affecting the title, but instead, the collateral liability of the grantor. A quit claim deed conveys all the interest the grantor has, and a warranty deed can convey no greater interest. In a warranty deed, however, the grantor assumes a collateral liability to re-imburse the grantee for any defects in the title, and if the grantor afterwards acquire the title to such property it will inure to the benefit of the grantee.

In many states there are at present certain statutory forms of deeds in use. Such deeds, however, can only be used in simple forms of conveyances.

Parts of a Deed.

The eight formal parts of a deed are as follows:

- (1) The premises.
- (2) The habendum,
- (3) The tenendum.
- (4) The reddendum.
- (5) The conditions.
- (6) The covenants.
- (7) The warranty.
- (8) The conclusion.

There are five, so-called, common covenants, which under the laws of most states, are presumed in the case of all warranty deeds. These five common covenants are those of "seisin," "quiet enjoyment," "good right to con-

vey," "free from incumbrances," and of "general warranty."

Description of Land.

In addition to describing the estate which the grantee is to take, it is also necessary that the deed should identify the land to be transferred by such deed. This identification of the land may be secured by reference to the following: (1) Natural objects of boundaries, such as rivers, mountains, etc.; (2) artificial devices, such as stakes or marked trees; (3) courses and distances.

By course is meant the direction of a line, and by distance, its extent. Natural objects and artificial devices are also known as monuments; courses and distances, as metes and bounds. The name of calls is given to all the above mentioned objects collectively.

It is also a common practice to insert in a deed the quantity of land conveyed thereby. In case of inconsistencies between the different methods of identification they control, in the following order: First, natural objects; second, artificial devices; third, courses and distances; and fourth, enumeration of quantity.

In the case of a description where one description is accurate and the other manifestly inaccurate, the latter may be rejected as surplusage.

"A general description of the property conveyed may be qualified by what is known as 'exceptions and reservations.'

"An exception is a withdrawal from the operation of the grant of some part of what is granted in general terms, as, for instance, a grant of a certain field, except the northwest acre. An exception is therefore always a part of the thing granted and is tangible.

"A reservation is the creating out of the property granted, of some new incorporeal hereditament, such as a right of way for the benefit of the grantor." (Putney's Law Library, 1st Edition, Vol. VI, pages 115-116.)

Contest in the Legal History of England Over the Right of Alienation of Real Property.

“One of the most interesting chapters in the legal history of England is the long contest between those who desired to keep the land mainly in a few noble families and to prevent its alienation, and those who desired to make land a free object of commerce.

“The first attempt to limit its alienation came in the form of the fee-conditional. This estate proving ineffectual to accomplish the desired purpose, it was abolished by the Statute of De Donis and the fee-tail substituted therefor. A little later a new method was devised of alienating estates in fee-tail by the means of fictitious suits known as fines, and common recoveries.

“Upon the fee-tail becoming ineffectual for the purposes for which it was devised, some of the conveyancers of those days invented a new form of conveyance by which land was granted to the first taker for life with remainder to his heirs or remainder to the heirs of his body. The purpose of the inventors of this form of conveyance was defeated by the construction put upon it by the court in a decision which has since been known as the rule in Shelley’s Case.” (Id., pages 119-120.)

The Rule in Shelley’s Case.

The rule in Shelley’s Case is that “When a person takes an estate in freehold, legally or equitably, under a deed, will or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs, or heirs of his body, as a class of persons, to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate.”

The words “with remainder to his heirs” are considered as words of limitation instead of purchase.

This rule really presents no great difficulty if the student remembers the circumstances under which it was laid down.

The court was called upon to construe a grant "To A for life with remainder to the heirs of his body" or "to A for life with remainder to his heirs." The court in their decision practically held the words "for life with remainder to" to be surplusage, and that a grant to "A for life with remainder to the heirs of his body" was exactly equivalent to, a grant "to A and the heirs of his body"; or, in other words, that it created an estate in fee-tail.

CHAPTER XIII.

PERSONAL PROPERTY.

(Note. The greater part of the subject-matter generally covered in a work on personal property has been already treated in previous chapters in this book. All that remains to be treated here is the subject of the various methods of acquiring personal property.)

Personal property may be acquired in three general ways: (1) By original acquisition, (2) by act of the parties, and (3) by operation of law.

Title by original acquisition is in turn subdivided into:

- (1) Occupancy.
- (2) Accession.
- (3) Products of intellectual labor.
- (4) Trade-marks.

Property may still be acquired by occupancy in this manner in the following classes of cases:

- (1) Goods taken by capture in war.
- (2) Goods lost by their owner and never reclaimed.
- (3) Goods intentionally abandoned.
- (4) Waifs.
- (5) Animals, *ferae naturae* reclaimed.

(1) The right of capture of personal property in war was formerly of great importance, but is now generally limited to captures on water.

(2) and (3) Goods lost or abandoned become the property of the finder, if the former owner has entirely abandoned the intention of reclaiming them. Until such abandonment on the part of the owner, he may retake his lost chattels, wherever and whenever he may find them, even in the possession of a bona fide purchaser.

(4) Waifs are stolen goods thrown away by a thief in his flight. Formerly, such goods belonged to the government if seized by anyone but the owner, but at the present

time the government is held to hold such goods in trust for the true owner.

(5) Wild animals, or animals *ferae naturae*, belong to no one. Any person may become the owner of such animals by reducing them into possession. Such property is a qualified one, however, which is lost upon the escape of the animal.

Property may be acquired by accession in the following cases:

(1) The fruits of the earth, either produced naturally, or by human industry.

(2) The increase of animals.

(3) Materials of one person united to the materials of another.

(4) Confusion of goods.

(1) The productions of the earth, whether produced naturally, or as a result of human labor, belong to the owner of the soil or the person rightfully in possession thereof.

(2) The increase of animals belong to the owner of the mother. If domestic animals are hired for a limited period, their increase during such special period belongs to the hirer.

(3) Where materials are furnished by one person, or several, and are united by the labor of another, the joint produce will, in the absence of any agreement, belong to the contributor of the most important or valuable constituent, whether it be materials or labor.

(4) Where a person wrongfully so mingles his own goods with those of another person, that they cannot be separated, the wrongdoer loses his goods, which become the property of the other person.

Under the products of intellectual labors are included (1) patents, (2) copyrights, (3) letters and (4) lectures.

(1) and (2) Patents and copyrights are exclusive rights to the use of discoveries or writings for limited periods and depend entirely upon Federal Statute.

(3) Where a letter is written and sent by one person to another, the right of property in the letter as a tangible

piece of property is in the party receiving it, while the right of property in the letter as an intellectual production is in the writer. The receiver of a letter has no right to publish it without the consent of the writer, unless such publication is necessary for the defense of the party receiving it.

(4) Lectures are a product of intellectual labor. The party who composed them has a property right in them and they cannot be published without his consent.

Trade-Marks.

A trade-mark has been defined as "the name, symbol, figure, letter, form or device, adopted and used by a manufacturer, or merchant, in order to designate the goods that he manufactures, or sells, and distinguish them from those manufactured or sold by another; to the end that they may be known in the market as his, and thus enable him to secure such profits as result from a reputation for superior skill, industry, or enterprise." (Upton on Trade-Marks, p. 2.)

Unlike patents and copyrights, the right in a trade-mark is given by the common law instead of by statute.

Transfer of personal property by the act of the parties may take place through any of the following methods:

- (1) Gifts, *inter vivos*.
- (2) Gifts, *causa mortis*.
- (3) Will or testament.
- (4) Sales.
- (5) Indorsements.
- (6) Assignments.
- (7) Bailments.

Gifts are of two kinds, *inter vivos* and *causa mortis*.

A gift *inter vivos* is a voluntary, actual and immediate transfer of a thing by one living person to another living person, actual delivery being essential to complete the transfer.

Gifts *causa mortis* are gifts of personal property, made in prospect of death at no very remote period, and which

are dependent upon the condition of death occurring substantially as expected by the donor, and that the same be not revoked before his death.

The ownership of personal property may be transferred by operation of the law in any of the following manners:

(1) By forfeiture, (2) succession, (3) judgment, (4) intestacy, (5) insolvency, and (6) marriage.

CHAPTER XIV.

EQUITY JURISPRUDENCE.

Equity is that system of jurisprudence which was originally administered by the High Court of Chancery in England, and is now administered by courts having equity jurisdiction in this country.

This definition (which is about the only accurate one which can be given in order to convey any clear idea as to the character and scope of this branch of jurisprudence) needs to be supplemented by a brief historical statement of the origin and development of equity jurisprudence.

Equity came into existence, as a distinct system of jurisprudence, sometime in the fourteenth century, for the purpose of giving relief in those cases, where the common law courts, on account of the rigidity of the common law at that period, were unable to take jurisdiction. The exact classes of cases over which equity assumed jurisdiction were therefore, in a way, the result of historical accident. The classes of cases over which equity to-day has jurisdiction are, in the main, those classes of cases, where the common law courts of the fourteenth century granted no relief, and which began to come before the courts during, what may be referred to as, the formulative period of equity jurisprudence. This period may be taken, roughly, as covering the three hundred years terminating about 1625. During this period the equity judges had the power to take jurisdiction, by their own volition, of new causes of action as they arose, and to create new remedies to meet the demands of new conditions. About the end of the reign of James I. this power was lost by the equity (or Chancery) judges, and the general boundaries of equity jurisprudence became fixed. From this time on, the equity judges have had no more power to extend the jurisdiction of their courts, than have the common law judges.

Equity was from the outset a supplemental system of law. From this fact grew the great principle that equity will never take jurisdiction where there is a complete and adequate remedy at common law.

Concurrent Jurisdiction of Law and Equity.

In spite of the fact, however, that equity was created to take jurisdiction where the common law did not take jurisdiction, there are a few classes of cases where equity and common law courts have concurrent jurisdiction. Such concurrent jurisdiction may arise in several ways.

(1) Equity may take jurisdiction where there is a common law remedy, which, however, is not complete and adequate; e. g., the action of account.

(2) Where equity once acquires jurisdiction it keeps it, even although a complete and adequate remedy at common law is afterwards created.

(3) Equity courts may be given jurisdiction by statute over a class of cases where there is already a common law remedy.

Equitable Maxims.

There are thirteen principal equitable maxims. These maxims are of great importance, and a very large part of the whole subject of equity jurisprudence can be directly deduced from them. These maxims are as follows:

(1) Equity follows the law.

This maxim emphasizes the fact that equity is a supplemental system of law. Equity is bound by all the positive rules of the common law, and can only act in cases where the common law does not. Equity is bound by the rules of the common law on substantive law, by the provisions of the statute of limitations and by the common law rules of evidence. This latter is perhaps the most extreme application of the rule, as the common rules of evidence were mainly framed with the view of excluding improper evidence from the jury, and are therefore not well suited in their nature, for equity trials where juries are very rarely found.

(2) Equity will not suffer a right to be without a remedy.

This maxim is not entirely true at the present time, but during the formulative period of equity was the underlying principle upon which equity jurisprudence was built up.

(3) He who comes into equity must come with clean hands.

(4) He who seeks equity must do equity.

The dividing line between these two maxims is a time one; the former relates to what has taken place before the institution of the suit, the latter refers to what the complainant must stand ready to do during the course of the proceedings. By the former maxim it is meant that equity will not aid anyone who himself has been guilty of any unfairness relative to any phase of the general proceedings concerning which he seeks relief; while the latter maxim contains the principle that an equity court, as a condition for granting the relief sought by the complainant, can compel him to do whatever the court thinks necessary to do complete justice between the parties; even if the act required by the complainant, as a condition for obtaining the relief he seeks, is such that it could not have been decreed against him in an original suit in which he was defendant.

(5) Equity looks at the intent rather than the form.

This is true to a certain extent in the common law courts, but to a much greater extent in the equity courts.

(6) Equity aids the vigilant and not those who slumber on their rights.

This maxim is generally applied in cases where one of two innocent parties must suffer.

Under this maxim a court of equity may refuse to grant relief on account of delay, even when the period of such delay is less than the period specified by the statute of limitations.

(7) Equality is equity; or, equity delighteth in equality.

The meaning of this maxim is shown by the doctrine of contribution, where is found its chief application.

(8) Between equal equities, the law will prevail.

In such cases there is no reason for equity to interfere in favor of either party, and the one who holds the legal title, therefore, prevails.

(9) Between equal equities priority of time will prevail.

This principle is only applied as a last resort, and when there is no other distinction which can be made between the rights of the parties.

(10) Equity acts in personam and not in rem.

This is the second of the maxims which is not entirely true. Formerly all decrees in equity were against the person of the litigant and could only be enforced by punishing the litigant for contempt of court if he failed to carry out such decrees, or orders, of the court. As a result of this rule an equity court could enter a decree affecting land outside of its jurisdiction, provided only it had jurisdiction of the person of the party against whom the decree was directed.

Equity courts still retain their full power to act in personam, but have in addition been given the power to act in rem in certain cases, as, for example, in the foreclosure of mortgages.

(11) Equity acts specifically and not by way of compensation.

Where the only relief sought is pecuniary damages against the defendant, there is always a complete and adequate remedy at common law. When equity properly obtains jurisdiction, on account of some feature of the controversy, which cannot go before the common law courts, the equity court, in order to prevent the necessity for a multiplicity of suits, may give damages in connection with the peculiarly equitable relief sought.

(12) Equity considers that as done which ought to be done.

This maxim will never be applied in favor of the person who should have done the act but did not.

The doctrine of equitable conversion is an application of this maxim. Under the doctrine of equitable conversion,

where the testator in a will provides that personal property shall be turned into real property, or real property into personal property, equity will consider it as being already the class of property into which it has been directed that it shall be converted.

(13) Equity imputes an intention to fulfill an obligation.

Under this maxim whenever a person being under either a moral or legal obligation to do a certain thing, does an act which may, or may not, have been intended as a fulfillment of this obligation, equity will impute an intention to fulfill the obligation, and hold that the act was done with the purpose of fulfilling such obligation. The whole subject of resulting trusts is closely connected with this maxim.

Divisions of Equity Jurisprudence.

The four great divisions of equity jurisprudence are as follows:

1. Equitable titles.
2. Equitable rights.
3. Equitable remedies.
4. Those cases where equity takes jurisdiction on account of the character, mutual relations, or number of the parties.

Trusts.

Equitable titles are those which are recognized and enforced by the courts of equity, but not by the common law courts. The great subdivision of equitable titles is that of trusts.

A trust in the most enlarged sense, in which that term is used in English jurisprudence, may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof. (Story's Equity, C. 964.)

The essential element, which must exist in the case of every trust, is the separation of the legal title from the beneficial use.

Uses (which was the early term for trusts) were intro-

duced into England near the beginning of the fourteenth century to avoid the effect of the statute of Mortmain (1269) which prohibited any further lands being granted to the church. The use was an imitation of the *fidei commissii* of the Roman law. In 1392 the granting of land to any person to hold for the use of a religious body, was prohibited by statute. By this time, however, the use had become well established in England, and continued to be used for many purposes, some legitimate and others not so legitimate. Among the early purposes for which the use was used were to transfer land (i. e., the beneficial interests therein) without the necessity of livery of seisin, to avoid the incidents of the feudal tenure, to prevent the forfeiture of lands, and to defraud creditors. Upon the accession of the House of Tudor to the English throne (1485) there began the passage of a series of statutes directed against uses, which culminated in the passage of the Statute of Uses in 1535.

The purpose of the Statute of Uses was to abolish passive uses. The statute attempted to do this, not directly, by prohibiting the creation of such uses, but indirectly, by providing that when a passive use was created, the legal title and the beneficial use should be at once re-united (thus doing away with the use) and that the person holding the beneficial use should also take the legal title. This statute, by its terms, was not to apply to uses of the following classes:

1. Active uses.
2. Contingent uses.
3. Uses for the use of married women.
4. Uses in personal property (including interests in real property classed as personal property).

The main purpose of the Statute of Uses was entirely frustrated by a decision by the common law courts, rendered soon after the passage of the statute. This decision was to the effect that the statute could not operate twice relative to the same transaction. In other words, that where there was a grant to "A" for the use of "B" for the use

of "C" (or in trust for "C") that the statute would operate to transfer the legal title from "A" to "B," but that having thus acted once, it had exhausted its force so far as this particular transaction was concerned and could not operate once more to transfer the legal title from "B" to "C." The equity judges then stepped in, and held (in substance) that they "would follow the law" and hold the legal title to be in "B," but that they would also compel "B" to carry out the intention of the grantor, and hold such legal title for the benefit of "C." The Statute of Uses thus absolutely failed to accomplish the purpose for which it was passed. Instead of uses being abolished, they became established on a firmer basis than ever before. From this time on uses were generally known as trusts.

Classification of Trusts.

Trusts are classified in several different ways. The most important classification is that into express trusts and implied trusts. An express trust is one created by express words either written or oral. (Trusts may be created orally except so far as they are required to be in writing by the provisions of the Statute of Frauds.) An implied trust is one created by implication of law. Implied trusts are subdivided into resulting trusts and constructive trusts. In the case of resulting trusts the law presumes that it is carrying out the intention of the parties. Constructive trusts are created against (or, at least, regardless of) the intention of the parties. Fraud, either actual or potential, is always an element in the case of constructive trusts. The courts either consider that there has been fraud in the transaction, or that the transaction is of a character which offers such temptation to fraud, that all transactions of the character should be discouraged. (The above is the classification of trusts as adopted by American authors. The English classification is somewhat different. Under this latter classification, implied, resulting and constructive trusts are three separate classes, the term implied trusts being given to those trusts which under the American clas-

sification are considered as express trusts, created by precatory words.)

Precatory words are words of expectation, hope, desire, or recommendation, which the donor uses in qualifying an absolute gift. The early English rule was in favor of holding such words to create a trust. The rule at present recognized in America is to the effect that precatory words will never create a trust, unless it otherwise appears that the donor intended such words to mean that the donor was to hold as trustee for some other party.

Trusts are also divided into active and passive trusts. An active trust is one where the trustee has, or may have, some act to perform on account of his position as trustee. It makes no difference how small the act to be performed may be. A passive trust is one where the trustee merely holds the naked title.

A further classification of trusts is into executed and executory trusts. This classification is made from the standpoint of the settlor, not from that of the trustee. When there is some act left to be done by the settlor, the trust is an executory one, when nothing remains to be done by the settlor, the trust is executed.

Parties and Subject-Matter in a Trust.

There must be three parties in the case of every trust: the settlor, who creates the trust; the trustee, who holds the legal title; and the cestui que trust, who has the beneficial use. The settlor may make himself either trustee or cestui que trust in the trust which he creates. From the very nature of trusts, the trustee and the cestui que trust cannot be the same person. (The trust deed used as a mortgage sometimes presents at least an apparent exception to this last rule.)

Any person who has the power to dispose of his property at all can become a settlor. Any natural person, at least temporarily, may become a trustee. In case a trusteeship falls upon an improper person equity courts have the power to remove such trustee, and appoint a qualified

successor. The authority of a corporation to act as trustee depends upon its charter and the provisions of the state statute.

Trustees may be appointed either by the settlor or courts of equity. Resulting and constructive trustees become so by their own acts. The extent of the estate which a trustee will take is determined by the extent of the beneficial interest granted to the cestui que trust. The trustee will take such an interest as will enable him to carry out the purpose of the trust; if the legal estate granted to him is more than sufficient for this purpose there will be a resulting trust back to the settlor as to the balance of the estate granted.

The first duty of the trustee is to reduce all the trust property into his possession. It is then his duty to take good care of such property and to see that it is properly invested. A trustee may be held liable for the damages resulting either from a failure to invest trust funds, or from their investment in improper securities.

A trustee is required to use the highest possible degree of good faith, but is only held responsible for the exercise of a reasonable degree of skill, ability, and energy.

One co-trustee is liable for the wrongful acts of another co-trustee, when such acts were rendered possible by his own collusion or negligence.

A trustee can only delegate his authority when the act whose performance is delegated is a mere ministerial one, or when it is one requiring special technical skill.

Any person may be a cestui que trust, except as prohibited by statute.

Any property, either real or personal, may be the subject of a trust.

Charitable Uses.

Charitable uses have their origin in the Statutes of Charitable Uses, which enumerated the following purposes for which charitable uses might be created:

“The relief of aged, impotent, and poor people; the maintenance of maimed and sick soldiers and mariners: the

support of schools of learning, free schools, and scholars of universities; repairs of bridges, ports, havens, causeways, churches, sea-banks, and highways; educational and preferment of orphans; the relief, stock, and maintenance of houses of correction; marriage of poor maids; and help to young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners and captives; aid of poor inhabitants concerning payments of fifteenths, setting out of soldiers, and other taxes." Similar statutes exist in most of the states in this country. Two peculiarities of the law governing charitable uses must be noticed; the first being the application of the "cy pres" doctrine, and the second, the fact that the rules against perpetuities and accumulations do not apply. The cy pres doctrine is the effect that when the exact object of a charitable use becomes impractical, but it appears that the testator intended at all events to give the property for some charitable purpose, the courts of equity will apply the trust property to some other charity, which resembles the particular charity designated by the settlor, as nearly as possible. The English rule on this subject is given full force in a few states in this country, in some other states it is adopted in a modified form, while in still other states it is rejected entirely.

The Rule Against Perpetuities and the Rule Against Accumulations.

The rule against perpetuities is a rule of law which was originated for the purpose of preventing owners of property from controlling the disposition and management of such property for more than a certain period after their own deaths. The period specified by this rule is that covered by a life, or lives, in being, and twenty-one years and nine months after the death of the last survivor. This rule limits grants or devises by way of use, or in the form of executory devises. It does not apply to contingent remainders (the creation of which are restricted by so many other rules, that the application of this rule is not necessary).

The rule against accumulations (which is a recent addition to the law both in England and in America) limits the period during which accumulations may be provided for (i. e., the continued addition of the income to the principal) to one of the three following periods:

1. The lifetime of the settlor.
2. The minority of persons in esse.
3. Twenty-one years after the death of the settlor.

Mortgages.

A mortgage is a conveyance of property (either real or personal) to be held as security for the payment of a debt, or the performance of an act, and to revert to the grantor (i. e., the mortgagor) when the debt is paid or the act performed.

Under the early common law there were three forms of conveyances of property as security for debt.

Under the *vivum vadium*, or living pledge, the rents and profits of the property transferred as security were applied towards the payment of the debt, and when this had been paid, both principal and interest, the property reverted, free and clear, to the grantor.

Under a *mortuum vadium*, or dead pledge, or mortgage, the debt could neither be extinguished nor reduced, nor even the interest on the loan paid, out of the returns from the property. Unless in the mortgage, the mortgagor expressly reserved the right to retain possession of the mortgaged property, the mortgagee had the right to enter the property, and collect and appropriate the rents and profits thereof, without being under the obligation to ever account for the same to the mortgagor.

In a Welsh mortgage there was an exchange of the use of the money for the use of the land. Under such a mortgage the mortgagee always took possession. The mortgagor could redeem by repaying the amount of the loan without interest, but the mortgagee was not obliged to account for the income from the property while it was in his possession.

The common law, in the case of a mortgage, looked entirely at the form of the instrument rather than at its intent. A mortgage on its face granted an estate in fee to the mortgagee liable to be defeated by the fulfillment of a condition subsequent. The condition subsequent being the re-payment of the loan. The mortgagee had the present legal title, and the mortgagor retained merely a possibility of reverter. As the common law courts looked with disfavor upon the loss of a present legal estate, through the instrumentality of a condition subsequent, the result was that the right of a mortgagor to redeem the property was very strictly construed, and if the debt was not paid (or the act done, as the case might be) within the time specified in the mortgage, the right of the mortgagor was gone forever.

Relief from this state of affairs which in many cases worked the greatest hardship, was found in equity. Equity took jurisdiction in such cases gradually, at first allowing redemption only in cases where the failure to pay within the specified time was occasioned by fraud, mistake or accident, but later allowing redemption by the mortgagor in all cases.

It was soon found that allowing a mortgagee to redeem at any time worked a hardship on the mortgagee as the latter could never get a secure title to the property. To remedy this the mortgagee was permitted to come into court and shut off the mortgagor's rights, by foreclosing the property.

There are two principal methods of foreclosure: Under strict foreclosure the title of the property is decreed absolutely to the mortgagee; under equitable foreclosure the property is sold, any proceeds above the amount of the debt (with costs) paid to the mortgagor, a deficiency judgment given against the mortgagor in cases where the property fails to bring the amount of the debt, and the mortgagor given a certain time to redeem the property from the purchaser, at the end of which time, the property (if not redeemed) becomes absolutely the property of such purchaser.

In some states mortgages may be foreclosed under a power of sale contained in the mortgage. Some states also permit the foreclosure of a mortgage by a common law action.

Under the modern view of a mortgage the debt is considered as the principal thing and the mortgage merely as a security for its payment. The interest of a mortgagee is therefore classed as personal property.

A sale, with the right of re-purchase reserved to the vendor will be considered as a mortgage if this appears to have been the real nature of the transaction.

Equitable Liens.

Equitable liens differ from common law liens in two important respects. Equitable liens arise from acts of the parties; common law liens are created by law. In equitable liens the party in whose favor the lien exists never has possession of the property which is the subject of the lien; in common law liens the party holding the lien always has such possession.

Equitable Rights.

By equitable rights are meant such rights, either for the purpose of securing redress, or for defense, as are only recognized, or more fully recognized, in equity.

Fraud.

The following classification of fraud is that given by Lord Hardwicke, in the famous case of Earl of Chesterfield vs. Janssen.

1. Frauds arising from facts and circumstances of imposition.
2. Frauds presumed from the circumstances and condition of the parties.
3. Frauds apparent from the intrinsic nature and subject-matter of the bargain.
4. Frauds which are an imposition and deceit on third persons not parties to the transaction.

The first class comes under the head of actual fraud, the last three under the head of constructive fraud. In every

case of actual fraud, there must be present those elements required in the tort action for deceit.

Under the English doctrine the jurisdiction of equity extends over every case of fraud, either actual or constructive. Under the American rule, according to the weight of authority, equity only has jurisdiction where there is no adequate remedy at law.

The relief which can be granted by a court of equity in the case of fraud is the cancellation, or reformation of the contract or written instrument, or the awarding of pecuniary relief (where equity properly obtains jurisdiction.) Equity may also enjoin the prosecution of a claim which is based upon fraud.

In cases of duress or undue influence, equity may grant the same relief as in cases of fraud.

Mistake.

Mistake, in a legal sense, exists whenever a person, on account of some erroneous conviction, executes an instrument, or does an act, which he would not have executed or done, except for the erroneous conviction.

Mistakes may be either of law or of fact. Equity will relieve against mistakes of fact, but not against mistakes of law. There are three classes of apparent mistakes of law which are considered as mistakes of fact, and therefore relieved against. These apparent mistakes of law are:

1. Mistakes as to foreign laws.
2. Mistakes as to private statutes.
3. Mistakes of fact which arise from mistakes of law.

Mistakes as to ownership are common illustrations of this last class.

Among the important kind of mistakes of fact, which equity often relieves against, are mistakes as to the existence, identity or quantity of the subject-matter of the contract.

In order for a mistake to be relievable it must be mutual: or there must be mistake on one side joined with fraud on the other. In this latter case, it perhaps would

be more accurate to say that the ground upon which equity grants relief is the fraud, rather than the mistake.

Equity will relieve against the mistake of a third party who was employed to reduce the terms of a contract to writing.

The two forms of relief which equity courts can give in the case of mistakes are the correction or cancellation of the contract.

Accident.

The majority of definitions given of accident are inaccurate (i. e., of the term as used in equity). The best definition is that by Pomeroy (Equity Jurisprudence, Sec. 79): "Accident is an unforeseen and unexpected event, occurring externally to the party affected by it, and of which his own agency is not the proximate cause, whereby contrary to his own intention and wish, he loses some legal right or becomes subject to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person in the circumstances, to retain."

Accident may be distinguished from mistake as follows: Mistake is subjective (i. e., in the minds of the parties), while accident is objective. Again mistake takes place (if it takes place at all) at the time the contract is entered into, while accident happens after the contract has been made or the right acquired which suffers injury by the accident.

Among the classes of accidents in which equity will grant relief are those of lost instruments, defective execution of powers, judgments at law, penalties and forfeitures.

Penalties and Forfeitures.

Equity looks with great disfavor upon both penalties and forfeitures. Equity courts will never enforce either, and in proper cases will relieve against them.

A penalty is a certain sum of money to be paid upon failure to perform a certain agreement according to its

tenure. A forfeiture involves the loss of existing rights in certain specific property.

Neither alternative stipulations, agreements for the reduction of an existing debt upon prompt payment, nor liquidated damages are considered as penalties. Equity courts, however, will be guided by the real nature of the transaction rather than by the name which the parties thereto have chosen to give to it. When the parties to a contract estimate in advance what the damages from the breach of a contract will be, and stipulate that in case of such breach such sum shall be paid, this will constitute a true case of liquidated damages; but if the amount of such damages bears no true relation to the real damage from the breach, equity courts will consider the alleged liquidated damages as being in reality a penalty, and treat it as such. This will always be the case where the same damages are to be paid for a small breach of the contract as for a greater one.

Contribution, Exoneration and Subrogation.

Contribution grows out of the maxim "Equality is Equity." Where one of several persons jointly liable for a debt pays the entire debt he is entitled, under this doctrine of contribution, to recover a pro rata share from each of the other persons liable. Except in a very few cases, the doctrine of contribution will not exist among joint tortfeasors.

Common law courts now recognize and enforce this right of contribution, but the relief here granted is not as complete (in some cases) as that given by equity. If one of the parties jointly liable is insolvent, or for any other reason no recovery against him is possible, the portion which the one who has paid the debt can recover from the others is at common law based upon the whole number of persons who were originally liable, while in equity it is based upon the number against whom recovery is possible.

The rights of exoneration and subrogation often exist together. Exoneration is the right in personam against

the party primarily liable on a debt, which exists in favor of a person who was secondarily liable on such debt (or who was obliged to pay such debt in order to protect his property) and who has paid such debt to the creditor.

This right is supplemented by that of subrogation, under which a person who has paid a debt under the conditions specified in the last paragraph, is entitled to the benefit of all securities which the principal debtor has given to the creditor. If a creditor releases securities of the principal debtor which he holds, the liability of the secondary debtor to the creditor is released *pro tanto*. A creditor is entitled to the benefit of subrogation relative to all securities which the principal debtor has given to his surety.

Accounting.

The equitable action of account only lies in those cases where the common law action of account is not an adequate remedy. It is held that a person is entitled to an accounting in equity in any one of the five following classes of cases:

- (1) Where there are mutual accounts.
- (2) Where the accounts are very complex.
- (3) Where the defendant holds a fiduciary position relative to the plaintiff.
- (4) Where the facts relative to the transaction are peculiarly within the knowledge of the defendant.
- (5) Where discovery is sought.

Marshaling.

The doctrine of the marshaling of assets was thus stated in the case of *Webb vs. Smith* (30 *Cha. Dev.*, 190): "If A has a charge upon Whiteacre and Blackacre, and if B also has a charge upon Blackacre only, A must take payment of his charge out of Whiteacre, and must leave Blackacre so that B, the other creditor, may follow it and obtain payment of his debtant of it. In other words, if two estates (Whiteacre and Blackacre) are mortgaged to one person, and subsequently one of them (Blackacre) is mort-

gaged to another person, unless Blackacre is sufficient to pay both charges, the first mortgagee will be compelled to take satisfaction out of Whiteacre, in order to leave Blackacre to the second mortgagee upon which alone he can go."

Satisfaction and Performance.

Under the doctrine of satisfaction the donation of a thing will be taken as extinguishing an obligation previously existing from the donor in favor of the donee unless it appears to have been the intention of the donor that the obligation should continue in force. There may be either (1) satisfaction of debts by legacies, (2) satisfaction of legacies by subsequent legacies, (3) satisfaction of legacies by portions and advancements, or (4) satisfaction of portions by subsequent legacies.

The doctrine of performance is that when a person is under obligation to do a certain act, and does some act which may, or may not, have been intended as a performance, of the duty, equity will "imply an intention to fulfill an obligation" and consider the duty as performed.

Equitable Estoppel.

The doctrine of equitable estoppel is that where a person by his words, actions, or silence, has produced an erroneous belief in some other person, upon which belief such person relies and acts, the first person will be prevented from setting up the true state of affairs, to the injury of the persons who have relied on his statements or actions.

Notice.

Notice may be actual, implied, or constructive. Actual notice is notice directly brought to the attention of a party. Implied notice is notice which the law will presume a person to have on account of information which is proved to have been in his possession.

Constructive notice is the notice which the law holds every person to possess, regardless of the question of actual notice. The doctrine of constructive notice is enforced on

the ground of public policy, and such notice will be held to arise from the following:

- (a) Extraneous facts, generally acts of fraud, negligence or mistake.
- (b) The possession or tenancy of the party claiming the equity or title.
- (c) Recital or reference in instruments of title.
- (d) *Lis Pendens*, i. e., pending suits relative to the particular piece of real property.
- (e) Judgments, when properly docketed.
- (f) Registration or recording of instruments.

Equitable Remedies.

The most important remedies are: Specific performance, injunctions, discovery, cancellation and reformation of contracts and other written instruments, establishment of boundaries, partition, removal of clouds from title, *ne exeat*, *interpleader*, and the appointment of receivers.

Specific Performance.

One of the most important equitable remedies is that of specific performance of contracts. This form of remedy will only be employed in the case of contracts, whose performance according to their terms is possible under the decree of an equity court and where pecuniary damages will not be an adequate remedy for the breach of the contract.

There may always be a decree for the specific performance of a contract to insure, or to sell real property, and there may be a decree for the specific performance of a contract to sell personal property when the personal property is of a character which cannot be readily purchased in the open market.

Equity courts, in proper cases, may even decree the specific performance of a contract with a slight modification. The specific performance of contracts of partnership, for personal services, to marry, or to pay a sum of money will not be decreed by a court of equity.

Specific performance will never be decreed where the

plaintiff is in default, where there is a lack of mutuality, or where specific performance would work great hardship on the defendant.

Injunctions.

An injunction is a writ issued by a court of equity commanding or prohibiting the doing of a certain thing. Injunctions are generally issued in connection with other relief.

Injunctions are either mandatory or prohibitory. A mandatory injunction commands a certain thing to be done. Mandatory injunctions are uncommon; when used they are generally for the purpose of ordering the defendant to undo something which he has previously done. Prohibitory injunctions forbid the doing of some act.

Injunctions are also divided into interlocutory, or preliminary injunctions and final or perpetual injunctions. An interlocutory injunction is one issued during the pendency of the suit; a final injunction is one issued upon the final termination of the suit. The court which issued a final injunction always has the power to modify such injunction.

Injunctions are issued for a great variety of purposes, for example: Against waste; against nuisances; against trespasses (but only in cases where the trespass would inflict irreparable damage, or there are repeated trespasses, or the trespasser is financially irresponsible); injunctions against the breach of a negative promise in a contract (breach of affirmative agreements in a contract are redressed by equity, if at all, by means of a decree for specific performance); injunctions for the protection of patents, copyrights and trademarks; and injunctions against proceedings at common law.

In this country injunctions will generally not be granted against the commission of a tort, although there are some exceptions to this rule. It was formerly considered as a well settled principle of equity that an injunction would never be issued against the commission of a criminal act, but the recent decisions are to the effect that where the

threatened criminal act will also be an invasion of the rights of property, an injunction against such act may be issued.

Cancellation and Reformation.

The cancellation of a written instrument may be decreed by a court of equity, when such instrument is voidable on the ground of fraud or mistake, or while absolutely void, it is valid on its face.

Written instruments will be reformed by a court of equity when on account of mutual mistake, or mistake on one side and fraud on the other, or through the mistake of a third person employed to reduce the contract to writing, such instrument does not represent the true intention of the parties.

Equitable Relief Affecting Real Property.

The various forms of relief relative to real property which can be granted by a court of equity are: The partition of property among co-owners; the establishment of boundaries; and the removal of clouds from title.

Discovery.

By discovery, as the term is used in equity, is meant the securing of evidence by one party to a suit from his opponent. Formerly there was no method by which this could be done at common law, and bills for discovery might be filed in equity to aid suits at common law. This purpose may now be served by interrogations in common law suits, and bills for discovery alone are now practically obsolete, although they may still be brought, at least in some states (e. g., Illinois).

Ne Exeat.

The writ of ne exeat prohibits a person from leaving the jurisdiction of a court, before which a suit in equity is being tried to which he is a party.

Receivers.

"A receiver is a person standing indifferent between the parties, appointed by the court as a quasi-officer or representative of the court to hold, manage, control and deal with the property which is the subject-matter of or involved in the controversy, under the direction of the court during the continuance of the litigation, either where there is no person entitled competent to thus hold it, as, for example, in the case of an infant, or in the interval before an executor or administrator of a deceased owner is appointed; or where two or more litigants are equally entitled, but it is not just and proper that either of them should retain it under his control—as, for example, in some suits between partners; or where a person is legally entitled but there is danger of his misapplying or misusing it, as, for example, in some suits against an executor or administrator, or, under some particular circumstances in suits for the enforcement of a mortgage; or he is appointed in like manner and under like circumstances for the purpose of carrying into effect a decree of the court concerning the property—as, for example, a decree for winding up and settlement of a corporation, or the decree in a creditor's suit." (Pomeroy on Equity Jurisprudence, Sec. 1330.)

Jurisdiction of Equity on Account of the Character, Relation or Number of the Parties.

At common law a married woman could neither sue nor be sued. The first change in this respect was made by the courts of equity, which permitted married women to sue or be sued relative to their separate estates. The disability of married women in this respect has now been very generally removed by statute.

Neither suits between husband and wife or between partners will be entertained by common law courts; and all litigation between parties holding these relations to each other must be brought in equity.

In order to prevent multiplicity of suits equity will ad-

judicate the mutually diverse interests, in the same subject-matter, of an indefinite number of parties. At common law while there can be an indefinite number of either plaintiffs, or defendants, provided all such plaintiffs, or all such defendants, have a common or joint interest, but three (or more) mutually diverse interests cannot be adjudicated in the same suit.

CHAPTER XV.

PRIVATE CORPORATIONS.

A corporation is a body created by law, consisting of one or more individuals, having a personality distinct from that of any of its members, and possessed of a franchise by virtue of which it subsists under a special name, with the capacity of succession either perpetual or for a limited period.

A corporation was defined by Chief Justice Marshall in the famous Dartmouth College case in the following language :

“A corporation is an artificial being, invisible, intangible and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities, and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.”

Classification of Corporations.

Corporations are divided into private and public corporations. Private corporations are those which are organized

and exist to promote the private interests, either financial or other interests, of its members.

A quasi public corporation is one organized for private profit, to engage in some business of a public character. Railways and telephone companies are examples of this species of corporations. Quasi public corporations, on account of the nature of their business, are subjected to a greater degree of public control than other private corporations.

A corporation, aggregate, is one having two or more members. A corporation, sole, is one with but a single member at a time. This latter class of corporations is almost unknown in this country.

Creation of Corporations.

At common law, corporations could be created either by prescription, royal grant or legislative action. In the United States a corporation can only be created by legislative action. In general, a corporation may be created either by special or general act of the legislative body; although in some states, the Constitution prohibits the creation of a corporation by special act.

Corporations may be created either by the National government, or by a state or territorial government.

The power to create a corporation is not among the powers expressly granted to Congress by the Constitution, but, in the case of *McCulloch vs. Maryland*, the Supreme Court of the United States decided that the Federal government had the power to create a corporation when such corporation would assist in the carrying into execution of any of the powers granted to Congress. At the present time the most important class of Federal corporations are the United States banks: the United States also has the power to charter corporations to engage in interstate commerce.

A state government has full power to create a corporation of any character, subject only to the restrictions contained upon such power to be found in the Federal Constitution or in the Constitution of the particular state.

A corporation created by a state, is not a citizen of that state in the sense the term is used in the United States Constitution. In the first clause of the second section of the third Article of the Constitution, the phrase, "between citizens of different states," was not at first construed broadly enough to give the Federal Courts jurisdiction over suits between a citizen of one state, and a corporation chartered by another state. Jurisdiction, in such cases, has since been acquired by the Federal Courts by means of the legal fiction that all the stockholders of a corporation are citizens of the state which created the corporation.

A corporation is not protected by the constitutional provision (Article IV, Section 2, clause 1) providing that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"; but is protected by the provision in the Fourteenth Amendment that "No state shall deny to any person within its jurisdiction the equal protection of the laws." It therefore follows that a state may refuse to permit a corporation created by another state to do business within its jurisdiction, or may impose conditions which it must fulfill before it can be admitted to do business in the state; but after such a corporation has once been admitted into a state, the state cannot discriminate against it. A state cannot prevent a foreign corporation doing business within its territory from removing any suit which may be brought against it into the Federal Courts. Some states attempt to evade this principle by requiring foreign corporations to agree not to remove cases to the Federal Court, as a condition precedent to their being allowed to do business in the state. The decisions are in conflict upon the question whether after a corporation has made such an agreement and then removes a case to the Federal Courts the state may deprive it of its right to continue to do business in the state.

Over the territory belonging to the United States, but not included within the limits of any state (i. e., in the territories and colonies), the Federal government possesses practically unrestricted powers. It would have the right,

therefore, to create a corporation to be located within one of the territories for any purpose. This power has been delegated by the National government to the Territorial governments. These latter governments have, therefore, practically the same power to create corporations, as do the state governments.

Powers of Corporations.

All powers possessed by a corporation must be derived from the power which created such corporation. Powers, however, may be granted either expressly or by implication.

The powers of a corporation may be divided into three classes:

(1) Powers expressly granted;

(2) Powers implied from the powers expressly granted; and

(3) Those implied powers which are held to belong to all corporations, unless denied to them, either expressly or by implication.

The last class of powers include, among others: The right of perpetual or continuous succession; the right to purchase and hold property, either real or personal for purposes authorized by the charter of the corporation; the right to have a common seal and the right to make by-laws; the right to a corporate name; and the right to contract, to sue and be sued.

The charter of a corporation is to be construed in favor of the public and against the corporation. The grant of certain powers to a corporation, excludes all other powers, except such powers as are implied from the powers expressly granted, and such powers as are presumed to belong to all corporations.

Matters relative to the management of a corporation which are not regulated either by statute or by the charter of the corporation may be regulated by the by-laws of such corporation. All by-laws must be legal, reasonable, general in their application and must not impair vested property rights.

Ultra Vires Acts of a Corporation.

An ultra vires act of a corporation is one beyond the powers of the corporation, i. e., an act which it is not authorized to do either by the statutes or by its charter.

An ultra vires act done by a corporation may be a ground for the revocation of the charter of such corporation by the state. A threatened ultra vires act may be restrained upon suit brought by one of its stockholders.

The decisions of the various states are in hopeless conflict on the question as to whether an ultra vires contract of a corporation is enforceable in court, and if so, under what circumstances.

The courts of a majority of the states, at the present time, seem inclined to take a rather liberal view on this question and to hold that the mere fact that a contract, which is not otherwise illegal, is ultra vires, will not of itself prevent, either party from suing on the contract; and that the defence of ultra vires shall not be allowed to be set up, when such an action would work an injustice, under all the circumstances of the case.

Some of the courts take a stricter view of the matter and hold that the mere fact that a contract is ultra vires is sufficient to prevent any action being brought thereon. Even these courts hold, however, that if the contract has been fully executed on both sides, the courts will not interfere at the instance of either party to undo what has been done, that a negotiable instrument executed or indorsed by a corporation is good as against it in the hands of a holder for value and without notice, except in cases where the corporation clearly had no power at all to execute or indorse such instruments, and that a transaction, or contract, if severable, may be valid in part, though in part it is ultra vires.

Liability of Corporations for Torts and Crimes.

A private corporation is liable for the acts of its agents to the same extent as an individual. Such a corporation, therefore, is liable for all the torts committed by an agent

in the regular course of his agency. Corporations may even be held liable for torts involving a mental element, such as malice, deceit, etc.

A corporation may always be held criminally liable for acts of omission, and a large majority of the states now hold that a corporation may be liable, criminally, for certain acts of commission, as, for example, maintaining a nuisance.

A corporation may be liable for contempt of court.

Management of a Corporation.

A corporation for profit is under the control of its stockholders. Matters of the highest importance are voted upon directly by the stockholders, while the settlement of matters of less importance are delegated to the control of the Board of Directors. The Board of Directors are always elected by the stockholders; other officers of a corporation are sometimes elected by the stockholders and sometimes by the Board of Directors.

Directors.

The general management of every stock corporation is vested in a board, generally known as the Board of Directors. Directors have power only collectively. An individual director cannot bind a corporation. Directors are chosen by vote of the stockholders; sometimes by a vote of all the stockholders and sometimes by the vote of the common stockholders alone. The exact powers of the directors vary in different corporations. Such powers will be determined by the statutes of the State, the charter of the corporation and the by-laws of the corporation. In general, all routine matters and matters effecting the ordinary carrying-on of the business of a corporation are determined by the directors, while matters of more fundamental importance must be referred to the vote of the stockholders. Among the more important matters which must be voted upon by the stockholders are acceptance of amendments to the charter, changing of by-laws, increasing or decreasing the capital stock, changing

the character of the business, issuing bonds, etc. The question of declaring dividends is determined by a vote of the board of directors.

Financial liability is also imposed upon directors in some other respects, by statutes in various States. For example, in Illinois it is provided that when the total indebtedness of a corporation shall exceed the capital stock, the officers and directors asserting thereto shall be liable for the excess of the liabilities over the capital stock. In some other States, officers and directors may be liable for certain classes of debts, as, for instance, wage claims.

Directors hold a fiduciary relation towards the stockholders and will be liable for any misconduct on their part. An innocent director, however, will not be liable for the fraud of others.

Stocks and Bonds.

The securities of a corporation are divided into stocks and bonds. The stockholders are collectively the owners of the property of the corporation, while the bondholders are creditors of the corporation.

Subscriptions for Stock.

Subscriptions for stock may be made either before or after the incorporation of the corporation. If made after incorporation the contract is binding, even when executory. There has been much difference of opinion as to the effect of a contract of subscription to stock made before the charter of the corporation was issued. The better rule seems to be that if the subscription was in pursuance of a step expressly authorized by law to be taken in the creation of a corporation, such a contract is binding but otherwise not. Contracts to subscribe for stock are generally, but not always, held to come under the provisions of the Statute of Frauds. In some States it is necessary that all stock of the corporation be subscribed for before the corporation begins doing business, but in other States this requirement does not exist.

In some States all stock subscribed for must be paid for in full in advance. In most States a portion may be paid and the

payment of the balance deferred. Stock may be paid for either in money or in property or labor.

In some States the value of such property must be passed upon by some State official and in many cases where there is fraud in the valuation of property the party paying for stock with such property may be held liable to the creditors of the corporation.

Preferred Stock.

The name preferred stock is given to that stock which is "preferred" in payment of dividends. In other words, stock which receives dividends in advance of common stock.

Preferred stock may be classified in several ways. The first classification would be into voting and non-voting preferred stock. Some preferred stock carries with it the right to vote at stockholders' meeting, and other preferred stock is without any share in the management of the company.

Another division of preferred stock is that into cumulative and non-cumulative stock. In non-cumulative preferred stock each year's business is considered by itself and if the company fails to earn enough to pay the dividend to which the preferred stock is entitled one year, such deficiency cannot be made up out of the earnings of the following year. In the case of cumulative preferred stock, any back deficiency due on preferred stock must be paid before the common stock may receive anything.

The third classification of preferred stock is into preferred stock which can never receive a larger dividend than that which is paid before the common stock receives anything, and preferred stock which will receive an equal dividend with the common stock if enough is earned to pay both a dividend higher than that to the extent of which the preferred stock is preferred.

A fourth classification of preferred stock is that into preferred stock which may be retired by a vote of the common stock and preferred stock which cannot be so retired.

Transfer of Stock.

It is generally provided that stock in a corporation can be transferred only by transfer of the shares on the books of the

company. This is a matter which is partly regulated by statute and partly by the by-laws of the corporation.

The Uniform Transfer of Stock Act, which has been recommended for adoption to the legislature of the various states, contains the following provisions of this subject :

Section 1. How Title to Certificates and Shares May Be Transferred.

Title to a certificate and to the shares represented thereby can be transferred only.

(a) By delivery of the certificate indorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or

(b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign, or transfer the same or the shares represented thereby, signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.

The provisions of this section shall be applicable although the charter or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate and certificate itself, provide that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a register or transferred by a transfer agent.

Section 2. Powers of Those Lacking Full Legal Capacity and of Fiduciaries Not Enlarged.

Nothing in this Act shall be construed as enlarging the powers of an infant or other person lacking full legal capacity, or of a trustee, executor or administrator, or other fiduciary, to make a valid indorsement, assignment or power of attorney.

Section 3. Corporation Not Forbidden to Treat Registered Holder as Owner.

Nothing in this Act shall be construed as forbidding a corporation.

(a) To recognize the exclusive right of a person registered on its books as the owner of shares to receive dividends, and to vote as such owner, or

(b) To hold liable for calls and assessments a person registered on its books as the owner of shares.

Section 4. Title Derived from Certificate Extinguishes Title Derived from a Separate Document.

The title of a transferee of a certificate under a power of attorney or assignment not written upon the certificate, and the title of any person claiming under such transferee, shall cease and determine if, at any time prior to the surrender of the certificate to the corporation issuing it, another person, for value in good faith, and without notice of the prior transfer, shall purchase and obtain delivery of such certificate to be the owner thereof, or shall purchase and obtain delivery of such certificate and the written assignment or power of attorney of such person, though contained in a separate document.

Section 5. Who May Deliver a Certificate.

The delivery of a certificate to transfer title in accordance with the provisions of Section 1, is effectual, except as provided in Section 7, though made by one having no right of possession and having no authority from the owner of the certificate or from the person purporting to transfer the title.

Section 6. Indorsement Effectual in Spite of Fraud, Duress, Mistake, Revocation, Death, Incapacity or Lack of Consideration or Authority.

The indorsement of a certificate by the person appearing by the certificate to be the owner of the shares represented thereby is effectual, except as provided in Section 7, though the indorser or transferor,

(a) was induced by fraud, duress or mistake, to make the indorsement or delivery, or

(b) has revoked the delivery of the certificate, or the authority given by the indorsement or delivery of the certificate, or

(c) has died or become legally incapacitated after the indorsement, whether before or after the delivery of the certificate, or

(d) has received no consideration.

Rights of Stockholders.

The rights of stockholders in private corporations fall under the four divisions:

(1) Rights of stockholders to a share in the management of the corporation.

(2) Rights of stockholders to examine the books and records of the company.

(3) Rights of stockholders in the property and earnings of the corporation.

(4) Rights of stockholders to bring suit on behalf of the corporation, or to bring suit against the officers of the corporation.

The rights of a stockholder to a share in the management of the corporation are three in number, viz.:

(1) The right to vote in the election of directors and of such other officers as by the charter and by-laws of the corporation are to be elected by the stockholders.

(2) The right to vote at all regular and special meetings of the stockholders upon all subjects, which, by the charter and by-laws of the corporations, are reserved for the determination of the stockholders.

(3) The right to vote upon the question of any proposed change in the charter of the corporation.

In voting for officers, each stockholder has one vote for each share of stock which he owns. In some states the cumulative method of voting has been adopted in the election of directors. By this method each stockholder has as many votes as he has shares multiplied by the number of directors to be chosen. Thus, if a stockholder has one hundred shares of stock and five directors are to be elected, he has five hundred votes.

Elections must be held at a reasonable time and place, and when a certain time has been announced for the election it cannot be held at an earlier hour, so as to deceive part of the stockholders.

“Stockholders have the right, at common law, to examine and inspect all the books and records of the corporation at all reasonable times, and to be thereby informed of the condition of the corporation and its property.” (Lewis vs. Brainerd, 53 Vt., 519.)

A creditor of the corporation or any person who is a stranger to it can obtain access to its records by a bill in equity for discovery. Corporate books in the hands of a receiver should be open to all parties.

In case of a refusal to a stockholder of the right to examine the books and records of the corporation, he may seek redress in any one of the four following different ways:

(1) An action at law for damages against the corporation.

(2) Such an action against the officer of the corporation who thus refuses to allow such examination.

In either of these cases the stockholder is entitled to nominal damages without proof of loss, and in addition to substantial damages for losses, resulting from such refusal, which he can prove.

(3) A writ of mandamus against the corporation.

(4) A writ of mandamus against the officer of the corporation in whose possession the books and records of the corporation are to be found.

A writ of mandamus is generally the only adequate remedy.

A stockholder forfeits his right to examine the books and records of the corporation when he seeks to use it for an improper purpose, as to aid a rival corporation.

The stockholders of a corporation are in a sense the owners of the property held by the corporation. The interest, however, of a stockholder in the property of the corporation is an intangible one. In the case of a going

corporation, no stockholder has any claim to any particular piece of property owned by the corporation. What a stockholder really owns is his proportionate share of the excess of the assets of the corporation over its liabilities. In a going concern it cannot be ascertained what such excess is. Until the dissolution of a corporation a stockholder is entitled to receive nothing except dividends.

Dividends must be distinguished from profits. The profits of a corporation include all money earned by a corporation; dividends are a fund which a corporation has set aside from its profits to be divided among its stockholders. A stockholder has no legal right to any portion of the profits of a corporation until a dividend has been declared.

The declaration of a dividend is generally within the discretion of the directors. Only when such discretion has been greatly abused, as where the directors act in bad faith, will a court of equity interfere and order the declaration of a dividend.

When a dividend has been once properly declared, the money set aside for this purpose is in the nature of a trust fund held by the corporation for its stockholders, and the stockholders are entitled to this money even as against the creditors of the corporation.

After a dividend is due and payable it becomes a debt of the corporation, and a stockholder may sue for it.

Ordinarily, the control of litigation for a corporation is in the control of its officers and directors. The law, however, does not leave the stockholders of a corporation without relief, where the officers of a corporation, through negligence or fraud, fail to bring a necessary suit. In such a case one or more stockholders may bring suit in behalf of the corporation.

Rights of Creditors Against Stockholders.

The stockholders of the corporation are not liable to the creditors of the company for the ordinary indebtedness of the corporation. They are liable, however, to the creditors (when the action is brought in a proper manner) for the unpaid portion of their stock.

A corporation when organizing cannot sell its share below par and make an agreement with its stockholders that they will not be held liable for the shares so as to render this agreement binding upon the creditors of the company. If, however, a going corporation is compelled, or finds it advantageous, to issue additional shares of stock to continue or enlarge the business, such new shares may be sold at the market value at the time of the sale of the old shares of the company, and the purchaser will not incur any further liability.

To constitute one a stockholder some sort of subscription or contract is necessary whereby the subscriber obtains a right to the stock, and to act as a stockholder.

Stockholders who have received their stock in return for labor or services stand on the same basis as the stockholders who have paid cash for the stock except that in cases where the property or labor were fraudulently overvalued, the true value of the same must be shown in suits by creditors.

The general rule is that the liability of the stock passes from the transferrer to the transferee, but if the corporation is insolvent at the time of the transfer, transfers to irresponsible parties or to infants or married women does not relieve the transferrer. Furthermore, the transfer must be registered before the transferrer can be released from liability.

In addition to their liability on the unpaid portion of their stock, stockholders will also be liable for the money received by them as the proceeds of dividends improperly paid out of the capital of the company.

Remedies against the corporation itself must be exhausted by the creditors before they proceed against a stockholder.

Status of Foreign Corporations.

A corporation established in one State does not fall within the protection given in the first clause of the second section of the Fourth Article of the United States Constitution which provides that :

“The citizens of each State shall be entitled to all privileges and immunities of the several States.”

A corporation created under the laws of one State has.

therefore, no inherent right to enter to do business in another State.

It is, however, a principle of law of nations that, in the absence of any positive rule affirming, denying, or restraining the operation of foreign laws, courts will, through comity, presume the tacit adoption of them by their own government unless repugnant to its policy and interests. By an application of this rule, the legal existence and corporate capacity of foreign companies are now universally recognized.

Recent Legislation Against Foreign Corporation.

For some years past it has been customary for corporations to take out a charter in a State other than that in which their principal place of business is located on account of the greater leniency of the corporation laws of the State granting the charter.

This has led to such great abuses in the past that very recently a number of States have passed laws requiring all foreign corporations doing business with the State to obtain a license before commencing business in such State, and also putting such other restrictions and burdens upon foreign corporations as to deprive them of nearly all the benefits which they sought by incorporating in some other State.

(NOTE.—A part of the text of this chapter on Private Corporations is composed of extracts from the author's work on "Corporations.")

CHAPTER XVI.

PUBLIC CORPORATIONS.

A public corporation is a political subdivision of some character; it is created to exercise certain governmental functions, and to a greater or less extent it acts as the agent of the government (national, state or territorial) which created it.

Public corporations are divided into municipal corporations and public quasi corporations.

A public quasi corporation is the simpler species of corporation. Such a corporation is merely a local subdivision of the state which created it, created for the benefit of the state at large instead of for the benefit of the inhabitants of the territory included within the limits of the public quasi corporation itself. The powers exercised by any public quasi corporation are entirely of the class which belong primarily to the government which created the corporation, and which it is the duty of the government to exercise, either directly or through some appropriate agency, throughout the whole territory subject to its jurisdiction. Examples of public quasi corporations are counties, townships, towns (in the New England States), school districts, sanitary districts, etc.

Municipal corporations, in addition to the general governmental powers possessed by public quasi corporations, have the authority to exercise other powers for the especial benefit of the citizens of the municipal corporations. Municipal corporations include cities and incorporated towns and villages.

Systems of Local Government.

The general system of local government differs greatly in the different states, the difference mainly consisting in the varying powers of the counties, and of the townships

(or towns). There are four general systems of local government in the United States: The New England system, the Southern (or Virginia) system, the New York compromise system, and the Pennsylvania compromise system.

Under the New England system, the most important matters of local government are given to the towns, the counties being little more than judicial divisions. An annual town meeting is held in each town at which all matters of importance are discussed and voted upon directly by the voters of the town. The principal officers of the town government are, a moderator, who is the presiding officer of the town meeting, and a Board of Selectmen (generally three in number) who have general charge of carrying on the public business of the town, subject to the action taken by the town meeting.

Under the Southern system, there are no towns or townships at all, and all local government is vested in the counties. In some of the southern states this system has been somewhat modified, and the system of local government is now of the general character of the Pennsylvania Compromise system.

Under the New York compromise system, or supervisor system, the powers of local government are more equally divided between the townships and counties. Each township elects a supervisor, who is the chief executive officer of the township, and the supervisors of all the townships in a county constitute the governing board of such county. The supervisor thus constitutes a connecting link between the governments of the towns and of the county.

Under the Pennsylvania system township government exists, but most of the powers of government are given to the counties. Each county is governed by a Board of County Commissioners.

Illinois has a mixed system of county government. Under the provisions of the Constitution of 1818, the Southern system of local government was the only system recognized; dissatisfaction with this provision in the northern part of the state was mainly responsible for the adoption

of the Constitution of 1848, one provision in which permitted a majority of the voters in any county to adopt a township organization with a supervisor system of government. This dual system of local government was retained in the Constitution of 1870. A special system of local government is provided for Cook County. Township organization exists in Cook County (a few years ago this was abolished in that part of the county included within the limits of the City of Chicago), but the county is governed by a Board of County Commissioners instead of by the supervisors of the various towns.

Powers of Public Quasi Corporations.

All classes of public corporations must derive their powers from some legislative body. "In this country all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given or may not be reasonably inferred. But if we were to say that they can do nothing for which a warrant could not be found in the language of the charter, we would deny them in some cases the power of self preservation as well as many of the means necessary to the essential object of their incorporation. And, therefore, it has long been an established principle of the law of corporations that they may exercise all the powers within the fair intent and purpose of their creation which are reasonably proper to give effect to powers expressly granted. In doing this they must have a choice of means adapted to ends and are not to be confined to any one mode of operation." (*Bridgeport v. Railroad Co.*, 15 Conn., 475).

The most important powers of such public quasi corporations as towns or counties, are those relative to the administration of justice, those relative to streets and highways, and those falling within that broad, vaguely defined class of powers, grouped together under the general title of the police power.

There are other public quasi corporations which are created for the exercise of powers of one special class of pow-

ers: such as school districts, park districts, and sanitary districts.

All classes of public quasi corporations have the general implied powers possessed by all corporations, such as the power to contract and the power to borrow money.

Among the police powers possessed by many quasi corporations are: the preservation of health; the regulation of wharves and markets; the prevention of fires; the granting of licenses of various kinds; and the care of the indigent and the infirm.

Powers of Municipal Corporations.

In addition to the powers possessed by public quasi corporations, a municipal corporation has certain powers of a private character, which are exercised for the special benefit of its own citizens. Supplying its citizens with gas or water are illustrations of the exercise of powers of a private nature by a municipal corporation. The control which a state legislature has the right to exercise over a municipal corporation is much less complete when it affects the private powers of such corporation than when it affects its public powers.

“These municipal corporations are of two-fold character; the one public as regards the state at large, in so far as they are its agents in government, the other private in so far as they are to provide the local necessities and conveniences for their own citizens. As to the acquisitions they may make in their latter capacity as mere corporations, it is neither just nor is it competent for the legislature to take away or to deprive the local community of the benefit thereof. Conceding to the state the authority to shape the municipal organizations at its will, it would follow that a similar power of control might be exercised by the state as regards the property which the corporation has acquired, or the rights in the nature of property which have been conferred upon it. There are cases which assert such power, but they are opposed to what seem to be the best authorities, as well as the soundest reason. The

municipality, as an agent of the government, is one thing; the corporation, as an owner of property, is in some particulars to be regarded in a very different light." (Judge Cooley in *People vs. Hurlburt*, 24 Mich., 44).

Liability of Public Corporations Ex Contractu.

A public corporation of any kind is liable upon all contracts, which are within the scope of the powers granted to it by its charter or by statute, and which are made by the proper officers, in the manner prescribed by law.

The doctrine of ultra vires contracts is enforced much more strictly in the case of a public corporation than in the case of private corporations.

The harshness of this rule, however, has led to the adoption of certain modifications which seem necessary in order to do justice between the parties, the principal modifications being secured by the application of the doctrines of estoppel and implied contract.

When a public corporation enters into a contract which is within the general scope of the power of the corporation, but which is entered into in an irregular manner, the corporation cannot set up the defence of ultra vires against a party who in good faith has transferred property to, or performed services for, the corporation.

Where a contract is only partially ultra vires, if the contract is separable, the part of the contract which the corporation could have properly made, is valid.

Where the property has come into the possession of a public corporation under an ultra vires contract, the law implies a contract on the part of the public corporation to restore such property to the person from whom it was received.

Taxes illegally collected may be collected back again by the person paying the same under protest if: (1) the tax was actually illegal and not merely irregular; (2) the tax was paid under compulsion or its legal equivalent; and (3) the taxes were paid over by the collecting officer and received by the public corporation for its own use.

Liability of Public Corporations *Ex Delicto*.

A marked distinction is to be noted between the liability of a public corporation (either public quasi or municipal) arising out of acts of a governmental nature, and the liability of a municipal corporation arising out of its acts of a private character. Thus, as a general rule, neither a public quasi corporation or a municipal corporation, can be held liable for negligence in the exercise of a governmental power, while a municipal corporation may be held liable for negligence in the exercise of one of its strictly corporate powers.

If the exercise of a certain power is discretionary, a municipal corporation cannot be held liable for any error of judgment as to whether such right should, or should not, be exercised. Thus the act of a municipal corporation in opening or closing a street, changing a grade of a street, making a crossing at a certain place, etc., cannot constitute the basis of a suit against the corporation.

If a municipal corporation, however, undertakes to do any act, and does it in a negligent manner, they are liable to the same extent whether the act was one whose discharge was discretionary with it, or one which was imposed upon it by law.

While the doctrine of *respondeat superior* applies to the acts of the agents of a public corporation, while acting for such corporation, within the scope of their authority, the extent of the liability of a public corporation for the torts of its officers and agents is very restricted. The principle of the non-liability of public corporations for the *ultra vires* torts of its officers is clearly established.

A public corporation is not responsible for the torts of a public officer when engaged in the performance of his duty, nor for the acts of independent boards or subordinate boards which exercise governmental power.

The officers of a public corporation cannot extend, by contract, the liability of such corporation for negligence, nor can an *ultra vires* tort be ratified.

When a public corporation owns private or strictly cor-

porate property, it is liable for negligence in the maintenance of such property, to the same extent as a private corporation, or an individual, would be. No such liability attaches when the property is devoted to public purposes, unless a portion of such property is rented out for private uses.

When a municipal corporation engages in a business enterprise, such as the furnishing of water or gas to its citizens, it is held to the same degree of responsibility as a private corporation engaged in the same line of business.

Public quasi corporations cannot be held liable for damages arising out of defective streets and highways under their control, unless such liability is placed upon them by statute. The weight of the authority of American decisions, however, is to the effect that municipal corporations are required to use reasonable care and diligence to see that its streets and sidewalks are reasonably safe, and are liable for their failure to use such care. A municipality, however, can never be held responsible for injuries resulting from defective sidewalks without proof that the municipality had either actual or constructive notice.

Municipal Ordinances.

A certain degree of legislative power is given to municipal corporation. This power is vested in a municipal legislative body, generally called either a Board of Aldermen, or a Common Council. This legislative power is exercised by the method of the passage of ordinances.

An ordinance should have the same general form as a statute. It is generally provided that an ordinance must relate to one subject only, which must be recited in the title. An ordinance must contain an enacting clause, and a clause fixing the penalty for its violation, but need not recite authority.

The steps required to be taken in the passage of an ordinance are regulated by statute or charter and must be complied with. It is generally required that ordinances

shall be published before becoming operative. In most states a provision of this character is held to be mandatory, but in Massachusetts, and perhaps some other states, such a provision is held to be merely directory.

Corporate Taxation and Securities.

A public corporation has such powers of taxation as are given to it by the legislative body which created it. In most states a limit is placed upon the rate of taxation which may be imposed by any public corporation.

Local assessments differ from ordinary taxes, being imposed for the purpose of improvements in a certain locality, and being assessed upon those living in that locality, instead of upon the community at large.

A public corporation has the power to borrow money to carry out the legitimate powers of such corporation. The limit of indebtedness which a public corporation may contract is generally fixed by statute. The most common restriction is that the indebtedness must not exceed a certain percentage of the assessed valuation of the property situated within the limits of the corporation. All persons must take notice of the legal limitation of indebtedness of a corporation and a person lending money to a public corporation must determine for himself and at his own peril whether such limitation has been reached.

A warrant is an order drawn by one officer of a corporation upon another officer, in favor of some person to whom the corporation is indebted.

CHAPTER XVII.

WILLS.

“A will is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is, in its own nature, ambulatory and revocable during his life.” (Jarman on Wills.)

The right of disposing of personal property by will existed in England from the earliest times, but the right to dispose of real property by will was given by the Statute of Wills, in 1540. (32 Henry VIII.)

Formerly only wills conveying real property were required to be in writing; but at the present time, under the statute of the various states, all wills must be in writing, although in a few states different formalities are required in the case of wills affecting real property, than in the case of other wills.

A holographic will is one entirely in the handwriting of the testator; in certain states, wills of this character are valid although lacking the formalities required in the case of other wills.

Every person of age, and who is not under some special legal liability, may make a will. In some states an infant over the age of fourteen may make a will disposing of personal property.

Any person may take under a will, except those to whom the statutes deny such right. Such right is denied, or restricted, in a number of states, in the case of corporations and non-resident aliens.

A will may be irrevocable if made for a valuable consideration.

Requisites of a Will.

The requisites for a valid will are:

- (1) It must be reduced to writing;
- (2) It must be signed by the testator:

- (3) It must be acknowledged by the testator;
- (4) It must be signed by witnesses at the request of the testator.

The signature may be by mark, or some other person may sign for the testator, in his presence and at his express request.

In some states the witnesses must see the testator sign the will; in other states it is sufficient if the testator acknowledges such signature to be his. In some states the witnesses must sign in the presence of each other; in others this is not necessary. All such matters are regulated by statutes. In the absence of statutory requirements to this effect, neither the sealing or dating of a will is required. The publication of a will is the declaration of a testator before the witnesses to a will, that such instrument is his last will and testament.

Revocation of Wills.

A will may be revoked either by the act of the testator, or by operation of law. The making of a new will, will revoke an earlier one, either entirely or pro tanto. The tearing, burning, cancelling, obliterating or destroying a will, will act as a revocation of a will if the act was done with that intention. The accidental destruction of a will has no effect. On the other side, the mere intention to revoke a will not manifested by an act, is not sufficient to accomplish the purpose.

A will is revoked by operation of law, if the testator, after making the will, marries and has issue.

Republication and Codicils.

A codicil is a supplement to a will, which is to be considered as part of the original will. The same formalities are required in the making of a codicil as in the making of an original will.

Where a will has been revoked, otherwise than by the making of a new will, it could be revived at the common law by an oral statement of a testator, or by an informal

written statement. In most of the states of this country, the same formalities are required to renew a will as to make a new one.

Probate of Wills.

The probate of a will is its proof before the proper court. The required formalities are entirely regulated by statute.

The probate of a will may be opposed on the ground of mistake, fraud, or undue influence, as well as by denying the signature, or the proper execution of the will.

CHAPTER XVIII.

CONSTITUTIONAL LAW.

(Note.—This chapter on Constitutional Law is composed of extracts from the author's work on "United States Constitutional History and Law." The text of the United States Constitution will be found as Appendix B.)

The United States Constitution.

The adoption of the United States Constitution marked the opening of a new era in the World's legal history. Its derlying principle stands as the second great contribution by the Anglo-Saxon race to the progress of political science. The English statesmen of the thirteenth century did away with the seeming incompatibility between free government and extended areas by the creation of representative legislative assemblies. It remained for their descendants in a new continent five centuries later to crown this work by proclaiming the principle that while in large countries ordinary legislation must of necessity be delegated to representatives of the people, the fundamental principles of government must be the work of the people themselves.

Such fundamental principles are contained in a constitution, and where the true principles of Constitutional law are appreciated, such principles must be beyond the reach of ordinary legislative enactments. "The security of a people against the misconduct of their rulers must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions." "Constitutional mandates are imperative," and "it is quite clear that legislation cannot abridge a constitutional privilege." (Counselman vs. Hitchcock, 142 U. S., 585.)

From its nature the proper scope of a Constitution is confined to the fundamentals. A Constitution, from its nature, deals in generals, not in detail. Its framers

cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles. "A Constitution must necessarily be an instrument which enumerates rather than defines, the powers granted by it."

Within the limits of all the territory which owns the authority of the United States Government, the supreme law is the Constitution of the United States. The Federal Government is created by, and exists only in virtue of this instrument. The state governments, while older than this Constitution, and in certain respects independent of it, are still obliged to recognize it as the supreme law of the land, and to allow all matters concerning their relations with the central government to be regulated by its provisions. Over the territory belonging to the United States the authority of the Constitution is absolute. As the first successful national written Constitution, that of the United States has served as a model, during the past century, to the constitutional conventions of many countries. Before, however, treating further of the Constitution of the United States it is necessary to consider briefly the nature and origin of constitutions in general.

Definition of a Constitution.

A definition of a Constitution in the modern sense of the word is a matter of some difficulty, mainly on account of the difference between existing Constitutions. A Constitution is a fundamental body of laws adopted by the sovereign power of the state, to serve as a foundation for its government. Authorities and Constitutions are not agreed as to what should find a place therein. Three great subjects, however, always should be included: the structure of government, the division of powers, and the bill of rights. The boundaries of the states are generally included, and a schedule is necessary when one Constitution is peacefully substituted for another. The tendency of modern Constitutions is to include much matter on the subject of administrative laws. It is impossible, however, to lay down

any absolute rules as to what must be included or excluded. Any rule of law, to which the people of the state may attach a sufficient degree of importance properly finds a place in its Constitution.

Classification of Constitutions.

Constitutions are generally said to be either written or unwritten. Written Constitutions are also described as conventional or enacted Constitutions, and unwritten Constitutions as cumulative or evolved. A written, conventional or enacted Constitution is one which is adopted by the people of the country, at some definite time, and contained in some written instrument. Except so far as this is modified by amendments to the Constitution, a written Constitution is adopted at one time and contained in a single instrument. An unwritten, cumulative or evolved Constitution is one which has grown up by gradual evolution, which is not contained in any single instrument and is not entirely reduced to writing.

Federal and State Constitutions.

An important distinction is the one which must be made between the Constitution of the United States and those of the several states. The Government of the United States is one of delegated powers, while those of the states are governments of residuary original sovereignty. The Government of the United States is one established by the joint action of the several states and the people of the several states, by their adoption of the United States Constitution. Within its sphere of operation, the Government of the United States is supreme, but the scope of such sphere is limited to the grants of the Constitution. Neither the United States Government, nor any department thereof, can exercise any authority not affirmatively given to them, either expressly or by implication, by the Constitution. The governments of the states existed before the adoption of our Federal Constitution, which contained all the powers which the States consented to surrender to the Na-

tional Government. All powers not thus surrendered remained with the states or the people. A State Constitution is, therefore, entirely one of restriction on its government as far as the question of its powers are concerned. There is no provision in any State Constitution similar to Section 8 or Article I of the United States Constitution, consisting of a list of powers granted to the legislative body. The state Legislatures have full general legislative power, except so far as it is prohibited to them or abridged by the Constitution of the United States and the Federal Statutes and Treaties made in pursuance thereof, or by the Constitution in the particular state.

The Co-existing Governments.

Throughout all the time that has elapsed since the adoption of the Constitution, there have been, and are at the present time, two distinct governments within the territorial limits of each state of the United States. Each of these governments has its separate departments; each has its distinct laws; and each has its own tribunals for their enforcement. Neither government is allowed to encroach upon the proper jurisdiction of the other, nor to authorize any interference therewith by its executive or judicial officers. The United States Constitution recognizes and protects both governments, but its relation to each is very different.

The United States Constitution contains no grant of powers to the state governments: these existed prior to the Federal Constitution; and at the time of its adoption, except for the slight restrictions contained in the Articles of Confederation, were possessed of full sovereign powers. The United States Constitution was thus a grant of powers to the United States Government, and a consequent limitation upon those of the states.

The United States Government is entirely the creation of the Constitution, it is a government of delegated powers, possessing no authority not expressly or by implication granted to it by the instrument which created it. The state

governments exist independently of their Constitutions and possess all such rights as are not expressly or by application denied to them by their own Constitution or by that of the United States. The Government of the United States is one of delegated powers, and that of a state of residuary original sovereignty.

Distribution of Legislative Powers Between the Government of the United States and the Governments of the States.

The greater part of the controversies relative to the respective powers of the governments of the United States and of the states which have arisen out of the attempted exercise of some particular legislative power by the latter. Legislative powers, in relation to their position under the Constitution of the United States, may be divided into five classes.

First. Those powers denied by the Constitution both to the United States and to the several states. The powers thus denied to both are the passage of any bill of attainder or ex post facto law, the granting of any title of nobility, or the depriving any person of life, liberty or property without due process of law. Most of the restrictions contained in the last three amendments also restrain both.

Second. Those powers which the Constitution neither grants to Congress nor prohibits to the states; here are included those legislative powers which constitute the main part of the state's legislative jurisdiction. Congress has no more right to exercise a power not granted to it, either expressly or by implication, than it has to exercise one expressly denied to it.

Third. The third class consists of those powers denied by the Constitution to the United States and not prohibited to the states. The legislative powers included in this class are generally denied to the state legislatures by the state Constitution.

Fourth. Those powers which the Constitution grants to Congress and prohibits to the states. Here are included

most of the great powers of the Federal Government—the authority over foreign affairs, the power of peace or war, the power to lay duties or imports, to coin money and regulate its value.

There is comparatively slight possibility for controversy in respect to powers which are included in any of these four classes of powers, the difficulties have mainly arisen with relation to the fifth and remaining class.

Fifth. In this class are included those powers which the Constitution grants to the United States Government, without denying them to the states, either expressly or by implication. Here generally both governments may legislate, but if the laws of any state conflict with those of the United States then the latter prevail.

A few legislative powers stand in an anomalous position, being denied to the states and neither denied nor granted to the United States Government. Most important among these powers is that to emit bills of credit.

The Natural Division of Governmental Powers.

The powers and duties of every government fall naturally into three divisions, commonly called the Legislative, Executive and Judicial Departments. This division has been recognized by jurists from the earliest times. Aristotle says: "In every form of government there are three departments, and in every form the wise lawgiver must consider what in respect to each of these is for its interest. If all is well with these, all must needs be well with it, and the difference between forms of government are differences in respect to these. Of these three one is the part which deliberates about public affairs, and the second is that which has to do with the offices * * *; and the third is the judicial part." The separation and independence of these three departments, from, and of, one another, is one of the most characteristic features of a free country.

The Supreme Court has thus indicated the proper spheres of these three departments: "The difference between the

departments undoubtedly is, that the legislative makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily." (Wayman vs. Southard, 10 Wheaton, 1.)

Separation of Departments Under the Government of the United States.

It was in the United States that the doctrine of the independence and equality of the three departments of government was first worked out to its completion. The government of the United States is one of checks and balances, and provisions are inserted to enable each department to protect itself against the others. The President is given the veto power to protect himself against the legislative branch of the government; the independence of the judiciary is secured by their power to declare acts of Congress unconstitutional; while to Congress is given the power of impeachment, as a weapon against encroachment on the part of either the executive or the judiciary. The most startling innovation contained in our Constitution, from the standpoint of all foreign governments, was the power given to the courts of disregarding acts of the legislative department, when the same were in conflict with the Federal Constitution. Such a power is essential to the preservation of the Constitution. The alternative to this would be that the legislative body could at any time abrogate the fundamental laws of the country by an ordinary legislative act. It is this power granted to the courts which alone makes the distinction between constitutional and statutory provisions of practical importance.

The provisions of the United States Constitution as to the division of powers and as to these checks and balances were mainly in accord with the existing laws on these subjects in a majority of the states; they were, however, a radical departure from the Articles of Confederation. In the Ar-

ticles of Confederation the powers of the Government were centered in the legislative department; there were no executive, and the most important of the judicial powers were vested in special committees appointed by Congress. The Virginia and New Jersey plans in the Constitutional Convention both provided for this three-fold division of powers, but the Virginia plan alone contained this idea in its complete form.

The Federal Constitution blocked out the allotment of power to the three different departments and, as a general rule, powers granted to one department belong to that one exclusively and cannot be exercised by one of the others; one department should not encroach upon the proper jurisdiction of either of the others. Each of the three departments should possess powers, in their respective spheres, co-extensive with those possessed by either of the others.

Primacy of the Legislative Department.

While, however, in theory in the United States the three departments are supposed to be equal in dignity and power, still no government has ever yet been organized in which some one of these departments did not have a certain superiority over the other two. In all free governments this department almost of necessity must be the legislative; and such is the case in the United States.

There are many reasons why this primacy of the legislative department is of advantage to free institutions. The larger number among whom the legislative power is divided renders any concerted action for its abuse more difficult, and the (in general) shorter term of legislative officers has also a strong similar tendency. Again the open discussions which generally exist in legislative bodies, together with the length of time which generally elapses before final action is taken therein, enables public opinion to make itself strongly manifested against any proposed violent abuse of power. Any usurpation of power on the part of the legislative is also checked by the requirement

of a two-thirds vote to enable it to exercise its supreme functions—the passage of a measure over the President's veto, or the impeachment of a public official.

The Legislative Department.

The powers of the legislative department of the United States Government, i. e., of Congress, are limited to the jurisdiction granted by the Constitution. Such jurisdiction, however, may be assumed when granted either expressly or by implication. All legislative acts in excess of such jurisdiction are void. Whatever a legislative body cannot do directly it cannot do indirectly. No judicial power is vested by the Constitution in Congress except in cases of impeachment. Congress, however, has a general control over the judicial department through the fact that the provisions of the third article of the Constitution are not self-executing and legislation is necessary to put them into operation. Congress can at any time create or abolish inferior Federal courts, increase or decrease the number of judges of the Supreme or inferior courts, enlarge or decrease the jurisdiction of the courts (within the maximum jurisdiction prescribed in the Constitution), or change the procedure in the courts.

Congress has a similar control over the number and duties of the officers of the executive department, except those of the President and Vice-President.

Congress cannot delegate any part of its legislative powers either to the executive or judicial departments of the United States Government, to any department of any state government, to any other body or to any individual.

No legislative body can bind subsequent legislatures in matters of public law relating to public subjects.

The Executive Department.

To the executive department belongs the execution of the laws as enacted by the legislative department and interpreted by the judicial department. The enforcement of the Constitutional guaranty to a state of a republican form

of government belong to the executive department, and the decision of political questions and the management of foreign relations falls primarily within its jurisdiction.

The pardoning power is vested by the Constitution in the President as the head of the executive department; but this provision is not exclusive so as to forbid the passage by Congress of general amnesty acts.

No encroachment by the executive department upon the proper jurisdiction of the judicial department is permitted under the United States Constitution. No subordinate administrative or executive tribunal can, consistently with due process of law, enforce its orders by fine or imprisonment, nor has any administrative body established by Congress the general power of making inquiry into the private affairs of any citizen.

The Judicial Department.

Under the constitutional law of England the judicial department is by far the weakest of the three departments of government. Nowhere else in the United States Constitution do we see such a radical advance as in the power and protection given to this department. The great power given to the judges of declaring acts of Congress unconstitutional has already been referred to and will be treated of in detail in the chapter on the judicial department.

The judiciary department, however, is not allowed to encroach upon the proper jurisdiction of the legislative department. The duty of the judiciary is to interpret the Constitution and the acts of Congress, not to itself legislate. Judicial power is to be exercised for the purpose of giving effect to the will of the legislature, not that of the judge, courts must expound the law as they find it.

Courts cannot inquire into the motives of a legislative body in passing an act, nor into the question whether an act is unwise, unjust or oppressive. The remedy for an unjust or inconvenient law lies with the people, through the election of legislative officers, not with the courts. The power of confiscation and banishment is not judicial, but

legislative. No court can question the validity of an executed and ratified treaty, but the construction of treaties is within the province of the judiciary. The judicial department cannot encroach upon the executive. The writ of mandamus cannot be used to direct or control an executive officer in the discharge of an executive duty involving the exercise of judgment or discretion, nor can the courts interfere in political questions. No nonjudicial powers can be conferred on United States courts or judges.

The Powers of Congress.

The government of the United States is one of delegated powers, it rests upon the Constitution of the United States, and has only such powers as are therein granted to it. The grants of powers to Congress, the legislative department of the government (except the grant of powers to govern territory belonging to the United States but outside of the limits of the United States itself), are contained in the eighth section of the first article of the Constitution. The powers thus granted are given only in their rough outline; the Constitution enumerates these powers but does not define them. The powers granted by the Constitution to Congress are the maximum which it can exercise. Congress is not compelled to use all the powers granted to it; it may entirely disregard certain of these powers, or may exercise them only in part. When Congress fails to legislate on any subject over which they have been given jurisdiction but which has not been expressly denied to the states, then the states may legislate on the subject. It is not required that a power be expressly granted to Congress, it is sufficient if it be granted to it by implication.

The eighth section of the first article contains eighteen clauses, each containing the grant of certain powers to Congress. These eighteen clauses will be taken up in order.

Powers and Duties of the President.

The position of the President of the United States does not exactly correspond to the position of any official of

any other country. In particular it does not correspond either with that of the King or of the Prime Minister in England. "In the distribution of political power between the great departments of government, there is such a wide difference between the power conferred on the President of the United States and the authority and sovereignty which belongs to the English crown, that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war or any other subject where the rights and powers of the executive arm of the Government are brought into question. Our own Constitution and form of government must be our only guide." (Fleming vs. Page, 9 Howard 603.)

The powers granted by the Constitution to the President are expressed in very general, or even vague terms, and as there have been few decisions by the Supreme Court on these grants and, as above stated, no precedents which can be referred to, the exact extent of the authority given to the President, under some of the grants, is as yet not entirely settled. Certain Presidents have claimed and exercised more authority than have others.

The powers of the President may be divided into two classes, (1) those which are conferred upon him directly by the Constitution; and (2) those which are conferred upon him by act of Congress. In the execution of powers of the first class he is independent of Congress, or even of the courts. "By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience." (Marbury vs. Madison, 1 Count, 137.) Where the power is granted by Congress the President is subject to the control of Congress in exercising such power.

In general the duties of the President are executive rather than legislative. It is his duty to execute the laws passed by Congress rather than to legislate himself. The whole system of government created by the Constitution

is one of division of powers and of checks and balances. Nither department should be allowed to usurp powers properly belonging to either of the others. The true rule to apply where disputes arise between the executive and the legislative departments of the Government seems to be this: If the power in question is executive or administrative in its nature, all points of doubt should be decided in favor of the President; if on the other hand the power betakes rather of legislative character, then all questions of doubt should be resolved in favor of Congress.

The Judicial Department.

Among the changes made by the Constitution was the establishment of a strong national judiciary with extensive powers. The third article of the Constitution is devoted to the judicial department. The first section provides for the establishment of the courts and is as follows: "The judicial power 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 continuance in office." A distinction is to be noticed between the provision for the Supreme Court and that for the inferior courts of the United States. The former was created directly by the Constitution, while the establishment of the latter was made optional with Congress. The number and character of the inferior courts, if any were established, were left to Congress to determine. Congress was given the power to determine the number of Supreme Court judges. The judges of the Supreme Court have the right, in virtue of their office, to sit in the inferior courts of the United States, each Supreme Court judge being assigned to one of the nine judicial courts.

Power of Judges to Declare Acts of Congress Unconstitutional.

The most noticeable characteristic of the judicial department of the United States Government, and the feature of the United States Constitution which has attracted the most attention among foreign students and statesmen, is the right of United States judges to declare unconstitutional acts of the legislative department. Such a power has never been possessed by the courts of any European government. The courts do not exercise this power of declaiming directly by setting aside the act when passed by the legislative body, but only indirectly, when the constitutionality of the act becomes involved in the decision of some question which comes before them in the regular course of legal procedure.

Extent of the Judicial Powers of the United States.

The judicial power of the United States is part of the grant of powers from the states to the National Government. Like all other departments of the United States Government, the power of the judiciary is derived entirely from the Constitution. All judicial powers not granted by the Constitution to the Federal courts are reserved to the state courts.

Bill of Rights.

The term "Bill of Rights" was first used as the title of the statute passed by the English Parliament after the Revolution of 1688-9, for the purpose of securing to the English people those political and civil rights of which the crown had attempted to deprive them during the Stuart period. It was the last of the "three great charters of English liberty."

This term is now applied to that portion of a constitution designed to guarantee the individual rights of the citizen and to protect him and his property against oppression by the Government.

The Bill of Rights in the United States Constitution was expressed almost of necessity in broad general terms; and

its framers mainly employed in the work phrases and maxims already well known in English history. Their original English meaning, however, cannot always be held to follow them into the Federal Constitution.

“It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English Constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, there they have become bulwarks also against arbitrary legislation; but in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty and property.” (*Hurttools vs. California*, 110 U. S., 516.)

A liberal and elastic interpretation must thus be given the United States Bill of Rights; one which will tend to secure substantial rights of liberty and safety to the individual rather than one based on an exact adherence to the technical meaning generally accorded to its terms. The common law meaning of the terms employed in the Bill of Rights, however, is generally referred to in aid of their interpretation. This is done, not because the common law is part of the law of the United States, for it is not, but because this is supposed to give to these expressions the meaning which they had in the minds of the framers and adopters of the Constitution and the first eight amendments.

Ex Post Facto Laws.

The term “ex post facto laws” applies to criminal legislation only. The Constitution, however deals with substance and not with form, hence any statute depriving citizens of rights for past misconduct is void; however disguised, the inhibition against ex post facto laws cannot be evaded by giving civil form to what is in substance criminal. The following classes of laws are held to be ex

post facto in the case of *Calder v. Bull*. First. "Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. Second. Every law that aggravates a crime, or makes it greater than it was when committed. Third. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. Fourth. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of commission of the offense in order to convict the offender."

Government of Territory Belonging to the United States But Not Included Within the Limits of Any State.

There is not, and never has been, any such legal question as to whether (to use a popular expression) "the Constitution follows the flag." The government of the United States rests entirely upon the powers granted to it by the Constitution, if the Constitution under any circumstances or in any place, ceases to be operative, the National Government must of necessity cease to have any power to act. The question often arises, however, as to the application of a certain portion, or portions, of the Constitution. The question as to the degree of power possessed by Congress over the territories and colonies of the United States is not whether the Constitution applies at all in these cases, but as to what part of the Constitution so applies.

A summary of the decisions in these cases of *Hawaii vs. Mankichi*, *Dorr vs. United States*, *United States vs. Rasmussen*, and *Kepner vs. United States*, would establish the following general propositions:

(1) The protection contained in the Bill of Rights of the United States Constitution does not attach to residents of territory under the authority of the United States government but outside the limits of the states themselves.

(2) Such rights can be given to the residents in such territory either by legislation by Congress, or by treaty with the country from which such territory is acquired.

(3) Where such rights are given by terms having an

established meaning in the common law, these terms must be interpreted in accordance with their meaning under the common law.

The cases of *De Lima vs. Bidwell* and *Downes vs. Bidwell* taken in connection fix the status of the territories and colonies of the United States as follows:

1st, they are not foreign territory; 2nd, they are not a part of the United States; 3rd, they can only be described as territory belonging to the United States.

Regulation of Interstate Relations by the United States Constitution.

The main purpose of the United States Constitution was the establishment of the Federal government and the regulation of the relations between this new central government and the governments of the states. A small portion, however, of the Constitution, is concerned with the mutual relations of the states. The provisions of this character are mainly taken from the Articles of Confederation and are contained in the fourth article of the Constitution. Except for the provisions contained in the United States Constitution, the states in their relations to one another are in the position of foreign countries. The laws of one state are foreign laws in another state, and the same principles of Private International Law apply, in the main between two states of this Union as between two foreign countries.

CHAPTER XIX.

CONFLICT OF LAWS.

The subject of "Conflict of Laws," or "Private International Law," is the study of certain legal principles which determine the preliminary question as to the laws of what state or country are to be applied in the determination of the real question at issue.

It is generally said that the courts of one state or country apply the laws of another state or country out of comity. A more accurate statement would be that foreign laws are applied for the purpose of doing justice between the litigants. A brief statement of the underlying basis of this branch of the law is, that: a court will apply the laws of another state or country when such action is necessary in order to do justice between the parties to the action before the court.

There are five classes of cases where a court will never apply the laws of another state or country.

- (1) Laws against the established public policy of the forum;
- (2) Laws contrary to the generally recognized standard of good morals;
- (3) Laws which would work an injustice to citizens of the forum;
- (4) Penal laws;
- (5) Laws which would affect the title to land situated within the jurisdiction of the forum.

Situs, Domicile and Residence.

Every person has both an actual situs, a legal situs, or domicile, a residence, and a citizenship in some country. The actual situs of a person is the place of his actual physical presence. The domicile of a person is the place which he considers as his permanent home.

Minor in his "Conflict of Laws," thus distinguishes between domicile and residence:

"It must be observed that domicile is also to be distinguished from a mere residence, of a temporary character, not intended to be permanent. Residence in a state is usually said to be permanent. Residence in a state is usually said to be necessary to domicile, but it must be a residence of a permanent, not of a temporary or limited character. When the term 'resident,' or 'residence,' is used in connection with private international law, it is generally used in the sense of domicile, though not always.

"The Virginia case of Long vs. Ryan is a good illustration of the distinction between mere residence and domicile. In that case, a person domiciled in Washington came to Virginia intending to remain there about nine months, until he should complete a contract into which he had entered, proposing afterwards to leave Virginia. His property was attached in Virginia under a statute permitting attachments against 'non-residents,' but the court, notwithstanding his domicile in Washington, held him to be a resident of Virginia, and dismissed the attachment."

A person is a citizen of the country to whom he owes political allegiance.

As to its extent, domicile is divided into (1) national, (2) quasi-national, and (3) municipal.

Domicile is also classified as: (1) Domicile of origin; (2) constructive domicile; and (3) domicile of choice. Domicile of origin is the domicile assigned to a person at the time of his birth. A legitimate child takes the domicile of its father, an illegitimate child that of its mother, and a foundling that of the place where he is found.

The constructive domicile of an infant is governed by the same principles as its domicile of origin.

The constructive domicile of a married woman is that of her husband. If a husband deserts his wife, she has the right to acquire a new domicile for all purposes. If, however, a wife leaves her husband, even if for justifiable reasons, she has no power to acquire a general domicile, but

may acquire a special domicile for the purpose of suing for divorce.

The domicile of an insane person is generally referred to as a constructive domicile. This is incorrect, however, as no person has the power to change the domicile of an insane person and his domicile must remain what it was at the time he became insane.

Three elements are necessary in the acquisition of a domicile of choice: (1) The party must be *sui juris*; (2) he must be in the place of domicile; and (3) he must actually choose such place as his domicile. All these three elements must coincide in point of time.

The four principal rules governing domiciles are as follows: (1) Every person must have a domicile; (2) no person can have more than one domicile at the same time; (3) a person keeps one domicile until he acquires another; and (4) every person, *sui juris*, has the right to change his domicile at his will.

Situs of Status.

The status of an individual is the legal relation in which that party stands to the rest of the community.

The capacity of a person in the case of a voluntary act is determined by the law of his actual situs at the time the act was performed.

The capacity of a person in the case of an involuntary act is determined by the law of his legal situs or domicile.

The capacity of a person to make a contract is determined by the law of the actual situs of the making of the contract.

Marriage (as was shown under "Domestic Relations") is of a dual nature. The capacity of a person to make a contract of marriage is determined by the law of the place where the marriage is celebrated. All questions relative to the status of marriage are decided by the law of the domicile of the parties at the time the question arises.

The situs of a divorce is the place where it is granted.

Status of Legitimacy.

If the question of legitimacy depends upon the question whether or not there was a valid marriage between the parents of the party whose legitimacy is in question it will be determined by the laws of the place where the marriage is alleged to have taken place.

If the question of legitimacy depends upon whether or not an illegitimate child was legitimized by the after marriage of his parents, the governing law will be that of the domicile of the father at the time such marriage is contracted.

The legality of an adoption is determined by the laws of the place where it is alleged an adoption took place.

Fiduciaries.

A fiduciary occupies two relations: One towards the person to whom he stands in the position of trust, and the other towards the general public. His rights and obligations towards the former are determined by the law of the domicile of the beneficiary; his rights and obligations towards the latter by the same laws that would govern if the fiduciary was acting in an individual instead of a trust capacity.

Situs of Property.

The situs of real property is always its actual situs. The situs of personal property is the domicile of its owner.

Situs of Debts.

The situs of debts must be considered from a double standpoint. In every debt there is the obligation on the part of the debtor, and the right on the part of the creditor. Voluntary transactions affecting the right of the creditor will be governed by the law of the situs of the transaction, involuntary transactions affecting the right of the creditor by the law of the legal situs of the creditor, and matters affecting the liability of the debtor (in general) by the law of the domicile of the debtor.

There are six or seven theories (each followed by the courts of one or more states) as to the situs of a debt for the purpose of attachment or garnishment. The best rule seems to be that a debt may be attached wherever service may be had on the debtor.

Situs of a Contract.

There is no such thing as a general situs of a contract. There is the situs of the making of the contract (*lex celebrationis*), the situs of its performance (*locus solutionis*), the situs of the consideration (*locus considerationis*), and the situs of the remedy.

All matters relative to the making of a contract, such as the capacity of the parties, the required formalities, etc., are governed by the law of the place where the contract is made.

All matters relative to the performance of a contract are governed by the law of the place where the contract is to be performed.

All matters relative to the consideration of a contract are governed by the law of the place where the consideration is to be paid.

All matters relative to the remedy are governed by the law of the place where the suit is tried.

Situs of Torts and Crimes.

The situs of a tort is the place where the act takes place which fixes the liability. The law of the situs of the tort fixes the extent of the liability of the defendant, and the question as to who is the proper plaintiff in the suit.

A statutory tort cannot be sued upon in a state other than that in which the right of action accrued, unless the laws of the forum provide a proper remedy.

The situs of a crime is the place where the crime was committed. A person who puts in motion a force which results in the commission of a crime in another state may be held to have been constructively present in such state when the crime was committed.

One state or country will never enforce the criminal laws of another state or country.

Situs of Remedies.

All matters of adjective law are governed by the *lex fori*. This rule covers the case of all matters of pleading, practice, evidence, limitations of actions and set-offs or counter claims.

CHAPTER XX.

INTERPRETATION AND CONSTRUCTION.

(Note. In this chapter the rules of interpretation and construction of constitutions, statutes, contracts, deeds, wills, etc., are treated together.)

The words "interpretation and construction" are often used interchangeably, but there is, nevertheless, a great distinction to be observed between the two terms.

Interpretation is the process by which the proper meaning to be given to particular words or phrases is ascertained. It is the same process as is used in interpreting something written in one language into another language. Interpretation can only take place if the text conveys some meaning.

Construction is a broader process, it involves the idea of building up, it also involves the drawing of conclusions, respecting subjects that lie beyond the direct expressions of the text. By construction we arrive at the meaning conveyed by the spirit of the text, or of all portions of the text taken together.

The interpretation and construction of all written instruments, belongs to the judicial department of the government. Any legislative body, however, may insert an interpretation clause in any statute which they may pass, and if they do so, the courts will be bound thereby.

First Principle of Construction.

The first principle to be applied in the construction of any written instrument, whether it be a constitution, statute, contract, or will, is that the court must endeavor to discover, and give effect to, the meaning and intention of the party (or legislative body) who has used the language which is being construed. There are limits, however, to the application of this principle. If the parties have clearly

said one thing in an instrument of any kind, the courts cannot give to the instrument an entirely different meaning, even although the court feels certain that what the parties said was not what they intended to say.

Other Rules of Construction.

In construing either a statute, will or contract, the whole instrument must be considered together. The court will attempt to give effect to every part of such instrument. If two provisions are absolutely repugnant to each other, the last of such repugnant provisions will prevail in the case of a will or statute, and the first of such provisions in the case of a deed; provided, in all the cases mentioned that there is nothing in the instrument to show which of the repugnant provisions of the instrument, represented the real intentions of the parties thereto.

In the construction of all instruments a construction which will render the instrument legal will be adopted in preference to a construction which will render it illegal. If the parties, however, really intended an illegal meaning, such a meaning must be given to it, and the instrument declared illegal and void. Similarly the presumption will always be against constructions which will occasion impossibility, injustice, inconvenience, or absurdity.

Special Presumptions in Statutory Construction.

The following additional presumptions will be employed by the courts in the construction of statutes:

(1) Presumption against unnecessary change of law. Just as the courts construe the whole of a statute together, and attempt to give force to every provision therein, so the courts will construe an old and new statute together, and hold the former to be still in force to as great an extent as possible.

(2) Presumption against unconstitutionality.

(3) The presumption that the legislative department has not exceeded its authority.

- (4) Presumption against statutes in violation of good morals.
- (5) Presumption against irrepealable laws.
- (6) Presumption against implied change of laws.

Presumptions in Construction of Contracts, Deeds and Wills.

Words in a contract will be construed most strongly against the party using them.

Words in a deed will be construed most strongly against the grantor; except that in cases where the public is the grantor, all words will be construed most strongly against the grantee.

Courts will apply much more liberal principles in the construction of a will, than in the construction of a deed or contract.

Intrinsic Aids to Construction.

The intrinsic aids to construction are those to be found within the instrument itself.

The most important intrinsic aid to the construction of any written instrument is the context.

Punctuation is also an intrinsic aid which is sometimes of importance, but the court, when necessary to carry out the intention of the testator, may disregard both punctuation and grammar.

In the construction of statutes the courts may be aided by the titles, preambles, and section headings (although no great degree of importance can be attached to such aids, except perhaps in those states where it is provided by the state Constitution that the title of every act must accurately designate the subject thereof) and interpretation clauses.

Extrinsic Aids.

Extrinsic aids are those to be found outside of the language of the instrument itself.

Among the important extrinsic aids which may be used, in the construction of constitutions or statutes, are journals

of constitutional conventions or legislative bodies, meanings which a term has in the common law (for example as the Supreme Court of the United States sought the common law meaning of "double jeopardy" which called upon to construe this term in the case of *Kepner vs. United States*) the contemporary construction of a statute, and the construction which has been placed upon a statute by the executive and judicial departments of the government.

CHAPTER XXI.

COMMON LAW PLEADING.

A pleading is "a statement in a logical and legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defense." (1 Chit. Pl., 2, 13.)

Common law pleading is the name of that system of pleading which was developed in civil actions in England by the common law courts.

Parties.

In England there are various classes of persons who may not sue or be sued, but in the United States all persons have legal capacity to sue or be sued, except that an alien enemy cannot bring or prosecute a suit during the continuance of hostilities. A political sovereignty cannot be sued by an individual except by its own consent.

"One who has no right or title to sue cannot join as a coplaintiff with others who have such right.

"Thus, a stranger to a contract cannot join with a party thereto in an action thereon, even though he may have an interest therein as a subcontractor or partial assignee under one party.

"In like manner two or more persons cannot join in an action *ex delicto* for an injury done to only one of them.

"Several persons having rights of action against the same obligor arising out of several and distinct contracts must sue separately, and may not unite as plaintiffs in one action against their common obligor except as authorized by statute.

"Where two or more persons have a separate interest and sustain a separate damage, they may and must sue separately, and cannot join even though their several injuries were caused by the same act. Thus, owners of property in severalty may not join as plaintiffs in an action for an injury to such property.

“Persons who have a separate interest, but who sustain a joint damage by reason of the defendant's tort, may sue either jointly or separately at their option.

“Persons who have a joint interest must sue jointly for an injury to such interest. Joint owners of property must unite as plaintiffs in one action for an injury thereto or for a conversion thereof.” (From Encyclopedia of Pleading and Practice, Vol. XV.)

Two or more parties cannot be joined as defendants in one action where the liability of each depends upon causes of action which are essentially distinct and several, also where one or the other of two persons is liable, but not both, such persons cannot be joined as defendants, nor can persons who are successively liable, each for his own acts alone, though in respect to the same matter, be joined.

Where a tortious breach of duty is committed by two or more persons, the plaintiff may elect whether to sue one or all or any number of them.

“Several persons acting independently but causing together a single injury are joint tortfeasors within the rule, and may be either jointly or severally. In other words, it is not always essential that defendants shall have acted in concert in order to render them liable as joint tortfeasors.

“Wherever a duty is owing by several and a breach occurs, though by the act of one alone, all the persons owing the duty are liable to be sued either jointly or severally.

“Where a master or principal is liable for the tortious negligence of his servant or agent, it has been held that they may be both sued jointly in one action; but this proposition is not free from doubt, and there is much good authority to the contrary.

“Persons who act severally and independently, each causing a separate and distinct injury, cannot be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same time. A joint tort is essential to the maintenance of a joint action.

“If it appears on the face of the pleadings in an action

ex contractu that there are other parties to the contract who ought to be joined as plaintiffs, but are not, it is fatal to the action, and the defendant may raise the objection by demurrer or by motion in arrest of judgment, or he may urge it as ground for reversal on error.

“Where it does not appear upon the face of the pleadings that a necessary coplaintiff is omitted, the defendant may plead such nonjoinder in abatement, though it has been held that he should plead it in bar.

“Even if the nonjoinder is not specially pleaded either in abatement or in bar, it is available to the defendant under the general issue as a ground of nonsuit at the trial as a variance, except in case of coexecutors or coadministrators, the nonjoinder of whom can only be taken advantage of by a plea in abatement.

“It is a general rule in actions ex delicto that the nonjoinder of one who should have been joined as a coplaintiff can be taken advantage of by the defendant only by pleading it in abatement.” (Id.)

Actions.

Actions at common law are divided into real, mixed and personal. Real actions are those affecting the ownership or possession of real property. (At an early period actions for the recovery of specific personal property were classed as real actions.) Mixed actions are both for the recovery of real property and damages for its detention. Personal actions are those where a judgment for damages against some person is sought. (At the present time actions for the recovery of specific personal property are—perhaps inaccurately—classed as personal actions.) Personal actions are subdivided into actions ex contractu, or actions arising from contracts, and actions ex delicto, or actions arising from torts.

Real Actions.

At any early period there were an extremely large number of real actions, several hundred in all. These actions were divided into proprietary actions, which determined

the right of ownership, and possessory actions, which merely determined the right of possession.

The principal proprietary actions were:

The writ of right, to recover an estate in fee simple;

The writ of formedon, to recover an estate in fee tail;

The writ of dower, to recover dower rights; and

The writ of advowson, to recover the right of presentation to a benefice.

The principal possessory action was the writ of entry, of which there were at least twelve important varieties. Other important possessory actions were the writ of quare impedit, relative to the presentation to a benefice, and three of the so-called lesser assizes: those of novel disseisin, mort d'ancestor, and darrein presentment. None of the above mentioned forms of real actions are in force in any state in this country.

The action of ejectment was originally a personal action for damages by a lessee for years against his lessor, who had ousted him from possession. It has survived all the ancient real actions and has now become the sole method of trying title to land in most of the states (e. g., Illinois) which still retain the system of common law pleading.

The action of forcible entry and detainer is a summary proceeding to recover possession; it is mainly used by landlords to oust tenants for non-payment of rent or other cause.

Actions Ex Contractu.

The principal actions ex contractu are debt, detinue, account, covenant, and assumpsit.

The action of debt was originally for the recovery either of some specific chattel or chattels, or some definitely ascertained sum of money. Later its scope was restricted to the latter class of cases. There were two great disadvantages to the use of the action of debt, one was that the exact sum sued for must be proved or the action failed entirely, while the other was found in the fact that the defendant could defend by means of "wager of law" (by this is meant that if the defendant could come into court with twelve persons who would swear to their belief in

the merits of the defendant's cause as a whole, the plaintiff lost his case). On account of these disadvantages, the action of debt became practically obsolete, being supplanted by the action of *assumpsit*; and even although both of these above mentioned disadvantages have now been removed, debt has never again come into general use, either in England, or in any state in this country.

Detinue branched off from debt. When the scope of this latter action became limited to suits for the recovery of money, *detinue* came into existence as an action for the recovery of other personal property. The principal forms of *detinue* were those upon bailment (*sur bailment*) and upon *trover* (*sur trover*). This action also could be defeated by the "wager of law" and mainly for this reason was superseded by the action of *trover*. The action of *detinue* was at first always strictly an action *ex contractu*, but later, in many cases, became in reality, an action *ex delicto*.

Account, as its name implies, is an action for accounting. The action of *account* is one of the oldest forms of personal actions, and for several centuries was of great importance. While the action may still be brought, at least in some states, it has fallen into disuse on account of the development of more effective remedies. In the case of complicated accounts the common law action of *account* has been supplanted by the equitable action of *account*; and in the case of simple accounts by the action of *assumpsit*.

The action of *covenant* could originally only be brought upon a lease, but later its scope was extended to cover the entire field of instruments under seal. The action of *covenant* can only be brought by a party to the *covenant*.

The action of *assumpsit* has been, for a long period, the principal action *ex contractu*. This action was one of those growing out of the Statute of Westminster II (1285), it was an off-shoot of the action of *trespass on the case*, and, consequently, was originally an action *ex delicto*. The passage from the field of *tort* to that of *contract* was made through a suit for *deceit*.

"The action of *assumpsit* is a specialized form of *case*

which gradually acquired recognition and individuality in the fifteenth century as the proper remedy for the breach of simple promise. It was not from any subtle perception of the tie resulting from the making of the oral promise that the courts were led to countenance this form of case. The advance was due to a very natural extension of the older delictual remedy which we will not trace. The fact that the step by which *assumpsit* was differentiated from case was taken is not more surprising than the fact that the courts were so long about it.

“By way of anticipation it may be said that the conception which is at the root of liability in *assumpsit* is that of damage done by deceitful artifice. Thus if A contrives to obtain a thing of value from B on the faith of a promise to do some act for B in the future and A subsequently refuses to fulfil the promise, it is not difficult to look upon A's refusal or failure to perform as being the culmination of a false pretense.

“The situation here conceived disclosed the existence of a detriment to B, the promise, which in later times is denominated the consideration for the promise, and also an actionable deceit on the part of A. The deceit is of an *ex post facto* nature, it is true, since the presumption of deceitful intent does not arise until the subsequent breach. But in a legal system where simple promises were pressing for recognition as a source of legal duty, this objection could not stand; and accordingly an action on the case in the nature of deceit was permitted to be maintained upon the promise. Such was *assumpsit*. The full and final establishment of the remedy did not take place until near the end of the fifteenth century.” (Street's *Foundations of Legal Liability*, Vol. III, pp. 172-3.)

The scope of *assumpsit* was next extended so as to furnish a remedy for damages resulting from the improper performance of a contract, and later for damages for non-performance of a contract. The greatest extension of this action came in 1602 when in *Slade's Case*, it was decided that where a person was under any legal obligation to pay

a sum of money, the law would imply a promise to pay such money, and would sustain an action of assumpsit on such implied promise. The effect of this decision was to make assumpsit a concurrent remedy with debt in all cases where the latter remedy formerly lay.

Assumpsit is divided into general assumpsit and special assumpsit. Special assumpsit is based upon the special facts of the particular case, and the declaration must set out all the material parts of the contract upon which the action is brought.

In general assumpsit the action is founded upon an obligation raised by law independent of express contract, the declaration in such cases contains one or more of the common counts.

The common counts are as follows:

(1) *Indebitatus assumpsit*. This count simply alleges that the defendant, being indebted to the plaintiff in a certain amount, promised to pay the same. The cause of the indebtedness is generally alleged in a general way as being for goods bargained and sold; for goods sold and delivered; for use and occupation; for services rendered; for money loaned; for money paid for the defendant's use; or for money received by the defendant for the plaintiff's use.

(2) *Quantum meruit*. This is used when services are rendered, at the request of the defendant, without a definite agreement as to what shall be paid for them, to recover what such services merited.

(3) *Quantum valebant*. This is used when goods are delivered to the defendant, at his request, either express or implied, but without any agreement as to price, to recover what such goods are reasonably worth.

(4) *Insimul computasset*. This alleges that the parties had agreed between themselves upon a balance due, upon which balance suit is brought.

Seire facias is an auxiliary action, which is brought on the record of some prior action for the purpose of enforcing judgments, recognizances or other obligations of record, or to continue suits.

An old common law action now entirely obsolete, was that of annuity.

Actions Ex Delicto.

Trespass was the original tort action and for a considerable period the fields of trespass and tort were co-extensive. Near the beginning of the thirteenth century, however, the action of trespass lost its elasticity and could no longer be extended to give relief in new classes of cases. A remedy for this state of affairs was secured by the passage of the Statute of Westminster II (1285),

By the provisions of this statute it was provided that whenever the clerks in Chancery (who then issued all the common law writs) had been accustomed to issue writs in certain cases, they should have authority to frame new forms of writs in similar cases (*in consimili casu*).

From this statute came the action of trespass on the case. Trespass and trespass on the case taken together are broad enough to cover the whole field of tort. Although there are other actions *ex delicto* and although in certain cases they may furnish a more effective remedy than either trespass or trespass on case, still there is no tort upon which one of these two forms of action will not lie. The distinction between trespass and trespass on the case is generally said to be that trespass lies from all injuries resulting from direct application of force and trespass on the case for all injuries resulting from an indirect application of force. This was the distinction as laid down in the famous "Squib Case". This distinction although correct in the main is not absolutely so. The true statement is that trespass on the case will lie for the redress of all torts, for which no redress was given by the action of trespass at the time of the passage of the Statute of Westminster II. In addition to cases involving the indirect application of force, trespass on the case is also the proper remedy in the cases of those wrongs where no physical force is involved at all, such as deceit, slander and libel, malicious prosecution, etc., and is also the remedy in one class of cases, *i. e.*, waste, even when the application of

force is direct. By statute in Illinois all distinction between trespass and trespass on the case has been abolished, and both actions now lie concurrently, where either action would lie before.

Trover grew out of detinue, in much the same manner as trespass on the case grew out of trespass, and supplanted detinue for much the same reasons that assumpsit supplanted debt. Trover is in a sense a specialized form of trespass on the case.

“The most curious feature of the action of trover is the fact that it is encumbered with more fictions than any other personal action. The declaration alleges a losing by the plaintiff and a finding by the defendant, but neither of these allegations need be proved. Furthermore, if a bailment is alleged as a means of indicating the manner in which the defendant acquired possession, it need not in modern times be proved. A refusal to surrender on demand is also often alleged in the declaration, but this allegation is likewise immaterial where the taking is tortious.

“The gist of the action is found in the allegation that the defendant ‘converted the goods to his own use.’ But oddly enough, even this allegation is also a sort of fiction; for if words mean anything a conversion to one’s own use implies an appropriation under such circumstances as to result in benefit to the converter. But nothing is better established than that this is not necessary. Conversion in law does not mean acquisition of property. It is enough that the owner or person having the right to possession has, under conditions more or less clearly defined, been deprived of dominion over the goods. A withholding of possession under an inconsistent claim of title is sufficient.” (Street’s Foundations of Legal Liability, Vol. III, pp. 159-160.)

Replevin is an action for the recovery of specific articles of personal property. Its advantages over trover are that possession of the property can be obtained (by giving bonds) pending trial of the suit, and that the defendant does not have the alternative of paying damages instead

of returning the property. The details of this action of replevin are largely regulated by statute in the different states.

The Pleadings.

The pleadings in a case are the allegations made, in turn, by the parties to the suit, for the purpose of presenting to the court the point at issue between the parties. The object of all pleadings is to reach the point, where there is some allegation, or allegations, affirmed on the one side, and denied on the other.

The different pleadings in their order in a common law action are as follows:

1. The Declaration.
2. The Plea.
3. The Replication.
4. The Rejoinder.
5. The Surrejoinder.
6. The Rebutter.
7. The Surrebutter.

The first, third, fifth and seventh of these pleadings are by the plaintiff, and the second, fourth and sixth by the defendant. After this point (which is very seldom reached) the pleadings have no special names.

A demurrer is not a pleading, but instead a request to be released from pleading. Pleadings raise questions of fact while demurrers raise questions of law.

A declaration contains the following parts:

- (1) Caption,
- (2) the title,
- (3) the inducement,
- (4) the charge,
- (5) the injury and ad damnum clause,
- (6) production of suit, and
- (7) the signature, either by the plaintiff or his counsel.

Pleas are either peremptory or dilatory. Peremptory pleas are those which go to the merits of the case. Dilatory pleas are those which seek to delay the action or to

defeat it on some ground which does not go to the merits of the case.

Dilatory pleas are classified as follows:

1. To the jurisdiction of the court.
2. To the disability of the person.
 1. of plaintiff.
 2. of defendant.
3. To the count or declaration. (Obsolete.)
4. To the writ.
 1. To the form of the writ.
 - a. For matter apparent on the face of it.
 - b. For matter dehors the writ.
 2. To the action of the writ.
 1. By way of traverse.
 2. Or in confession and avoidance.

A peremptory plea must be either by way of traverse or by way of confession and avoidance.

A plea by way of traverse denies the allegations contained in the plaintiff's declaration, while a plea by way of confession and avoidance admits such allegations and then proceeds to state new matter as a defence thereto. A plea by way of traverse concludes with the words "And of this he puts himself upon the country." In such a case issue is joined by the plaintiff filing a "similiter," generally in the following words: "And the said John Doe as to the plea of the said Richard Doe above pleaded, and whereof he has put himself upon the country, does the same." (What has been said about the distinction between pleas by way of traverse, and by way of confession and avoidance, applies equally to the case of all later pleadings. The method of joinder in issue is the same whether such joinder takes place upon the plea, or upon the replication, or upon the surrebutter.) A traverse may be either general or special. A general traverse, also known as the general issue, is a general denial, by single technical phrase, of the plaintiff's whole cause of action or the greater part

thereof. The scope of the general issue is broader in some forms of actions than in others. The general issue in the various forms of personal actions is as follows:

Debt on a simple contract. *Nil debet*. Under this anything can be introduced, which proves that the defendant does not owe the debt. Under this plea, matters which are in reality by way of confession and avoidance may be introduced in the form of a traverse.

Debt on record. *Nul tiel record*.

Debt on specialty. *Non est factum*.

Detinue. *Non detinet*.

Assumpsit. *Non assumpsit*. This plea is much broader in its scope in the case of general assumpsit than in the case of special assumpsit. In the latter case all that can be proved under this plea is that the promise was not made.

Trespass. *Not guilty*.

Trespass on the case. *Not guilty*.

Trover. *Not guilty*. Under this plea in this action, any defence can be set up with the single exception of that of the statute of limitations.

A special traverse consists of some affirmative matter inconsistent with the adversary's former pleading, and a negative contradiction to it.

There is one special kind of traverse which can only be used by the plaintiff in his replication; this is the replication *de injuria*. This is properly used when the defendant has justified his actions in his plea, and the plaintiff in the replication denies the alleged justification, alleging instead that the injury was the defendant's own wrong.

Demurrers.

A demurrer may be either general or special. A special demurrer points out the reasons why the opponent's pleading failed to show a good ground of action, or of defence. A general demurrer merely alleges in general terms that the opponent's pleading does not thus allege a good ground of action or of defence.

Matters of substance can be raised by either a general or a special demurrer, but matters of form can only be raised by a special demurrer.

Upon a demurrer the court will consider the whole record and give judgment to the party who upon the whole is entitled to it. This rule does not apply, however, where the demurrer is by the plaintiff to a plea in abatement; where there has been a discontinuance; or where the right on the whole record appears to be with the plaintiff, but he has put his action on some other ground. This question of the rights of the parties on the whole record will be considered in regard to substance, not form.

Rules of Pleading.

Rules Tending Solely to the Production of an Issue.

(1) After the declaration, the parties at each stage must demur, or plead either by way of traverse or of confession and avoidance.

(2) Upon a traverse, issue must be tendered.

(3) When issue is tendered, it must be accepted.

Rules Tending to Produce a Material Issue.

(1) All pleadings must contain matter pertinent and material. Two minor rules need to be noticed:

(a) A traverse must not be taken on an immaterial point.

(b) A traverse must not be too large, or too narrow.

Rules Tending to Produce a Single Issue.

(1) Pleadings must not be double.

The effect of this rule is qualified by allowing the plaintiff to unite several counts in the same declaration. Consequently the defendant can offer different pleas, according to the nature of the different counts.

(2) It is not allowable to plead and demur to the same matter.

Rules Tending to Produce a Certain Issue.

(1) The pleadings must have certainty of place, i. e., the venue of the action, namely, the county in which it is

to be tried must be stated in the declaration. Actions, with regard to venue, are divided into two classes: local actions, or those the cause of which could have arisen in some particular county only, as any of the real actions, and transitory actions, or those the cause of which might have arisen elsewhere. In transitory actions, the venue may be laid in whatever county the plaintiff chooses.

(2) The pleadings must have certainty of time. In personal actions, the day, month and year when each traversable fact occurred must be alleged. As a rule, the time is not regarded as being material to the issue, so that the pleader is not obliged to prove the time as alleged.

(3) The pleadings must specify quality, quantity, and value.

(4) The pleadings must specify the names of parties.

(5) The pleadings must show title in the party bringing suit.

(6) The pleadings must show authority; i. e., when a party justifies under a writ, warrant, or precept, or any other authority whatever, he must set it forth particularly in his pleadings.

(7) In general, whatever is alleged in pleading must be alleged with certainty.

Rules Tending to Prevent Obscurity and Confusion.

(1) Pleadings must not be insensible, or repugnant; i. e., they must be intelligible, and consistent with themselves.

(2) Pleadings must not be ambiguous, or doubtful in meaning, and when two constructions present themselves, that one shall be adopted which is most unfavorable to the party pleading.

(3) Pleadings must not be argumentative; i. e., they must state facts in an absolute form, and not leave them to be collected by inference and argument.

(4) Pleadings must not be hypothetical, or in the alternative.

(5) Pleadings must not be by way of recital, but must be positive in form.

(6) Things are to be pleaded according to their legal effect and operation.

(7) Pleadings should have their proper formal commencements and conclusions.

(8) A pleading which is bad in part is bad altogether.

Rules Tending to Prevent Prolivity and Delay.

(1) There must be no departure in the pleadings. A departure occurs when, in any pleading, the party deserts the ground which he took in the last antecedent pleading, and resorts to another.

(2) When a plea amounts to the general issue, it should be so pleaded.

(3) Surplusage is to be avoided. By surplusage is meant unnecessary matter of whatever description.

Certain Miscellaneous Rules.

(1) The declaration must be conformable to the writ.

(2) The declaration should have its proper commencement, and should in conclusion, lay damages.

(3) Pleas must be pleaded in due order.

(4) Pleas in abatement must give the plaintiff a better writ, or declaration; i. e., the plea must correct the mistake of the plaintiff so as to enable him to avoid the same mistake in framing a new writ, or declaration.

(5) Dilatory pleas must be pleaded at a preliminary stage in the suit.

(6) In all pleadings where a deed is alleged under which the party claims or justifies, profert of such deed must be made.

(7) All pleadings ought to be true.

Trial.

The various steps in a common law action are as follows:

(1) The process.

(2) The appearance of the defendant.

(3) The trial.

- (4) The verdict.
- (5) The judgment.

The process against the defendant may be either by summons, *capias ad respondendum*, or by attachment. The *capias ad respondendum* involves the arrest of the defendant for the purpose of bringing him before the court.

The beginning of a suit by attachment is only permitted in special cases, which are regulated by statute. When a non-resident of a state has property within that state, he may be sued in such state and jurisdiction obtained by attaching such property. A judgment obtained under such circumstances will only be binding as against the property attached and can never be a judgment in personam.

The appearance of the defendant may be either voluntary or involuntary; and, also, either general or special. A general appearance is one made for the purpose of fighting the plaintiff's case; a special appearance is one made for the purpose of objecting to the jurisdiction of the court. If the defendant fails to appear at all he will be defaulted.

After the appearance of the defendant, the proper pleadings are filed and the case is then ready for trial. In general questions of law are determined by the court and questions of fact by the jury.

Each side is allowed to examine the prospective jurors for the purpose of securing an unprejudiced jury. Challenges may be either to the array or the polls. Challenges to the array are directed against the whole list of jurors on account of the manner in which they have been selected.

Challenges to the polls, or to individual jurors may be either peremptory or for cause. Each side is allowed a certain number of peremptory challenges, which number is determined by statute. Challenges for cause may be allowed or disallowed at the discretion of the judges. No complete list of causes which will render a juror properly open to challenge has ever been made, but the cause must be one which would probably render the juror prejudiced towards one side or the other.

The verdict is the decision of the jurors upon the issues presented to them. It is usually in general terms for "the plaintiff" or "for the defendant," and if for the former the amount of damages must be stated. When there are separate and distinct issues submitted to the jury there must be a finding upon each.

Proceedings After Verdict.

The following proceedings may be taken by the unsuccessful party after a verdict:

(1) Motion for a new trial. The granting of this motion depends mainly upon the discretion of the judge.

(2) Motion in arrest of judgment. This must be based on error apparent upon the face of the record.

(3) Motion for judgment non obstante veredicto. This motion may be made by the plaintiff upon the ground that some pleading by the defendant, by way of confession and avoidance, was bad in substance, and could have been demurred to.

(4) Motion for a repleader. This motion may be made when issue was joined upon an immaterial point.

(5) Taking up the case to a higher court by means of a writ of error. A writ of error is issued from a court of appellate jurisdiction to the judge, or judges, of a court of record, directing them to send up to such appellate court, the record of same case which has been tried by the lower court.

Only questions of law can be raised by a writ of error, and this writ will only lie for substantial errors, never for mere formal errors.

A writ of error is based upon a bill of exceptions. A bill of exceptions must set out the alleged errors committed by the judge in the course of the proceedings in the lower court, and the objections taken to them. A bill of exceptions must be authenticated by the trial judge. Exceptions must generally be taken at the time that any alleged error was committed.

Bills of exceptions were created by the 31st Chapter of the Statute of Westminster II.

CHAPTER XXII.

EQUITY PLEADING.

There are three classes of parties to a suit in equity, namely: indispensable, necessary and formal parties.

“Formal parties are those who have no interest in the controversy between the immediate litigants, but have an interest in the subject-matter, which may be conveniently settled in the suit and thereby prevent further litigation. They may be parties or not at the option of the complainant. Necessary parties are those who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does complete and full justice between them. Such persons may be made parties, if practicable, in obedience to the general rule which requires all persons to be made parties who are interested in the controversy, in order that there may be an end of litigation. Indispensable parties are those who not only have an interest in the subject-matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.” (Fletcher on Equity Pleading, Section 40.)

The following have been held not to be necessary parties:

1. Those whose interest is very small.
2. Those whose interest has been created to deprive the court of jurisdiction.
3. Those who consent to the decree sought.
4. Those against whom the complainants waive their rights.
5. Those who are legally represented.

In equity, if one of the parties who would be a proper party complainant, refuses to join as a complainant, he may be made a party defendant.

Order of Proceedings.

The order of proceedings in a suit in equity is as follows:

Process for appearance.

Appearance.

Proceedings on default.

Interlocutory proceedings.

Taking of evidence.

Reference to master.

The hearing.

The decree.

Correction or reversal of decrees.

Enforcements of decrees.

Appearance in a suit in equity is secured by a subpoena. If the defendant fails to appear the bill may be taken pro confesso. The taking of evidence in a suit is generally referred to a Master in Chancery, who makes a report to the judges; although the evidence may be presented in the form of affidavits, or may (at the discretion of the judges) be introduced for the first time at the hearing, as is generally the case in the trial of suits for divorce.

A suit in equity is taken to an appellate court by means of an appeal instead of by a writ of error (as is the case in common law actions).

The Pleadings.

The first pleading by the complainant is the bill of complaint; the defendant may then either disclaim, answer, plead or demur; the replication (which in equity is merely a joinder in issue by the plaintiff) closes the pleading. The place of the later pleadings at common law is supplied in equity by permitting amendments to the bill and answer.

Classification of Bills.

Bills in equity are primarily divided into original bills and bills not original.

Original bills are in turn subdivided into bills praying relief and bills not praying relief.

Original bills praying for relief are divided into three classes:

Bills praying the decree or order of the court touching some right claimed by the party exhibiting the bill, in opposition to some right, real or supposed, claimed by the party against whom the bill is exhibited, or touching some wrong done in violation of the complainant's right;

Bills of interpleader;

Bills of certiorari.

Original bills not praying relief are as follows:

Bills to perpetuate testimony.

Bills to examine witnesses *de bene esse*.

Bills of discovery.

Bills not original are divided into:

Interlocutory bills, and

Bills in the nature of original bills.

Interlocutory bills include:

Supplemental bills and original bills in the nature of supplemental bills.

Bills of revivor and bills in the nature of bills of revivor.

Bills of revivor and supplement.

Bills in the nature of original bills are:

Cross bills.

Bills of review, and bills in the nature of bills of review.

Bills to impeach a decree on the ground of fraud.

Bills to suspend or avoid the operation of decrees.

Bills to carry decrees into execution.

Original Bills.

The first class of original bills praying relief may be used for a great variety of purposes, among which are the following: For specific performance, to reform or cancel written instruments, to set aside fraudulent conveyances.

to quiet title, to foreclose mortgages, to redeem, for divorce or separate maintenance, and for other purposes.

A bill of interpleader may be brought by a person who is in possession of property, in which he claims no title, and which is claimed by two or more other persons, provided that neither of the titles to the property is derived from himself, and all the diverse interests were derived from the same original source.

A bill of certiorari is for the purpose of having the record of a case certified up from the trial court to an appellate court. This bill is seldom used in an equity suit in this country.

A bill to perpetuate testimony is for the purpose of securing and perpetuating the testimony of a witness, who is liable to die or remove from the jurisdiction of the court, on some question which is expected to be the subject of a future suit. This form of bill can only be brought by a person who expects to be the defendant in such threatened suit. Bills to examine witnesses *de bene esse*, are for the purpose of obtaining evidence for some party to a pending suit. Bills for discovery are brought for the purpose of obtaining testimony from the opposing party in a common law case. The two last species of bills are practically obsolete as their purpose can be better accomplished by means of depositions or interrogatories.

Interlocutory Bills.

When it is desired to allege new matter in the bill of complaint in any equity suit, this can be done by means of an amendment to the bill provided such new matter consists of matters which have happened prior to the commencement of the suit. If, however, it is desired to amend the bill of complaint by bringing in matters which occurred subsequent to the filing of the bill, this must be done by means of a supplemental bill. If it is desired to bring in new parties defendant to the suit, a bill in the nature of a supplemental bill must be used.

A bill of revivor is one brought to revive a bill which

has abated upon the death of one of the parties, or (in some states) upon the marriage of a female complainant, by one whose title as his representative is clear (i. e., by the heir, executor or administrator). When the right of a party does not certainly appear from the mere proof of the relation in which such party stands to the deceased party to the suit (e. g., when the bill to revive is brought by a legatee) a bill in the nature of a bill of revivor must be brought.

A bill of supplement and revivor performs the office both of a supplemental bill and of a bill of revivor.

Bills in the Nature of Original Bills.

A cross bill is one brought by the defendant in a suit against the original complainant, when such defendant (i. e., in the original suit) seeks affirmative relief against such original complainant.

A bill of review is a bill brought to obtain a modification or reversal of a decree made upon some former bill, after such decree has been enrolled. If the decree has not yet been regularly enrolled, a bill in the nature of a bill of review is used. Either of these bills may be based either upon the ground of newly discovered evidence, or upon error appearing on the face of the record. In the latter case these bills may be brought as a matter of right, while in the former case, the consent of the court is required before the bill can be filed.

Parts of a Bill in Equity.

There are nine recognized parts to a bill in equity. Of these nine parts, the first three and the last two are necessary, while any or all of the remaining four may be omitted. The nine parts are as follows:

(1) The address, which consists of the technical description of the court in which the complainant brings his action.

(2) The introduction. This contains the names and residences of the complainants and of the character in which they sue. In the Federal courts the introduction

also contains the names, residences, citizenship and description of the defendant.

(3) The premises or stating part. This contains the names and description of the defendants (except in the Federal courts) and a statement of the complainant's cause of action. Much less technicality is required in the stating of such cause of action than is required in the stating of a cause of action in a common law case.

(4) The confederating part. This alleges a confederating between the defendant and certain unknown parties. It was formerly considered that this part was necessary in order to enable the complainant to bring in new parties as defendants, at a later stage of the proceedings in the suit. This view has now been abandoned and this part of the bill is without any practical value whatever.

(5) The charging part. This is used for the purpose of anticipating a defense which the defendant is expected to set up, and then answering it. Its main purpose is to enable the complainant to file interrogations relative to his answer to the defendant's anticipated defense.

(6) The jurisdiction clause. This part is almost invariably inserted but is of no possible value. A court of equity has jurisdiction of a cause (if it has jurisdiction at all) on account of the facts set forth in the premises of the bill, not on account of a mere allegation by the complainant that such jurisdiction exists.

(7) The interrogating part. This is practically a bill for discovery inserted in a bill whose main purpose is to seek some relief from the equity court. The interrogations must relate to the complainant's cause of action and not to the defendant's defense.

(8) The prayer for relief. In this part, the complainant asks for the special form of equitable relief which he seeks, and generally concludes with a prayer for general relief, "and for such other relief as to your Honors shall seem meet, according to equity and good conscience."

(9) The prayer for process. Here the complainant asks for a summons to be issued directing the defendant (or

defendants) to appear before the court. If an injunction is sought it should be prayed for both in the prayer for relief and in the prayer for process.

The Disclaimer.

The disclaimer may be used by the defendant in reply to a bill of complaint which merely concerns the defendant's interest in certain specific property, but not in reply to a bill which seeks some decree in personam against the defendant. By a disclaimer the defendant disclaims and renounces all interest in the property which is the subject-matter of the suit.

The Plea.

“Where an objection to the bill is not apparent on the bill itself, the defendant, if he wishes to take advantage of it, must show to the court the matter which creates the objection, by answer or plea. A plea is a special answer showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed or barred. It has been said to differ from an answer in the common form, as it demands the judgment of the court, in the first instance, whether the special matter urged for it does not debar the complainant from his title to that answer which the bill requires. A plea which sets forth nothing except what appears on the face of the bill is bad, and must be overruled, although the objection, if raised by demurrer, would have been valid, as the proper office of a plea is to bring forth fresh matter not apparent in the bill. Every defense which may be a full answer to the merits of the bill is not, of course, to be considered as entitled to be brought forward by way of plea. Where a defense consists in a variety of circumstances, there is no use in a plea. The examination must still be at large, and the effect of allowing such a plea will be that the court will give its judgment upon the circumstances of the case before they are made out by proof. The true end of the plea is to save the parties the expense of an examination of the witnesses at large. The defense proper for a plea is such

as reduces the cause, or some part of it, to a single point, or to the point to which the plea applies. Hence, a plea, in order to be good, whether it be affirmative or negative, must be either an allegation or denial of some leading fact, or of matters which, taken collectively, make out some general fact, which is a complete defense. But although the defense offered by way of plea would consist of a great variety of circumstances, yet, if they all tend to a single point, the plea may be good." (Fletcher on Equity Pleading, § 235.)

Pleas may be either in abatement or in bar. The defenses most often set up by a plea in bar are such defenses as payment, the statute of limitations, the statute of frauds, etc.

Pleas are also divided into pure pleas, negative pleas, and anomalous pleas. Pure pleas set up affirmative matter and are in the nature of pleadings by way of confession and avoidance. Negative pleas deny some allegation in the complainant's bill of complaint and are in the nature of pleadings by way of traverse. Anomalous pleas contain both affirmative and negative matter and are of two kinds: (1) Where the defendant sets up a defense which the complainant has anticipated in the charging part of his bill, and then denies the complainant's denial of such defense; and (2) where the defendant alleges matter inconsistent with the complainant's bill (though not a direct denial of it) and then denies such portion of the complainant's bill as is inconsistent with such plea.

Pleas in equity are not of very frequent use at the present time, as any defense which can be made by a plea can always be made by an answer, and generally more advantageously.

The chief purpose for which a plea is used is to save time or expense, or to avoid the necessity of answering interrogatories. If, however, any of the interrogations in the bill of complaint relate to the matters put in issue by the plea, the plea must be supported by an answer to such interrogatories. A defendant may plead to part of a bill,

and answer or demur to the balance of it. In cases where there are any inconsistencies between them, the plea will be overruled by the answer.

For the determination of the issue raised by the plea, such plea admits the truth of all allegations in the bill of complaint not put in issue by the plea.

A decision in favor of the defendant upon a plea is a final decision in favor of the defendant, with relation to that part of the bill which is covered by the plea. If a plea is overruled the defendant is generally given leave to answer.

The Answer.

The answer in equity must take up all the allegations in the complainant's bill and admit or deny each in turn. Matters in defense, by way of confession and avoidance, may also be set up in an answer. An answer may raise the legal sufficiency of the complainant's bill as well as questions of fact. A sworn answer is evidence for both parties and an answer must be sworn to unless an answer under oath is expressly waived in the bill of complaint.

An answer cannot be demurred to, but the same result is reached by taking exceptions to it.

The Demurrer.

In equity a demurrer can only be to the bill of complaint. A demurrer may be to the whole bill or to a part of the bill only. A demurrer may also be either general or special. A special demurrer specifies the grounds of objection to the bill; a general demurrer alleges the bill to be without equity. A demurrer may be both general and special. Objections to the form of the bill can only be taken by special demurrer.

A speaking demurrer sets out matters not appearing upon the face of the bill, and is bad. When there is a special demurrer to the whole bill, and the particular grounds of objection are overruled the defendant may be permitted to allege other grounds of objection, orally, at the trial. This is called a demurrer *ore tenus*, and merely amounts

to giving the defendant the same advantage as if his demurrer had been both special and general.

Under certain circumstances there may be a demurrer to the discovery alone.

A demurrer admits the truth of all facts well pleaded in the bill, for the purpose of the argument on the demurrer.

If a demurrer is sustained the complainant is generally given leave to amend his answer, unless it is evident that no good bill can be framed on the complainant's cause of action. When a demurrer is overruled, the general practice is for an order to be entered for the defendant to answer.

CHAPTER XXIII.

EVIDENCE.

The distinction must be noted at the outset between proof and evidence. Proof is the establishment of conviction as to the truth or falsity of a certain fact. Evidence is the means by which proof is secured.

Relevant evidence is such evidence as tends to prove, or disprove, the point at issue.

Competent evidence is such evidence as the law permits to be introduced. Evidence may be relevant but still not competent, as the court may exclude it as being too indirect, or too probably false, or for other cause.

Evidence is material when it bears upon the substantial matter in controversy.

Direct evidence is evidence that the fact, which is the point in controversy, did or did not occur.

Circumstantial evidence is evidence that some other fact did or did not occur, when there is such a connection between the fact which is the point at issue, and such other fact which is proved or disproved, that the truth or falsity of the point at issue may be inferred from the truth or falsity of such other fact, which was proved or disproved.

Affirmative evidence is evidence that a certain act occurred; negative evidence is evidence that such fact did not occur at the time and place alleged. Affirmative evidence carries with it greater weight than negative evidence, as the testimony of one man that he actually saw a thing is much more convincing than the testimony of another man (of equal credibility) that he did not see it.

Four Principal Rules of Evidence.

The so-called four principal rules of evidence are as follows:

(1) The evidence must correspond to the allegations and be confined to the point at issue.

(2) It is sufficient if the substance only of the issue be proved.

(3) The burden of proof is always upon the party upholding the affirmative.

(4) The best evidence of which a case is by its nature susceptible must always be produced.

Immaterial variations between the evidence and the allegations will not constitute a violation of the first rule.

By the third rule it is not meant that the burden of proof is always upon the plaintiff; when the defendant pleads by way of confession and avoidance, the burden of proof falls upon him. Thus where the plaintiff sues for money lent to the defendant, and the latter sets up payment as a defense, the burden of proof is upon him. The burden of proof may shift back and forwards from one party to another during the trial of a cause.

In civil suits the person upon whom the burden of proof falls must prove his contention by a preponderance of evidence. In criminal cases the guilt of the accused must be proved beyond a reasonable doubt.

Best Evidence.

Primary evidence is that evidence which affords the greatest certainty of the fact in issue. All other evidence is secondary. Thus the best evidence of a written document is such document itself. A copy of such document or oral testimony as to its contents are both secondary evidence.

The only important application of this "best evidence" rule at the present time is that requiring the production of the original copy of any written instrument, except a notice, whose contents it is desired to prove. An exception is made (on the ground of public convenience) in the case of public documents, which can generally be proved by exemplified or certified copies.

If it is impossible to produce the original copy of any document, then, upon the proof of the impossibility of such production, secondary evidence may be produced. If it

appears that the original document is withheld by design, then secondary evidence can never be produced by the party guilty of withholding such document.

If the original document which one party to a suit desires to introduce is in the possession of his opponent, he must call upon him (in the proper formal manner required by the laws of the state) to produce it in court at the trial. Failure to so produce it under these circumstances will permit the introduction of secondary evidence.

It is an important rule of evidence that parol testimony cannot be received to vary the terms of a written instrument. Latent ambiguities in a written instrument may be explained by parol, but patent ambiguities cannot.

Presumptions.

Presumptions are divided into presumptions of law and presumptions of fact. Presumptions of law are those rules of law which hold that the existence of a certain state of facts will always, either absolutely or *prima facie*, prove the existence of some other fact.

Presumptions of law are divided into conclusive presumptions and rebuttable presumptions. Evidence can be introduced to rebut the force of the latter class of presumptions, but no evidence can be received against the former class.

Presumptions of law are based either upon the fundamental principles of justice, or the laws of nature, or the general experience necessary to create a presumption of law. The exact dividing line between rebuttable presumptions of law, and presumptions of fact is at times a difficult one to trace. Certain presumptions of law, known as "false presumptions of law," are based upon no inference of fact, and, indeed, while upheld on the ground of public policy, are manifestly contrary to the real truth of the matter. An illustration of this class of presumption is the one that everybody is supposed to know the law, when it is evident from the dissenting opinions, that in many important cases only five out of the nine members of the Supreme Court of the United States, knew the correct law.

Among the important presumptions of law are the following:

A state of facts once known to exist is supposed to continue until the contrary appears.

A marriage, proved to have existed, is presumed to continue.

If the relations between a man and woman are proved unlawful, the illegal character of the relations is presumed to continue.

Death is presumed from seven years' absence without any tidings being received from the absent party. (Seven years is the period required at common law for this presumption to arise; in Illinois, five years has been fixed as the period, and various other periods have been established by statutes in other states.)

A letter properly addressed, stamped, and mailed is presumed to have been received in due course by the person to whom it is addressed.

A child under seven years of age is presumed incapable of committing a crime.

Illustrations of these presumptions might be multiplied almost indefinitely.

Presumptions of fact are those logical deductions which a jury is permitted to draw from the facts which have been proved.

Judicial Notice.

There are certain things of which the court will take what is known as judicial notice, thus dispensing with the need of any proof upon the subject at all.

Among the facts of which the courts will thus take judicial notice are the following:

The existence of recognized foreign governments, their flags and their seals of state, their public acts, decrees and judgments, the law of nations, the general customs and usages of merchants; the seals of notaries public and foreign admiralty and maritime courts; matters of common knowledge of every person of ordinary understanding and intelligence; the coincidence of days of the week with days of the month; the time when the sun or moon rises

or sets on a particular day or night; the legal standard of weights, measures and values, as established by law, or in common use; scientific and medical facts universally conceded and of common knowledge; agreed facts and stipulations; facts once judicially known through former litigation; courts sitting in a particular State have judicial knowledge of the boundaries of that State and of the United States; of the locations of their political divisions; their boundaries, in so far as prescribed by public statutes; geographical facts of common knowledge; boundaries of states and territories wherein they are sitting; of great lakes and rivers and their navigability; locations of prominent mountains and mountain ranges; distance and time of travel between cities; main facts of history; general history of the State; the ordinary course of nature; the phenomena of human life; meaning of words, phrases and abbreviations; the written and unwritten law of the forum; law merchant; maritime law; of the form of government established by law, and of the executive and judicial officers thereof.

As aids in such matters, the courts may refer to standard publications in which information upon such subjects can be found, such as histories, geographies, almanacs, official publications, etc.

Hearsay Evidence.

Hearsay evidence includes any statement, either oral or written, which depends wholly or partly upon the reliability of some other person than the witness who utters the statement or introduces the writing.

The general rule is that hearsay evidence is not admissible. There are several reasons for this rule, the principal one being the lack of opportunity of cross examining the person upon whose authority the statement primarily rests.

There are, however, certain apparent, and certain real exceptions to this rule against the admissibility of hearsay evidence.

The apparent exceptions are as follows:

- (1) Where the fact that the words were spoken, rather than their truth, is the real point at issue.
- (2) Expressions of bodily or mental suffering.
- (3) Matters of general and public interest.
- (4) Statements as to pedigree.

The principal real exceptions are as follows:

- (5) Declarations against interest.
- (6) Admissions.
- (7) Confessions.
- (8) Ancient possessions and documents.
- (9) Dying declarations.
- (10) Evidence as to character.
- (11) Testimony of witnesses who have subsequently died or removed out of the jurisdiction of the court.
- (12) Words constituting part of the *res gestae*.

Discussing these various apparent and real exceptions more in detail:

(1) Under this exception would be included the proof of the publication of the alleged defamatory statements in suits for slander or libel. •

(2) Such expressions are facts, the proof of which tends to show the condition of the party uttering them. This might be important in personal injury cases.

(3) An existing general belief among the public in a community, is rather a fact, than testimony by the members of the community collectively.

(4) Declarations as to the pedigree of a person or family, are admissible when made before the commencement of the suit, by a person since deceased, who was (legitimately) related, either by blood or marriage, to the person, or family, whose pedigree is in dispute.

(5, 6 & 7) Declarations against interest, admissions, and confessions are all closely connected. All three are admitted upon the ground of the extreme improbability of a person making false statements against his own interests.

Declarations against interest, as here used, mean statements or book entries, made by a person, since deceased, who was not a party or in any way financially interested in the pending suit, and which statement or book entry was against the interests of the party making it, at the time it was made.

Admissions are statements against the interest of the party making them, made by a party to a civil suit; or admissions of matters of fact made by a party to a criminal suit, which are against the interests of the party making them but which are not sufficient to amount to an acknowledgment of guilt. Admissions are either private or public. The former are made out of court and may be rebutted; the latter are made in the course of the judicial proceedings by pleadings or stipulations, and are conclusive.

A confession is an acknowledgment of guilt made in a criminal case. To be admissible the accused must not have been induced to make the confession either by threats, violence, or promise of immunity. Confessions, however, obtained as the result of spiritual exhortations or collateral promises are admissible.

(8) A deed or other instrument, thirty years old, or over, is known as an ancient document, and if it comes from its natural depository and is regular on its face, it is said to prove itself, and may be admitted as evidence, without the support of other evidence.

(9) The declarations of a person, who meets his death as the result of a homicide, as to the acts resulting in his death, are admissible, provided such party is in a rational state of mind and has given up all hope of recovery at the time the statement was made, and did, as a fact, die from the injuries received.

(10) Evidence of the bad character of the accused cannot be introduced by the prosecution in a criminal case, unless such bad character is an essential element of the alleged crime. The accused always has the right to introduce evidence of his good character, and if this is done the prosecution may introduce evidence in rebuttal.

In certain civil cases, such as those for seduction, breach of promise, slander and libel, etc., the character of the plaintiff is a material issue (at least on the question of the amount of damages) and evidence on this subject may be introduced.

In most states the only evidence which can be introduced to impeach the testimony of a witness on account of his character, is evidence as to his general reputation for truth and veracity in the community in which he lives. In some States, however, evidence as to his general moral character may be introduced.

(11) When a witness at one trial of a case, before a second trial, dies or removes out of the jurisdiction of the court, evidence may be introduced as to his testimony at the former trial. Formerly it was held that the exact words of the witnesses must be proved, but later cases have relaxed the rule, and now permit the substance of such testimony to be proved by any person who took notes of the testimony, and will swear to their accuracy, or who will swear to the testimony from his own memory.

(12) The *res gestae* includes all those acts which are so connected with the main transaction as to become part of it. Spontaneous declarations, made simultaneously with a transaction or occurrence, and relative thereto, are considered as part of the *res gestae*, and admissible in evidence in connection with evidence as to the main facts of the transaction.

Witnesses.

The greater part of the evidence presented in courts of law is by means of witnesses.

Formerly many classes of people were excluded by the common law from testifying, but such disabilities have been very generally removed at the present time.

At common law, a party to the suit could not testify in either a civil or a criminal suit. Now, he has the right to testify in both, but cannot be compelled to testify in a criminal suit unless he chooses.

The husband or wife of a party to a suit was also pro-

hibited from testifying in such suit. This disability has not been entirely removed, but most states, by statute, permit such testimony in certain cases, as where the suit is between the husband and wife, or one acted as agent for the other, etc. The law of Illinois presents the peculiarity of permitting the wife to testify when she acted as agent for her husband, but prohibiting the husband from testifying when he acted as agent for his wife.

Accomplices and accessories may be permitted to testify, and a conviction obtained on their testimony. A party, however, cannot be convicted upon the uncorroborated testimony of an accomplice who admits that he has been promised immunity.

Persons who have been convicted of an infamous crime (and who were excluded at common law) may now testify, but such conviction may be shown as affecting their credibility.

Persons of unsound mind may testify if the condition of their mind is such as to enable them to retain the memory of what they have seen or heard. The degree of credibility to be attached to such witnesses is for the jury to determine.

Deaf and dumb persons are now permitted to testify and their testimony (in most States) can be given either in writing or by the sign language.

The admissibility of the evidence of children under fourteen years of age rests with the discretion of the court. The test generally is whether the child understands the nature of an oath, and the wrong and consequences of breaking it. A child as young as four years has been permitted to testify. The weight to be given to the testimony of young children rests with the jury.

A person's religious belief is no longer a bar to his testifying in court. If it is against a person's belief and principles to take an oath, he may be allowed to affirm.

It is now generally held that a member of a grand jury may be called as a witness, under proper circumstances and examined as to what took place before the grand jury,

such examination, however, not extending to the question as to how any particular juror voted.

A judge cannot testify in a cause being heard before him, but there is no law to absolutely prohibit a juror in the case, from so testifying. The attorney trying the case may also testify for his client, but such an action on his part, except in very exceptional cases, would indicate an utter disregard of professional ethics.

Several States in the country have, or have had, statutes denying or limiting the rights of Indians, Chinamen, or Negroes to testify.

Privileged Communications.

Certain communications are considered by the law as being privileged, and the law will not compel (and except with the consent of the party for whom the protection was granted), will not permit, the introduction of such testimony.

The most important of this class of communications are those between husband and wife. Communications of this class are still considered as privileged, even although the marriage has been dissolved by death or divorce.

The second important class of privileged communications are those made to a lawyer by his client. The protection in this case is given for the protection of the client, and the lawyer will not be permitted to divulge them, even if he desires to do so. This protection does not attach to communications made to an attorney relative to the commission of a criminal act in which the client and attorney were jointly engaged.

The common law did not hold as privileged communications made to priests or clergymen by their parishioners, or to doctors by their patients. Protection has been given by statutes to such communications in many States.

Examination of Witnesses.

A witness is first examined by the attorney for the party who calls him. This is called the direct examination, or

the examination in chief. After this comes the cross examination by the opposite party, then the re-direct examination, and then the re-cross examination. After this the alternate examinations by the two parties have no special names.

The principal rule governing direct examinations is that the attorney conducting such examination cannot ask leading questions. A leading question is one which suggests the answer desired. Exceptions to this rule against leading questions are found in the following cases:

(1) Where the questions are merely preliminary questions, leading up to the real testimony; (2) where it is impossible in any other way to call the attention of the witness to the point upon which his evidence is required, and (3) where the witness is manifestly hostile to the side calling him.

Leading questions may be asked on cross-examination. In most States the scope of the cross-examination must be confined to the matters upon which the witness has already testified in his direct examination. If the party who is cross-examining a witness desires the testimony of a witness as to some matter not touched upon in his direct testimony, he must summon him as his own witness. In some of the States, however, a contrary rule prevails and a witness may be asked, in his cross-examination, about any matter which is material to the question at issue.

The scope of a re-direct examination must be confined to the matters upon which the witness was questioned in his cross-examination, unless the court, in its discretion, permits the party calling the witness to question him concerning some matter which was omitted on the direct examination.

The court, at its discretion, may exclude from the court room all the witnesses except the one testifying, and such witnesses as are also parties to the suit.

Rights and Privileges of Witnesses.

In civil cases a witness may demand his statutory witness fee and mileage in advance, and may refuse to attend

unless it is paid. A witness in a criminal case, however, cannot refuse to attend because his fees are not paid.

A witness is privileged from arrest, except in cases of treason, felony, or breach of the peace, while attending a case, or going to, or returning from the same.

Books and Memoranda.

Books of account, properly and regularly kept, may be introduced in evidence for the party keeping them, upon the testimony of the party or his bookkeeper showing how the books were kept.

A witness upon the stand will be allowed to refresh his memory by the aid of written documents or memoranda in the following cases: (1) Where the reading of the writing refreshes his memory and he is then able to swear to the truth of the statements contained therein, as from his own memory; (2) where he can remember writing the memoranda and remembers that he knew the statements to be true when he wrote them; and (3) where, although after reading the paper he can neither re-call the facts stated, or even the fact of writing the paper, but recognizes the signature, or the handwriting as his own, and is able to swear on account of his system of doing business that such a paper was written by him shows certain things to have been true.

Maps, Photographs, Etc.

Maps, photographs, X-ray photographs, etc., may be admitted in evidence, upon proper proof of their accuracy, when they present evidence tending to prove or disprove any of the contentions in the case.

Expert Witnesses.

An expert witness is one called, not to testify as to the facts of the case on trial, but to give an expert opinion on some question or questions, which only those with a specialized training can be supposed able to answer.

The following have been held proper subjects of expert testimony: Meaning of entries in books; agriculture and

crops; diseases of men or of animals; blood and blood-stains; the nature and effects of poisons; architecture and building; chemistry; all branches of medicine and surgery; anatomy; electricity; explosives and fire-arms; engineering and machinery; cause of death; drowning; suffocation; strangulation; time of death; post-mortem examinations; rape; nature, cause and effect of wounds, and the means by which probably inflicted; distance at which shot was fired; whether wounds were suicidal or homicidal; seaworthiness of vessels and seamanship; surveying; photography; weather; law of a foreign state; gas and steam fitting; geology; elevator devices; midwifery; botany; banking; insanity; malpractice, injuries and wounds, etc.

Before a person can testify as an expert he must qualify by showing his education, experience, etc. It is generally sufficient for the party calling him to make out a *prima facie* case of qualification, leaving it to the other side to go further into the matter of the witness' qualifications, if they so desire, upon their cross examination.

It is not a ground upon which to object to the introduction of an expert witness, that a more experienced and better qualified witness could have been obtained.

Expert witnesses are examined by means of hypothetical questions. Such questions should include all the undisputed material facts bearing upon the case, or all the undisputed facts together with such other material facts as the side asking the questions alleges to be true, and has introduced evidence to sustain. If the opposing counsel thinks that a hypothetical question is unfairly stated, on account of the omission of material facts, he may re-frame the question, to meet his own views and ask such question upon the cross-examination.

The opinion of a non-expert may be asked upon many questions upon which a man of ordinary knowledge and experience should be able to frame a reasonably accurate opinion. Among such subjects are included:

The sanity or apparent health of a person by him observed; speed of railway trains and street cars; condition

of tracks and ties; age of a person; the identification of persons, animals, or things; intoxication of an individual; heat; cold; light; darkness; shape; size; distance; quantity; time and duration; force of a sudden jerk of a car; conduct and demeanor of a person not easily described.

Depositions.

A deposition is the testimony of a witness taken out of court, but under the authority of the court, reduced to writing and signed by the witness.

Depositions must be taken before some person duly authorized by law, such as a Notary Public, Master in Chancery, Commissioner, etc.

Depositions may be taken where the witness is without the jurisdiction of the court, or is about to move out of such jurisdiction; where the witness is sick and is about to die, or is too sick to appear in court; or where it is desired to perpetuate the testimony of an aged or infirm witness on account of probable future litigation.

A deposition is taken under the authority of a *dedimus protestatum*, issued out of the court before which the cause is pending.

Depositions may be taken either upon written or oral interrogatories. In either case the opposite party has the right to cross examine by the same method.

The party taking the deposition of a witness is not obliged to introduce it in evidence, but if he fails to do so, his opponent has the right to introduce it.

CHAPTER XXIV.

DAMAGES.

Damages are the pecuniary reparation which the law compels a wrongdoer to make to the person injured by his wrong.

Damages are in general compensatory and their amount is in proportion to the injury sustained. In a few cases of torts accompanied by fraud, gross negligence, oppression or malice, exemplary damages may also be allowed against the defendant.

Damages must be certain. Hypothetical or speculative damages cannot be recovered for. It is not necessary, however, that the exact pecuniary value of the damages can be ascertained. In many cases, such as injury to the person, the extent of the loss can only be approximated to.

Damages can only be recovered for which are the proximate result of the wrong. Remote consequences cannot be recovered for. The question as to what are proximate consequences and what are remote consequences is a question of fact rather than of law.

Losses are either direct or consequential. Direct losses are those which proceed directly from the wrongful conduct, without the intervention of any intermediate cause. Consequential losses are those occurring after the intervention of some intervening cause. Consequential losses may be either proximate or remote. Recovery may be had for direct losses and for such consequential losses as are proximate consequences of the wrongful act.

The three principal rules governing the damages which can be recovered for in the case of the breach of a contract (laid down in the case of *Hadley vs. Baxendale*) are as follows:

“First, that damages which may fairly and reasonably be considered as naturally arising from a breach of con-

tract, according to the usual course of things, are always recoverable; secondly, that damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable unless the special circumstances are known to the person who has broken the contract; thirdly, that where the special circumstances are known, or have been communicated to the person who breaks the contract, and where the damages complained of flow naturally from the breach of contract under those special circumstances, then such special damages must be supposed to have been contemplated by the parties to the contract and are recoverable. A further rule is implied, viz., that damage which cannot be considered as fairly and naturally arising from breach of contract under any given circumstances is not recoverable, whether those circumstances were or were not known to the person who is being charged." (Hale on Damages, pp. 55-6.)

In suits on bonds the measure of recovery is the damage sustained, and not the face of the bond.

In a suit on an alternative contract the measure of damage for its breach is compensation for the least beneficial alternative.

In case of failure or error in sending a telegram, damages may be recovered for all the proximate consequences of the mistake, unless the company (as is generally the case) has limited its liability through the adoption of reasonable regulations.

In case of a breach of promise to marry the following elements of damage may be recovered for: The money loss of the marriage, the injury to the plaintiff's feelings, and the mortification and distress occasioned to the plaintiff by the failure of the defendant to fulfill the contract.

In actions of tort for the destruction of property the measure of damage is the value of the property. Where personal property is damaged the measure of damage is the difference between the value of the property before and after being damaged.

No general rule can be laid down as to the measure of damages in the case of personal injuries. Many elements must be considered in such cases, such as the expense incurred, loss of time, suffering, impairment of earning capacity, etc. Where one person brings an action for the death or injury of another the measure of damages (at least in theory) is the pecuniary loss suffered by the plaintiff in the action.

Generally, neither expense of litigation, nor interest on unliquidated demands, can be recovered as damages.

CHAPTER XXV.

CODE PLEADING.

Code pleading is the name given to that reformed and simplified system of pleading which has been adopted in a little more than half the states in the country. The codes of the different states differ more or less from each other, and the preparation for the Bar examination in any code state must include a careful study of the text of code governing pleading in that particular state. Certain fundamental principles, however, are common to the codes of the different states.

By the codes all distinctions between legal and equitable actions, and between actions *ex contractu* and *ex delicto* are abolished, and there is but a single form of civil action.

The real party in interest, instead of the nominal party in interest, must always bring the suit. The technical rules of the common law, governing the joinder of parties, have been abandoned, and the equitable rules allowing the joining of all interested parties, for the purpose of preventing a multiplicity of suits have been adopted.

There are but three pleadings under the codes: The complaint (by the plaintiff), the answer (by the defendant) and the reply (by the plaintiff). The place of the later common law pleadings are supplied by freely permitting amendments to the complaint and answer. The counter claim under the code corresponds in a way with the set-off, allowed under common law pleading, but more closely to the cross bill in equity pleading.

Demurrers exist under the codes, and have in general the same effect as at common law. The causes for which demurrers may be taken are generally enumerated in the codes.

Great liberality is allowed relative to the joinder of different causes of action in one suit, and the rules govern-

ing pleading have been simplified to as great an extent as possible.

The doctrine of *lis pendens* generally does not apply in cases of actions under codes, unless notice of the right claimed by the suit is recorded with the proper county official.

CHAPTER XXVI

LEGAL ETHICS.

Legal ethics treat of the duties which a lawyer owes to the court, to the public, to his clients and to other attorneys. The American Bar Association has adopted a code of legal ethics which may be taken, as setting forth the proper relations to be observed in all the above mentioned cases. This code is given as Appendix F to this volume, and a study of this code should be sufficient to prepare the student for the bar examination on this subject.

CHAPTER XXVII.

IRRIGATION LAW.

Irrigation is defined as the "act of watering or moistening; especially the distribution of water over the surface of land to promote the growth of plants." (Century Dictionary.)

At the present time, the term irrigation is generally used in connection with the watering of land by means of ditches constructed for this purpose. This, however, is very far from being the full legal significance of the term. Irrigation takes place whenever water is applied artificially to land for agricultural purposes, whatever methods are used in the application of water.

Irrigation Under the Common Law.

Irrigation was never of much importance in England, and few decisions under the Common law are to be found on this subject, the rights of the owner of land to make use of water for irrigation purposes being governed by the general principles governing the rights and duties of riparian owners. Under the Common law, any riparian owner has the right to make a reasonable use of such water for irrigation purposes.

Irrigation Law in the Arid States.

In the Pacific and Rocky mountain states, and southwestern states and territories, the subject of irrigation is of such vital importance to the welfare and development of the state that it has become the subject of many constitutional and statutory enactments.

The difference between the Common law and the law of the arid states on this subject are thus set out by the Supreme Court of Colorado, in the case of *Oppenlander vs. Left Hand Ditch Company*:

“At Common law the water of a natural stream is an incident of the soil through which it flows; under the constitution the unappropriated water of every natural stream is the property of the public. At Common law, the riparian owner is, for certain purposes, entitled to the exclusive use of the water as it flows through his land; under the constitution the use of the water is dedicated to the people of the state subject to appropriation. The riparian owner’s right to the use of water does not depend upon user and is not forfeited by nonuser; the appropriator has no superior right or privilege in respect to the use of water on the ground that he is a riparian owner: his right to use depends solely upon appropriation and user; and he may forfeit such right by abandonment or by nonuser for such length of time as that abandonment may be implied. A riparian proprietor owning both sides of a running stream may direct the water therefrom, provided he returns the same to the natural stream before it leaves his own land, so that it may reach the riparian proprietor below without material diminution in quantity, quality or force; the appropriator, though he may not own the land on either bank of a running stream, may divert the water therefrom, and carry the same whithersoever necessity may require for beneficial use, without returning it or any of it to the natural stream in any manner. The appropriator may, under certain circumstances, change the point of diversion as well as the place of application of the water; he has a property right in the water lawfully diverted to beneficial use, and may dispose of the same separate and apart from the land in connection with which the right ripened to anyone who will continue such use without injury to the rights of others.

“Thus it appears that the constitution has, to a large extent, obliterated the Common law doctrine of riparian rights and substituted the Common law doctrine of appropriation.”

The laws in these states vary greatly from each other, but all of them have wholly or entirely repealed the Common law on the subject.

The doctrine of riparian rights is recognized in Montana, California, Nebraska, North Dakota, Oregon and Washington, and to a limited extent in Texas. It is expressly repudiated in Colorado, Nevada, Utah, Wyoming and Arizona. In the states which recognize these rights of riparian owners, such rights do not attach to the water upon the public domain, and in some of these states, while the doctrine of prior appropriation of water on the public lands obtains in this state, yet it in no way interferes with the rule of the Common law as to the right of a riparian owner to be protected in the use and enjoyment of the water naturally flowing by or over his land as against subsequent appropriation of the water for irrigation or other purposes.

In several states (i. e.: California, Idaho, Montana, and Washington) the use of water for irrigation is declared to be a public use.

Appropriation of Water.

The most peculiar distinctive feature common to the law of all the arid states is that allowing the appropriation of water. This right is not recognized by the Common law, but is expressly created by statute in certain of the arid states, and is recognized by the courts as existing in the other of these states, as a matter of necessity. In Colorado it has been held that a statute was merely declaratory of a right already existing. The right acquired by the appropriation of water is a vested right.

In California, Nebraska and Texas the statutes conferring and regulating the right of appropriation expressly provide that the rights of riparian proprietors shall not be affected by the provisions of the statutes.

In determining the amount of water appropriated for useful or beneficial purposes, the number of acres of land claimed or owned by each party, and the amount of water necessary to the proper irrigation of the same, should be taken into consideration.

In some states the method of appropriating water is regu-

lated by statute, for example, the Civil Code of California, Sec. 1415, provides: "That a person desiring to appropriate water must post a notice. * * * at the point of intended diversion." Section 1419 provides: "That a failure to comply with such rules deprives the claimant of the right to the use of the water as against a subsequent claimant who complies therewith."

Ownership of land is not necessary in order to enable a person to make a valid appropriation of water. When water has once been appropriated there is no limit upon the place where the water may be applied.

Where the right to use water for irrigation depends entirely upon priority of appropriation, the first appropriator may acquire the right to use all of the water of the stream provided he finds a beneficial use for all such water.

The right to the use of water for irrigation is generally subject to the right of others to use water for domestic purposes.

Irrigation Ditches and Companies.

Irrigation ditches are held to be for a public purpose and therefore property may be taken by right of eminent domain for this purpose. This right, however, is limited, in that such ditches must be so arranged as to inflict the least possible injury on the servient estate.

Irrigation ditches are considered real estate.

An irrigation company is a quasi public corporation.

Irrigation companies organized by private enterprise may have for their object the supplying of water for irrigation purposes, either to the public generally, for hire, or to members only, for the irrigation of their own lands. Irrigation companies of the latter class, sometimes called mutual ditch companies, are associations formed by consumers for the purpose of conveying water solely to irrigate their own lands, to be distributed, either upon or without the payment of a fee, to members only. When incorporated, the respective interests of the members are represented by shares of stock. Private irrigation companies are authorized in the several arid states by statutes conferring upon

them certain rights and regulating the relations between them and the consumers under their canals.

A ditch company is a common carrier. An irrigation company may acquire the right to water either by appropriation, or by condemnation proceedings, in those states where the doctrine of riparian rights prevail.

CHAPTER XXVIII.

MINING LAW.

Although Mining Law is, strictly speaking, a branch of the law of real property, the legal principles governing mines and mining, present great contrasts to the American or English general law of real property. Mining law is very largely statutory, and is mainly based upon civil law, rather than upon common law, principles.

Sources of Mining Law.

Mining laws in the United States are drawn from the following sources:

- (1) United States statutes;
- (2) State statutes;
- (3) Rules of mining districts; and
- (4) Mining customs.

The highest law on the subject of mining is to be found in the Federal statutes. Where any question of mining law is settled by a provision of the Federal statutes, then state statutes, rules of mining districts and mining customs alike must yield to such statute.

Congress, however, has never deemed it expedient to cover the whole field of mining law by statutory enactments. Congress has permitted the state and territorial legislatures to legislate respecting the location, manner of recording, and amount of work necessary to hold possession of a mining claim; and nearly all the mining states and territories have passed statutes on these subjects. Congress has also recognized and continued in force the customs of miners, which are regarded as the common law of mining.

Mining districts were first created in California in 1849. Mining law being defective at this time, the miners in different districts were accustomed to meet and adopt rules to apply in such district. The geographical extent and situa-

tion of the various mining districts have now become fixed. The rules of mining districts, which are reasonable and which do not conflict with statutory enactments are recognized and enforced by the courts. The existence of a district mining law is a question of fact for the jury. District rules, when once proved are presumed to continue.

Mining Claims.

“All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.” (United States Rev. Stat., Sec. 2319.)

Mining claims may be located either by citizens of the United States or by those who have declared their intention to become citizens. Location may be made by an agent.

Mining claims are of two kinds—“lode” claims and “placer” claims.

“A mineral lode or vein is a flattened mass of metallic or earthly matter, differing materially from the rocks or strata in which it occurs.” (Bainbridge on Mines, P. 2.)

“Mining-claims upon veins or lodes of quartz or other rock in place being gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of

the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end-lines of each claim shall be parallel to each other." (United States Revised Statutes, Section 2320.)

The two requisites for the acquisition of a lode mining claim, provided by the Federal statutes, are the discovery of a mineral bearing lode, and the distinct marking of the boundaries of the claim.

The provisions of the Federal statute as to tunnel claims, placer claims, and coal lands are as follows:

"Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months, shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

"Claims usually called 'placers' including all forms of deposit excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

“Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer-claim made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

“Where placer-claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer-claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.”

“Every person above the age of twenty-one years who is a citizen of the United States, or who has declared his intention to become such, or any association or persons severally qualified as above, shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver

of not less than ten dollars per acre for such lands where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

“Any person or association of persons severally qualified as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved; Provided, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

“All claims under the preceding section must be presented within sixty days after the date of actual possession and the commencement of improvements on the land, to the register of the proper land district, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

“The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken

the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the property notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant."

In the location of a claim of any kind the following must be used:

- (1) The location notice at discovery;
- (2) The discovery shaft; and
- (3) The boundary stakes.

The necessity of recording a location is determined by the statutes of the several states.

Mining Patents.

By location, the location only secures an estate in the property located as long as the required yearly work is done thereon. A complete title is only acquired by a patent.

The obtaining of patents for mining claims is regulated by the Federal statutes as follows:

"A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land-office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor-general showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place, on the land embraced in

such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land-office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of the filing of this application, or at any time thereafter within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended on improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land-office, at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper office of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. Provided, That the claimant for a patent is not a resident, of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and affidavits required to be made in this section by the claimant for such patent may be made by his, her or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits; and, Provided; that this section shall apply to all applications now pending for patents

to mineral lands." (United States Revised Statutes, Section 2325.)

Extra-Lateral Rights and Cross Veins.

The extra-lateral rights of a location have been summarized by the Supreme Court of the United States as follows:

"First, the location as made on the surface by the locator determines the extent of rights below the surface. Second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third, every vein, the top or apex of which lies inside of such surface lines extended downward vertically becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing, he enters beneath the surface of some other proprietor. Fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed not along, but across the course of the vein." (Del Monte Min., etc., Co. vs. Last Chance Min. Co., 171 U. S., 89.)

When two or more veins intersect the owner of the vein first located shall be entitled to the mineral within the space of intersection. Beyond the point of intersection, each owner is again entitled to his own vein.

Forfeiture of Claims.

Claims are forfeited by a failure to perform the required annual labor thereon. The statutory provisions on this point are as follows: "On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located

prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the first day of January, eighteen hundred and seventy-five, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Sec. 5 A. C., May 10, 1872.

“Section 2. That section twenty-three hundred and twenty-four of the Revised Statutes of the United States, be amended by adding the following words: ‘Provided, that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, Anno Domini, eighteen hundred and seventy-two. January 22, 1880.’”

“Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.”

QUESTIONS AND ANSWERS

TEST CASES.

(Note. The following cases are each based upon some actually decided case. A majority of the cases are from the decisions of American Courts rendered during the last few years.)

1.

A, who was the driver of a wagon, was driving along the street, which he knew to be in a torn-up condition. He was knocked from his wagon by one of the barrels he was hauling and which projected at the end of the wagon, striking against an electric light pole. Can he recover from the village?

2.

Where the natural course of water through the dominant estate is from a ravine to a basin and thence through a depression in the rim to the servient estate, may the owner of the dominant estate construct a ditch on his own land so as to cut out the basin and carry the water through to the natural outlet upon the servient estate when debris which would otherwise have been carried to and remained in the basin is thereby cast upon the servient estate?

3.

Is a person who uses gas for heating or illuminating purposes which he fraudulently obtains without paying therefor by connecting the pipes so as to cut out the meter, guilty of larceny? If so, is the selling price of the gas, or the cost of manufacture to be used in determining whether the crime constituted grand or petty larceny?

4.

B brings suit against H on a written contract, the agreement of which had been substantially performed, nothing remaining to be done but the making of payment. Can recovery be had in this case under the common counts?

5.

In determining whether plaintiff's intestate, a boy of ten years old, was guilty of contributory negligence in failing to hear and get out of the way of the wagon which ran over and killed him, may the jury consider his age, intelligence, experience and ability to comprehend danger and take care of himself, and was it proper to deny a motion to return a verdict for the defendant based on the ground that such failure was contributory negligence as a matter of law?

6.

When a party attempts to flag a street car in order to prevent a collision with a fire engine, which collision in fact occurred almost immediately after such attempt, is a remark made by the motorman of the car to such party just before the collision took place, admissible as part of the *res gestae*?

7.

A, while insane, borrows money of B. B had no actual notice of A's insanity, but prior to the making of the loan notice of such insanity had been given to C an attorney at law and the husband of B. Is such notice binding on C?

8.

A, who is being examined as to his competency to act as a juror in a certain case, states that he has formed an opinion and that it will require evidence to change his opinion. Is this sufficient ground for challenging the juror?

9.

A engages B to work for him as a bookkeeper. B at the time of his employment agrees that if he leaves the employment of A for any cause, he will never enter the employ of any firm engaged in the liquor business in the same state where A's business is located. While in A's employ, B learns from whom A buys and to whom he sells, and then leaves A's employ, going to work for a rival liquor firm, located in the same state. A brings suit for an injunction

to prevent B working for said firm. Should the injunction be issued?

10.

In the trial of a will case, one of the witnesses had been in California at the time of the death of the testator who died in New York. He was asked if the testator did not commit suicide. Was the question admissible?

11.

The grandmother of a young man made a contract with the father of the young man by which she agreed that if the father would deposit the sum of \$1,200 to be used in payment for his board and room in a certain educational institution, she would pay from time to time as needed for the tuition and books, and clothing of the young man during the time that he should attend such institution, and that in case of her death prior to the time that the young man should have finished his course, her heirs and executors should carry out her part of such contract. The contract contemplated a four years' course, but it was found soon after the young man entered the school that he would be unable to finish his course in less than five years. The grandmother died at the end of three years. Was her estate liable for the expenses of the young man in the school for one year or two years additionally?

12.

Of what crime is a traveling salesman guilty, who, having charge of a branch of his employer's business, permits an article in his custody by virtue of his employment, to be removed by another traveling salesman, and subsequently accepts from the latter the money acquired from the sale thereof, for the purpose of its being transmitted to their common employer, and who then applied the money to his own use?

13.

Does the publication in a paper of a statement that a certain contractor has been placed upon the "unfair list" of

a carpenters' union, together with a statement that the publication of such notice will be continued until he has decided to set himself square with organized labor, constitute a libel?

14.

A contract under seal concerning the disposition of an estate, provided, viz.: "I, the said C. S., do hereby covenant and agree to and with the said C. S. and to and with such person that if there be a wife of the said G. S. at the time of his decease, that after the said G. S. shall die in my life time leaving a widow still living, I will, from and after the decease of said G. S. and during my life time, pay over to such person as may be the widow of G. S. one-third of the entire income aforesaid to which I may be entitled as such survivor." Can the widow of G. S. maintain an action on this contract?

15.

A brother and sister conveyed the premises upon which they were living, and together took back a mortgage with condition to support them during their lives, according to a bond, providing what rooms they should occupy; that they should have proper food, medicine, clothing, nursing, etc., fuel for each of them prepared and housed, and board of a horse for their use; that the grantee should build additions to their house, which he did, at considerable expense; and he should not dispose of the house during their lives. Were the brother and sister entitled to support any where else than in said house?

16.

In an action on a contract for labor performed, signed by defendant's son, it appeared that defendant was old and confined to his house; that he was also rich and the owner of the property on which the work was done; that before it was done he signed an application for a permit to do it; that the son had no property; that he told his father of the contract with defendant, and conferred with him about the work, and told him of its progress; that he was his father's

only son, and general business agent; and that the defendant had in mind the work in question, and consulted with his wife about it. Were the jury justified in finding that the defendant was the principal in the contract?

17

The banking firm of M & Son had been for a long time acting as plaintiff's financial agents. M died, and his sons H & E continued the business in the name of M's Sons, and H became plaintiff's treasurer. His firm continued to act as plaintiff's financial agents, keeping his transfer books, paying all stock dividends, and frequently making advances to it. The account of the firm's books was kept in the name of the plaintiff and on plaintiff's books in the name of M's Sons. Plaintiff kept no account in the name of H as treasurer. Remittances were at the time made to his order but afterwards at his request they were sent direct to the order of the firm. The annual reports distributed to plaintiff's stockholders, stated the funds now in the hands of the firm, but gave no statement showing funds in the hands of H as treasurer. M's Sons failed owing the plaintiff a large sum. Can the firm hold H personally responsible for the loss?

18

Defendant's employer who had testified to defendant's good character, was asked by the latter's counsel whether he had made inquiries as to defendant before engaging him and whether he had any fault to find with him. The court excluded the question. Was this action proper?

19.

In action for personal injuries caused by the bite of a dog, the question of defect of parties was not raised either by demurrer or answer. Can such defect be taken advantage of in an appeal?

20.

Is a note which provides in case of collection through attorney or by legal proceedings for payment of costs and expenses without specifying expenses, negotiable?

21.

B, a policy holder in a life insurance company has voluntarily ceased payment and abandoned his policy, can he maintain an action for damages for the cancellation of such policy?

22.

An accommodation indorser of a promissory note eighteen months after its maturity, with knowledge that there had been no demand of payment or notice of dishonor, and without receiving a consideration, indorses on the note the words "I hereby waive protest or demand of payment." Is such indorser liable on a suit thereafter brought against him on the note?

23.

When a surety, for his own protection, pays off the debt for which he is liable, but does so in form of a purchase, taking an assignment of the securities to himself, having in mind, however, only the better protection of his rights of subrogation and contribution. Is the transaction equivalent to a payment for the purpose of acquiring such rights?

24.

The defendant had gone on the bond of the cashier of the Savings Bank as his surety: the cashier being elected for a certain definite term. After the expiration of the term, no new bond was given, and afterwards the cashier stole a part of the funds of the bank. Suit is brought against the defendant on the bond which he signed. Is he liable thereon?

25.

Complainant's bill states the following case:—On September 6, 1904 the defendant Company issued to the complainant a policy containing among other things the following provisions: "The National Fire Insurance Company of Hartford, Conn. in consideration of the stipulations herein named, and of Nineteen Dollars and Thirty-Eight Cents premium to insure Hall and Hawkins for the term of one year from September 6, 1904 at noon to September 6, 1905

at noon, against all direct loss or damage by fire except as herein provided, to an amount not exceeding \$1,000 on the following described property, located and contained as described herein (describe property). This Company shall not be liable for loss occasioned directly or indirectly by invasion, insurrection, riot, civil war, or commotive or military, or usurped power, or by order of any civil authority or by theft, or by neglect of the insured to use or reasonable means to save and preserve the property in and after a fire, on when the property is endangered by fire in neighboring premises, or (unless fire ensues, and in that event for the damage by fire only) by explosion, or any kind of lightning; but liability for direct damages by lightning may be assumed by specific performance hereon." On November 12th, 1904, the property insured was partly destroyed through an explosion which occurred in a fire in the neighborhood. Can the plaintiff recover on his policy?

26.

Where a manufacturing firm has in its service a large number of workmen and it is the duty of the book-keeper aided by the foreman to ascertain what work is done, and for whom done, and to enter it daily in the books, are such books competent evidence of the items charged in them when supplemented by testimony of the foreman as to what workmen worked and by some members of the firm as to correctness of the charges and by testimony of persons who had made settlements with the firm of accounts on their books that such accounts were correct?

27.

Plaintiff's bill prayed an injunction against the removal of a bridge, which constituted part of a highway running through his farm on both sides of the stream. The bridge and the road had been re-located and the road abandoned. The bill was framed on the theory that it was defendant's duty as highway commissioners to keep the bridge in repair. Could plaintiff claim relief on the ground that as

abutting owner he had rights in the highway that could not be taken from him without compensation?

28.

An agent of an insurance company is intrusted with check and receipts for the purpose of settling a death claim; are the declarations and admissions made by the agent as part of the *res gestae* in closing up the transaction, binding upon the company?

29.

A is a switch tender in a certain railway yards and B is a member of the crew of a switching engine in the same yards. A and B, however, are employed by different roads. Are A and B fellow servants?

30.

The question at issue in a suit for personal injuries was whether the plaintiff used ordinary care in putting his hand under the blade of a slat cutting machine in a window mill factory to remove slats or slivers instead of going back of the machine to remove them. In this case the court admitted testimony to the effect that there were certain posts back of the machine which made it difficult to remove the slats from behind. Was it error to admit this testimony?

31.

The laws of Georgia provide that the husband or wife of any person who is sentenced to the penitentiary for two years or longer shall have the right to obtain a divorce on such ground. A's husband was sentenced to the penitentiary for a longer period than two years, but was pardoned by the governor. Did the pardon by the governor take away from A the right to a divorce?

32.

An artist brings suit for the wrongful breaking of a glass picture painted by him. He claims damages not

only for the market value of the picture, but also for the special value which he claimed it had to him. Is he entitled to recover for such damages?

33.

The plaintiff sues for personal injuries. The personal injuries received necessitated the amputation of his legs. This amputation aggravated a previously existing ailment. Can this aggravation of the previous ailment be considered in determining the damages?

34.

The plaintiff in error operated a bath-house in the city of Lincoln, having among its other attractions a plunge bath. In the office where tickets are sold there was a system of drawers or boxes in charge of an attendant who presents one of them to any patron having valuables about his person, in which the valuables are deposited, the box returned to its proper place, and locked, and the key given to the patron. After taking his bath, the visitor returned the key to the attendant, who unlocked and presented the drawer to the visitor, who in this way regained possession of such valuables as he may have deposited. On the evening of July 21st, 1900, Allen, the defendant in error, visited the bath-house in company with one Chase for the purpose of getting a bath. On purchasing tickets, the attendant presented a box to each of them in which they deposited their valuables, receiving the keys to their respective boxes, passed into the bathroom, where they disrobed and afterwards enjoyed their bath in the plunge. Allen testified that he placed the key given to him in his coat pocket, and that on returning to his dressing room he noticed that his clothing had been disarranged by some one during his absence in the bath and his key was missing. He immediately notified the attendant from whom he had received the key and was told his property could not be returned until the managing officer opened the boxes. The next morning he called at the bath-house and had a talk

with the manager, who told him that his key had been turned in and that his property was gone; that detectives had been employed; and requested him to call again a day or two later. The second day thereafter Allen again called up the manager and was told that nothing further had been learned, and on Allen's demand to be paid the value of the property, payment was refused. This action was thereupon commenced to recover the value of the deposit which in his petition Allen alleges there was a gold watch of the value of \$45.00 and currency to the amount of \$116.00. To what class of bailees did the Bath Company belong, and for what degree of negligence was it liable?

35.

A purchases goods in the name of a corporation which in fact has no existence, giving therefor the note of the supposed corporation, signed in its name, and his own name as Treasurer. What is the proper course of action to be taken by the seller upon discovering the non-existence of the supposed corporation?

36.

Will the following words written concerning the robbery of a safe containing county funds constitute libel: "Turn your searchlight on your treasurer and the man that boards with him and the postmaster, and you will find where the money went?"

37.

In a certain case, one of the instructions given by the court was as follows: "In this case damages are claimed by plaintiff on account of injuries done to his land through the seepage of water from the ditch of the defendant owing to its negligent and defective construction and maintenance. Before you can find for the plaintiff in this case, the fact must be established by a clear preponderance of the evidence that the ditch in question was defectively constructed or negligently maintained, and that through such defective construction or negligent maintaining the seep-

age occurred from which it is claimed the injury resulted, and unless the plaintiff has established this fact by a clear preponderance of the evidence the verdict should be for the defendant." Was this instruction proper or improper? If improper, in what respect?

38.

In an accident case the defendant attempted to introduce as a part of his defense a declaration or statement made by one Mansel Baugh, a child of six years of age, after the accident. The declaration made by the child and the circumstances under which it was made were as follows: J. M. Baugh, the father of the boy, was in the store at the time accompanied by the wife and the child. Jack Maloney, a salesman in the store, testified that he was near the elevator shaft on the first floor and heard groans or cries of pain down the shaft; that just as he heard the groans the little boy came running to him from in front of the elevator door and said to witness: "A man came up and pushed open the door and walked in." He stated that the child appeared to be greatly excited and that he (witness) immediately went down to the bottom of the shaft in the basement and found appellee in the injured condition. The court excluded the statement of the witness concerning the declaration made to him by the child. Appellant also offered to prove by Mr. Baugh that the boy ran to him from the elevator apparently much excited and pulled him down and said: "Papa, a man pushed the door of the elevator open and walked in." This was excluded by the court. Was such exclusion of this evidence correct or incorrect?

39.

The plaintiff "S" gave to "W" \$2,500 to be used for an illegal purpose. "W" expended part of such money as the agent of "S," and then refused to return the unexpended balance to "S," alleging the illegality of the purpose for which the money was to be used, as a defense. Was this defense a good one?

40.

A sheriff pursuant to an order of court paid the amount of a fine and costs for which he had taken a note with a surety not conforming to statutory requirements, but valid as a common law obligation. The sheriff failed to sue the principal on the note or to present the claim against the principal's estate when the latter went through bankruptcy. Was the surety discharged?

41.

A surety note bearing twenty signatures is put afloat before maturity and passes into the hands of a bona fide holder. Some of the signatures are genuine and some are forged. May the bona fide holder recover against the persons who actually signed the note?

42.

A policy of life insurance containing a stipulation excepting liability on the policy "if death is caused or superinduced at the hands of justice or in violation of, or attempt to, violate any criminal law," and the insured is slain by a husband either while attempting to have sexual intercourse with the wife or immediately after the completion of the act. Can there be a recovery on this insurance policy?

43.

A father has his daughter made the beneficiary of certain insurance certificates without surrendering control or possession of the same and declares his intention either at the same time or afterwards that she shall share the proceeds of such certificates with another named person, and the daughter assents to such declaration. Does this create a trust in favor of such third person which a court of equity will enforce?

44.

The bill in equity in substance sought a mandatory injunction to prevent the defendants, who were a colliery company, from erecting or working any coke ovens or

other ovens to the nuisance of the plaintiff, the nuisance alleged being from smoke and deleterious vapors. The plaintiff was tenant for life of a mansion-house and about 485 acres of land called Burnhall, situated in the county of Durham, having in the neighborhood and on all sides of his estate many collieries, some of which have been worked for thirty or forty years. The defendants had in 1870 opened or enlarged a coal pit called the Littleburn Colliery 400 yards from one of the plaintiff's plantations and 1,000 yards from his mansion-house and had erected his coke ovens, increasing by degrees to the number of 254. These works in fact intersected the lands of the plaintiff, and the plaintiff in February, 1873, filed the bill in this suit to restrain the defendants from allowing any effluvia to issue from their works so as to occasion nuisance to the plaintiff or diminish the value of his estate. The defendants alleged that their works did no real injury to the woods or lands of the plaintiff; and that there were already so many collieries and coke-works in the neighborhood (the nearest being half a mile off) that the colliery and coke ovens erected by the defendants made no perceptible addition to the smoke. Should the injunction be granted?

45.

In the case of Penn vs. Lord Baltimore, a bill was brought in the English courts for the specific performance and execution of the articles of a contract. The bill was founded on articles entered into between the plaintiffs and defendant 10 May, 1732, which articles recited several matters as introductory to the stipulations between the parties and particularly letters patent 20 June 2 C. I., by which the district property and government of Maryland under certain restrictions is granted to defendant's ancestor, his heirs and assigns; suit reciting charters or letters patent in 1681 by which the province of Pennsylvania is granted to Mr. William Penn and his heirs; and stated a title to the plaintiffs derived from James, Duke of York, to the three lower counties by common feoffments brought, bear-

ing date 24 August, 1682, the articles recite that several controversies had been between the parties concerning the boundaries and limits of certain two provinces and three lower counties and making part provision and settling them by drawing part of a circle about the town of Newcastle and a line to ascertain the boundaries between Maryland and the three lower counties, and a provision in whatever manner that circle and line should run and be drawn; and that commissioners should do it in a certain limited time, the final time for which was on or before 25 December, 1733. Objection was made to the jurisdiction of the court. Should this objection be sustained?

46.

The Act of July 1, 1902, establishing the civil government of the Philippine Islands, provided that the courts which had existed under the Spanish rule should continue in existence and should retain their previous jurisdiction, except as this was changed by the provisions of the present act. This Act also contained a Bill of Rights for the Philippines, one of the provisions of which provided that no person should be put twice in jeopardy for the same offense. The Spanish law had prohibited double jeopardy but had not held that a person was put twice in jeopardy through an appeal (which was always allowed) by the Government from a judgment of acquittal in a criminal case. "K" was acquitted of a certain charge in a lower court of the Philippine Islands, whereupon the Government appealed to the Supreme Court of the Philippine Islands by which court "K" was convicted. From this conviction "K" appealed to the Supreme Court of the United States on the ground that he had been put twice in jeopardy. What action should the Supreme Court of the United States take?

47.

A person accused of a criminal offense pleaded guilty and then took out a writ of error on account of defects appearing on the record. Is such proceeding permissible?

48.

The Constitution of Louisiana contains a provision prohibiting marriage between white persons and persons having one-eighth or more negro blood. No statute has ever been passed to carry such provision into effect. Should this constitutional provision be held to be self-executing?

49.

Plaintiffs' father left small legacies to them and gave the bulk of his property to his wife in trust for the benefit of his minor children. Nothing was ever done under the will and the widow and children lived together as one family, the former being recognized as the head and with the children's consent managing and controlling all her husband's estate. The business left by him was continued by the family, each child aiding therein when old enough. There was no agreement as to board and lodging and all were supported from the business. Plaintiffs, two of the daughters, worked partly at the store and partly at home until they were married, on the understanding that they should derive pecuniary profit from the successful conduct of the business. The profits of the business not needed for support were invested and the estate increased greatly in value after the father's death. Should the mother be held to be a trustee of the property purchased with the profits of the business?

50.

The legislature of Massachusetts passed an act providing for the abolition of grade crossings and requiring the cost of changes made to be paid by the town, the railroad company and the state in proportions fixed without reference to the value of the property owned by them or the benefits which they severally receive. Is such a law valid; if so, for what reason?

51.

A paragraph of a complaint in an action for damages on the ground of fraud in procuring a deed of land from a father to his son proceeds on the theory that the grantor

at the time the deed was executed was, by reason of age and infirmity, of unsound mind, but states no facts showing such unsoundness of mind. What action should the defendant take?

52.

The original bill asserted ownership of property held by the plaintiff's father. At the time of his death a part of this property consisted of land acquired by the father under a deed, which was set forth in the bill as the source of the father's title, and as the foundation of the plaintiff's claim. A cross-bill was filed by one of the defendants relying on the same deed and asking that a certain trust created by the deed should be declared and established. Was this cross-bill germane to the original bill?

53.

The object of a supplemental bill was to show that certain liens which while they existed were obstacles to the granting of the full relief sought in the bill had been removed since the filing of the original bill. Was this supplemental bill properly filed?

54.

A railroad mortgage gave the trustee of the bondholder the option of either a strict foreclosure or a sale at public auction. The bill prayed for a strict foreclosure, but under the prayer for general relief the plaintiffs were permitted to take a decree directing a foreclosure sale. Was this substitution of remedies proper?

55.

A bill which was passed by Congress passed the House of Representatives as follows: A majority of the members of the House were present, but less than a majority of the whole membership voted. A majority of those voting voted yes. Was this bill legally passed?

56.

A statute of Illinois requires every railroad company incorporated or doing business in the state to make certain

reports to the railroad commission. Is this statute in violation of the Commerce Clause of the United States Constitution?

57.

A statute of the State of Missouri relative to the forfeiture of life insurance policies for immaterial false warranties having been construed by the Supreme Court of that state; a case involving this statute comes before a Federal Court. Is such court bound by the construction given to it by the Supreme Court of Missouri?

58.

Where, in an action to construe a will, it appears that a charitable association named as a legatee does not exist, may extrinsic evidence be introduced to show that name was inserted inadvertently and that testator intended that bequest should go to an existing association having a somewhat similar name?

59.

Where testator devises to his five daughters, naming them, "the undivided one-fifth" of specified tract of land, and provides for disposition of daughter's share in event of her predecease, what share does each daughter take?

60.

This is an action of tort for slanderous words alleged to have been spoken by the defendant concerning the plaintiff. The original declaration was in the English language. During the trial it appeared that the words spoken were in the Italian language, and the counsel for the plaintiff stated that the alleged slanderous words had been spoken in Italian, and that he did not contend that they were spoken in English. The judge then suggested that if that were so there was a variance between the allegations and the proof. The plaintiff asked for leave to amend by setting forth the words spoken in Italian and the judge intimated that such amendment would be permitted. The trial proceeded as before through an interpreter. At the close

of the evidence for the plaintiff an amended declaration was filed setting forth the words spoken in Italian with their meaning in English. The plaintiff then rested. The counsel for the defendant then asked the judge to rule that there was no evidence that the foreign words set forth in the amended declaration were spoken by the defendant and further that there was no evidence as to the meaning of such foreign words, and requested the judge to rule that the action could not be maintained. The judge so ruled. A verdict was accordingly returned for the defendant and the case is taken up on the plaintiff's exception to this ruling. Should the exceptions be sustained or overruled?

61.

The plaintiff after having been hired to work for the defendant for a period of five months was discharged after two months, on account of his refusal to work on Sundays. The plaintiff brought suit on this contract and the defendant pleaded the general issue. On the trial the defendant introduced evidence of a custom of the trade in the place where the plaintiff was employed that all persons in that line of employment should work on Sunday. Was such evidence properly admissible?

62.

In a common law case one of the parties introduced what purported to be a copy of an original instrument in the possession of the opposite party. Counsel stated that notice to produce the original document had been served upon the possessor of the instrument. Was such purported copy properly admissible?

63.

In an action for malicious prosecution, the defendant testified in the course of his evidence that he commenced the criminal proceedings for the purpose of enforcing the payment of a debt. The court instructed the jury that this was prima facie evidence of want of probable cause and malice. Was such instruction correct?

64.

Bill in equity by Chenango Bridge Company to enjoin Binghamton Bridge Company. The plaintiff company was chartered by Section 4 of the Act of 1808 "for the purpose of erecting and maintaining a toll-bridge across the Chenango River, at or near Chenango Point." The corporation was "to have perpetual succession under all the provisions, regulations and clauses of the before mentioned Susquehanna Bridge Company" (referred to in Section 3 of the same act of 1808). The latter company was incorporated by Section 38 of the Act of 1805 which gave the Susquehanna Bridge Company all the "powers, rights, privileges, immunities and advantages" contained in the incorporation of the Delaware Bridge Company by Section 31 of the same act of 1805. Said Section 31 enacted: "It shall not be lawful for any person or persons to erect any bridge or establish any ferry across the said west and east branches of the Delaware River within two miles either above or below the bridges to be erected and maintained in pursuance of this act." Soon after the passage of this Act of 1808, the plaintiff company built a toll-bridge across the Chenango River at Chenango Point. In 1855 the legislature granted to the Binghamton Bridge Company permission to authorize the building of a bridge in close proximity to that of the plaintiff. The latter company built a bridge a few rods above the old one. The old company filed a bill in the Supreme Court of New York to enjoin the new company. The plaintiff contended that the exclusive rights given by Section 31 of the Act of 1805 to the Delaware Bridge Company were imported by Section 38 of the Act into the charter of the Susquehanna Company; that these within those imported were translated into Section 3 of the Act of 1808; and that these last were carried finally into Section 4 of the latter act; thus making a contract by the state with the Chenango Bridge Company that no bridge should ever be built over the Chenango River within two miles of their bridge either above or below it. Should the injunction be granted?

65.

Action to recover for certain onions sold by an oral contract. Plaintiff went to Boston and saw one of the defendants who were doing business as Chapin Brothers. Plaintiff told them what kind of onions he had and they agreed to take 729 bushels if the onions were of the size and quality the plaintiff said they were. Plaintiff was to put the onions in a car at North Amherst, Mass., the car to be furnished by defendants. Defendants sent a car to North Amherst, and plaintiff loaded the onions, and the car was taken by the railway company to Boston. The defendants refused to take the onions, contending that they were not of the size and quality guaranteed by the plaintiff. Is the question raised one for the court or the jury?

66.

A is induced to enter into a contract of partnership by the misrepresentation of B. Afterwards A discovers the fraud, and comes to you for advice. What remedies has he?

67.

P, a minority stockholder in a corporation, brought a bill in equity to set aside a sale of the corporation property to one H. The property was purchased by H, who was the highest bidder at a public sale which was authorized by resolutions passed at a meeting of the stockholders. Of the 393½ shares voted in the affirmative H voted in his own right 117½ shares and also voted as a proxy on 180 shares. No actual fraud was shown. Should the sale be set aside?

68.

A partner borrowed money on his individual credit for the use of his partnership and gave his note with a surety therefor. On his death his wife as his heir assumed his interest as an equal partner with his surviving partner. A bills receivable book was opened and this note entered into it. In the course of various changes in the firm during which the wife sold out, interest on the note was paid, in

each change there was a stipulation that as part consideration as between the newly constituted firm and the outgoing members the new firm should assume the debts and liabilities of the late firm including the note. Can the widow recover on the note against the members of the firm at the time the suit was brought?

69.

A is a student in a medical college which refuses to give him his diploma after he has completed the prescribed course. He brings a petition of mandamus to compel them to issue his diploma to him. Should the petition be granted?

70.

Where two persons owning different stores form a co-partnership and each contributes the stock he has and proceed to open a partnership in which the money derived from the sale of the goods is deposited and afterwards on disagreeing one buys the other out paying for his interest considering all stock valued at \$1,600 upon which there was owing only \$125. Is there sufficient evidence to support a finding that the partnership assumed the debts of the individual partners owing at the time of its formation?

71.

A and B make a contract in the State of Indiana, by which A is to work for B. A works for B in Indiana and is injured in that state, but sues B in Illinois. The laws of which state will determine the question of the liability of the defendant for the injury received?

72.

Where an antenuptial agreement provides that the wife shall in case of the husband's death have only \$200.00 a year during her widowhood and the use of half of the house and lot, and the husband's estate consists of personalty worth \$10,000 and land worth \$12,500, is the provision for the wife so disproportionate to the husband's

means that the agreement cannot be sustained, in the absence of clear proof that it was fairly entered into with full knowledge on the part of the wife of the extent of the husband's property?

73.

Defendants agreed to buy, and plaintiffs agreed to sell 4,000 barrels to be delivered to defendants' mill by January 1st. It was further agreed that defendants should buy of plaintiffs all the barrels that they should use for one year from the date of the contract. The plaintiffs had a quantity of barrels ready for delivery, though after January 1st, but before tender at the place agreed on were notified by defendants not to deliver them. What is the measure of the plaintiff's damages?

74.

A marries a widow B who has a child C. A takes C into his home and stands in loco parentis towards him. Can A recover from B for necessaries furnished C?

75.

A and B are residents of a state, the laws of which prohibit their marriage with each other on the ground of public policy. They go into another state where their marriage is permitted and are there married, after which they return to their former state. Is such marriage valid?

76.

A is the owner of certain real property and gives a deed of such property to B. The deed is not recorded. B later gives the deed back to A. Does this transfer the legal title again to A?

77.

Suit was brought to set aside a will on the ground of undue influence. The following evidence was introduced in support of such contention: First, that a codicil was added to the will for the sole purpose of giving the attorney for the testatrix certain articles—the articles were of

little value except as souvenirs, and the attorney was not a beneficiary under the original will; second, that the testatrix and a woman friend of hers were spiritualists and that the latter sought to induce the testatrix to have the will executed privately in the absence of her husband. Was this evidence sufficient to prove undue influence?

78.

Is a bill for specific performance of a contract for the sale of land defective in failing to allege complainant's performance of a condition precedent where facts are alleged showing a waiver of such condition for a period of thirty days to enable the defendant to furnish a proper abstract of title and an offer to perform such condition before the expiration of such period?

79.

A is the bailee of certain personal property under a contract made, while the goods were in his possession, with the agent of an undisclosed principal. The undisclosed principal is a minor who demands the goods from A before the termination of the period for which the bailment was to continue under the terms of the contract and upon the refusal of A to deliver the goods brings against him for damages. Should there be a recovery in this suit?

80.

A fraudulently obtains goods from B, and transfers them to C in payment of a pre-existing debt. C has no knowledge of the manner in which the goods were obtained. Can B recover the goods, or damages for their conversion, from C?

81.

A, a merchant, provides no place for keeping the wraps of his customers, and does not notify the customers to look out for their wraps themselves, nor does he give any directions to his clerks on the subject. B, a customer, while trying on a cloak, lays her wraps on the counter, and they are lost. May B recover damages from A?

82.

In an action of replevin to recover certain mirrors in a hotel known as the "Park House" in Summit, the plaintiff claimed them as personal property, of the defendant as owner of the real estate. Both the real estate and the mirrors at one time belonged to Lyons; Hicks was her tenant, hiring the personal property and renting the real estate. In 1898 Lyons conveyed the personal property including the mirrors in question to Hicks by a bill of sale. Subsequently Cheseburgh bought the real estate and leased it to Hicks. At that time Hicks gave Cheseburgh a chattel mortgage conveying the mirrors and other personal property to Cheseburgh to secure a loan. Hicks was then in possession of the hotel and the personal property as tenant under Cheseburgh. After Cheseburgh's death Hicks conveyed the personal property in the hotel to the present plaintiff by a bill of sale which does not specifically mention the mirrors, but after specifying a large amount of personal property conveys all the other goods and chattels and other personal property of every kind contained in the building. The situation then was that Cranston as executor claimed title under the bill of sale to the mirrors as personal property. While he had this title he conveyed the real estate as executor of Cheseburgh to the defendant. Nothing was said by either the plaintiff or the defendant at the time of the conveyance about the mirrors. The mirrors were of French plate glass, some of them resting on mantels supported at the top by iron spikes driven into the wall; the spikes were flattened at one end and through a hole in the end screws were driven into the mirror frames to hold the mirrors. Some of the mirrors rested on slabs supported by brackets. All of them rested against the wall, and the frames were painted in the same style as the woodwork of the room in which the mirrors were. Should the action of replevin be sustained?

83.

A contract or lease for five years of a lot and building thereon for a certain price payable in monthly installments,

contains a stipulation giving the lessee the right to purchase the property at a fixed price at any time during the continuation of the lease. Was there any consideration for this right to purchase?

84.

A is the vendor of the lots in a certain sub-division. Certain building restrictions are placed upon each of the lots. A sells one lot to B, and another to C. A gives B permission to disregard the building restrictions, but upon C's disregarding such restrictions A seeks an injunction against C. Should this injunction be granted?

85.

A carrier contracted with the purchaser to transport certain iron as evidenced by a letter from the purchaser to the carrier, accompanied by an order to the seller to deliver the iron. The carrier loaded the iron on a canal boat and delivered to the seller a bill of lading for the purchaser which modified the carrier's liability under the original contract. On the same day, by the sinking of the boat, the iron was lost. Can the carrier defend under the bill of lading against a recovery of the value of the iron by the purchaser in the absence of evidence of the course of business between the parties, or of a custom sanctioning such an interpretation of the original contract?

86.

Plaintiff intending to take passage from N. to C. purchased a ticket which by mistake read from C. to N. About four months afterward defendant's conductor refused to receive it for plaintiff's fare from N. to C. Has the plaintiff a right of action against the Company?

87.

The defendant's horses, which were being driven by his servant, ran away, and became so unmanageable that the servant could not stop them, but could, to some extent, guide them. The defendant, who sat beside his servant,

was requested by him not to interfere with the driving and complied. While unsuccessfully trying to turn a corner safely, the servant guided them so that, without his intending it, they knocked down and injured the plaintiff, who was in the highway. The jury found that there was no negligence in any one. Was the defendant liable?

88.

The defendant, an aeronaut, went up in a balloon and came down, contrary to his wishes and in spite of his efforts to prevent it, in the plaintiff's garden, thereby committing a trespass. A crowd of people rushed in, partly to extricate him and partly from curiosity. The result was that the plaintiff's vegetables and flowers were trodden down. Was the aerial navigator chargeable with the damage done by the crowd?

89.

A landlord wrongfully dispossessed a tenant and demolished a stable built by the latter. In an action for damages the tenant claimed that he kept a roll of money in the feed box of the stable and that this was lost as a result of the demolition of the stable. Was the defendant, as trespasser, liable for the loss of the money, if plaintiff's story was believed?

90.

The defendant bought a horse at Tattersall's and upon taking the animal out to try it, it became unmanageable and swerved from the roadway to the pavement. A pedestrian was there struck and fatally injured. It did not appear that the defendant had omitted to do anything he could have done to prevent the accident. The plaintiff insisted that the mere fact that the defendant had brought into a public place a horse with whose temper he was not acquainted was evidence of negligence. But the court was of the opinion that a man is not to be charged with want of due caution merely because he rides a horse whose qualities he does not happen to know. Was the charge by the court correct?

91.

The plaintiff's intestate, a passenger on the defendant's railway, was killed by an accidental explosion of fireworks which a fellow passenger had brought into the compartment in which the deceased was traveling. Suit was brought against the company on the theory that it was guilty of negligence in allowing the combustibles to be brought into the train. There was nothing to show that any servant of the company knew of the fact that the explosives were being brought aboard or knowingly suffered them to remain. Nor was there any proof to show that the package containing them was calculated to excite inquiry as to its contents. Judgment for whom?

92.

The authorities of the City of London were authorized by law to execute certain works over the line of the Metropolitan Railway Company. In carrying out their plans a girder was allowed to fall upon a passing train and the plaintiff, a passenger on the train, was hurt. The work was being carried on by an independent contractor employed by the City of London. Was the mischief in question one which the railway company could be expected to foresee and guard against?

93.

A house van attached to a steam plough was left for the night on the grassy side of a highway by the defendant. The van and plough were four or five feet from the metalled part of the way. During the evening the plaintiff's testator drove his mare in a cart along the metalled road. The mare was a kieber, but he was unaware of her vice. Passing the van she shied at it, kicked and galloped, kicking for 140 yards. She then got her leg over the shaft, fell, and kicked her driver as he rolled out of the cart. He afterward died from the kick he so received. In an action brought by the personal representative against the defendant for damages resulting from the obstruction of the high-

way, it was found by the jury that the leaving of the van over night beside the highway caused an appreciable danger to vehicles passing that way and that the defendant was guilty of negligence in so leaving the van. It was also found that the injury complained of was caused by the presence of the van combined with the inherent vice of the mare; and that the deceased was guilty of no contributory negligence. Should the plaintiff recover?

94.

A train of cars loaded with petroleum was negligently permitted to get from under control of the crew. Moving down grade of its own momentum, it came into collision with a locomotive, with the result that some of the oil tanks were thrown to the earth and burst. The oil thus released spread over the roadbed and coming into contact with coals of fire from the locomotive was ignited. The flaming oil trickled down the embankment to a brook below and was carried by the water to the plaintiff's barn which stood below on the bank of the stream. Was the company liable for the damage to the barn?

95.

A canal company, which, as common carrier, had undertaken to convey plaintiff's goods, negligently started the boat on its voyage with a lame horse, by reason of which the transportation of the goods was considerably delayed. It so happened that when the boat thus delayed was at a particular point on its way, an extraordinary flood occurred by which the boat was wrecked and plaintiff's goods lost. But for the delay which was caused by the lameness of the horse as aforesaid, the boat would have escaped the disaster. Can the damage in this case be attributed to the starting of the boat with the lame horse as its proximate or legal cause?

96.

The defendant company wrongfully ejected the plaintiff, a passenger, from its train. Owing, perhaps, to the

excitement, occasioned by the fact that he was being so ejected, the plaintiff forgot his race-glasses and left them behind on the train so that they were lost. He could have taken the property with him if he had thought of it. Could the loss of the glasses be attributed to the wrongful ejection as its proximate cause, and was the company liable for their value?

97.

By the negligence of A, timber was insecurely stacked near a street. As the plaintiff was going along a third person negligently drove his vehicle against a protruding piece and caused it to fall upon the plaintiff. Can A's negligence be treated as the legal cause of the hurt, though the negligence of the stranger also contributed to the accident, and was indeed the immediate occasion of it?

98.

The plaintiff declared that he was possessed of a close adjoining the defendant's, and that the tenants and occupiers of that close had time out of mind made and repaired the fence between the plaintiff's and defendant's close, and that for want of repair defendant's cattle came into the plaintiff's close and did damage. Which action is proper, case or trespass?

99.

In trespass for assault and battery the plaintiff gave evidence that the defendant unlawfully struck him. The trial judge charged the jury that the plaintiff could recover for all the direct injurious results of the assault and could also recover for the insult and indignity inflicted upon him by reason of the blow given him by the defendant. Was such charge proper?

100.

In divorce proceedings the plaintiff, a husband, sought to recover damages of the co-respondent for alienation of the wife's affections and for illicit cohabitation with her. Sir James Hannen, President, in charging the jury, said:

“You must remember that you are not here to punish at all. Any observations directed to that end are improperly addressed to you. All that the law permits a jury to give is compensation for the loss which the husband has sustained. That is the only guide to the amount of damages to be given. But undoubtedly, if it is proved that a man had led a happy life with his wife, that she has taken care of his children, that she has assisted in his business, and then some man appears upon the scene and seduces the wife away from her husband, then the jury will take those facts into consideration.” Was such charge proper?

101.

A— in marking out a mining claim, makes it in an irregular and many sided shape. Will the shape of his claim affect his right to go beyond the surface lines?

102.

A bill passed by the legislature of a certain state, increased the period during which appeals in certain civil cases might be taken. This law was to apply to cases where the right of appeal, under the previous law had already expired. Was this an *ex post facto* law?

103.

In a suit in equity, filed for the purpose of securing the setting off of dower and homestead, and for partition, a certain deed is sought to be introduced as an “ancient document.” This deed was less than 30 years old at the time the suit was filed, but more than 30 years old at the time it was offered in evidence. Is such deed admissible as an ancient document?

104.

In an action to recover damages resulting from the failure of the defendant (a railroad) to properly perform their contract for the shipment of the plaintiff's live stock, one of the plaintiffs was allowed, over defendant's objection, to testify from the market reports printed in a trade journal.

printed and published where the stock was sold, as to the market price of hogs and cattle during the period of delay in the shipment. Was such evidence properly admitted?

105.

In a suit against a railroad company for personal injuries, the company set up in defense alleged contributory negligence of the plaintiff consisting in jumping from the train. The plaintiff asserts that he was justified in jumping on account of the imminent danger existing at the time, in proof whereof he introduces expressions of fear uttered by other passengers at the time. Was such evidence admissible?

106.

A will contains a devise of land to a church "to be used as a parsonage and nothing else, and to be kept for that purpose and used for nothing else." There was no devise over. For a period of two years the house is not occupied as a parsonage, and at the expiration of this period, the residuary legatee brings an action of ejectment against the church. Is he entitled to recover?

107.

B—, who was tenant for life without impeachment of waste, began to pull down the walls of the house, with the intent to entirely destroy such house. The remainder man thereupon seeks an injunction against B—. Should an injunction against B— be granted, and if so, what kind of an injunction?

108.

The plaintiff and a fellow servant, engaged in dumping acid pots, each put a hook into a lug on opposite sides of the pot, and then raised it by a windlass. While so engaged, the pot dumped over by reason of the hook placed by the fellow servant, slipping in some manner. An expert consulting and mechanical engineer was permitted to testify that the hook slipped because of the use of a short and open-mouthed hook. Was the admission of this testimony proper?

109.

In a suit against a railroad company it was shown that the defendant's servants, switching out a caboose with no one thereon, permitted it to be kicked on a down grade track to a switch where it struck an engine, killing the plaintiff intestate standing by; that it was customary to have an employee on a caboose so running loose; and, that a brakeman unsuccessfully tried to catch this caboose. Was there sufficient evidence of negligence to send the case to the jury?

110.

A publishing firm in the United States published an encyclopedia under the same name as an encyclopedia published in England, and with the same contents except for certain articles copyrighted in this country. The foreign publishers seek an injunction against the American publisher. Will such injunction be granted?

111.

A—, the surety for a debt, after the debt is due, files a bill in equity to compel B—, the principal debtor, to pay the debt, and also to compel C—, the creditor, to receive payment. Should this relief be granted?

112.

“Clement Harwood, seized of three acres of land, each of equal value, held in capite, made a feoffment in fee of two of them to the use of his wife for her life, for her jointure, and afterwards made a feoffment by deed of the third acre, to the use of such person and persons, and of such estate and estates as he should limit and appoint by his last will in writing, and afterwards his last will in writing, he devised the said third acre to one in fee (under whom the plaintiff claimed.) And whether this devise was good for all the said third acre, or not, or for two parts of it, or void for the whole, was the question.”

113.

“A Tenant for life, remainder to trustees to preserve, etc. remainder to C. the plaintiff in tail, remainder over, with power for A, with consent of trustees to fell timber, and the money arising to be invested in lands, etc. to same uses etc. A. felled timber to the value of 3,000 £ without consent of trustees, who never intermeddled, and A. had suffered some of the houses to go out of repair. C. by bill prayed an account and injunction.” What action should be taken?

114.

A. borrowed money and executed a note therefor without the joinder or knowledge of his wife. Later the creditor filed a suit against the husband alone to have the note declared a mortgage on certain land described in the instrument, and a decree was entered establishing the mortgage and ordering a sale thereunder. The husband and wife thereupon, show that the land in question is their homestead and seek an injunction to prevent the sale. Should the injunction be granted?

115.

A— transfers property to B—, conditioned upon B— furnishing to A—support for life. Upon a failure by B— to perform his agreement, what remedy has A—?

116.

A— brings suit to have his marriage with B— annulled on the ground of fraud. The alleged fraud on the part of B— consisted in her falsely representing to A—. prior to the marriage that she (B) was entirely cured of epilepsy, and had had no attack of it in eight years. Should the marriage be annulled?

117.

A passenger on a railroad, riding on a free pass which stipulates that “the person accepting this pass assumes all risks of accidents and damages without claim upon the company,” is injured through the negligence of the company. Can there be any recovery against the railroad?

118.

A—, living in N. Dakota, where the sale of intoxicating liquors is prohibited, sent an order for liquors to a firm in Minnesota, such liquors to be delivered to consignee, f. o. b. cars in Minnesota. May the purchase price be sued for and recovered in N. Dakota?

119.

In an action at law on a promissory note the defendant sought to introduce parol evidence to show that the rate of interest agreed upon was different from that specified in the note. Was this evidence admissible?

120.

A— was being tried on an indictment for maintaining a nuisance, which consisted of a piggery containing about five hundred pigs. The defendant sought to introduce evidence that such establishments were customary throughout the state in populous neighborhoods. Was this evidence admissible?

121.

A telegram, properly addressed, is delivered to a telegraph company for transmission. The party to whom the telegram is addressed does not admit receiving it. What is the presumption in such a case?

122.

An insurance company, whose right to do business in the State of Missouri, on account of their violation of a statute of that state against any combination among insurance companies, claimed that such action was in violation of the fourteenth amendment to the United States Constitution. Was this defense a valid one?

123.

A—, acting for an undisclosed principal (C) makes a contract in his own name with B—. B— made the contract on account of his personal trust and confidence in A—. Can

C— compel the performance of this contract, or recover damages for its non-performance?

124.

A—, a tenant in common with B—, alienates his interest, and then brings an action against B— for waste, the alleged waste having been committed before the alienation of A's interest. Can this action be maintained?

125.

R—, an attorney at law, in a petition for a rehearing of a certain case, presented to an appellate court, uses insulting, contemptuous and slanderous language. Has the appellate court to whom such petition was presented original jurisdiction to suspend or disbar such attorney?

126.

M—, a passenger on a railroad train, was injured while alighting from the train while moving. The plaintiff introduced evidence to the effect that it was dark, that he felt no motion of the train and believed that it had stopped, and that he got off at the place pointed out to him by the conductor, or brakeman, as the depot. Is this proper evidence to go before the jury?

127.

In a contested will case, it was proved by those upholding the will that the testator did transact business, and fully understood the business he was engaged in, at the time of the making of the will. Against this evidence was introduced that the testator was near-sighted and feeble and that several years before the time of the making of the will, the testator had been guilty of the theft of various small articles from his neighbors. Was this evidence admissible?

128.

X— issued as a surety on a bond given by A—, a deceased collector of taxes of the town of M—. The town introduced as evidences, entries which A— had made in a pri-

vate account book of his, which showed that certain taxes had been paid to him by certain persons. Were these entries proper evidence?

129.

A testator devises property to his wife, "to hold and to have to her, my said wife, and to her heirs and assigns forever, but if she gets married again, then at the time of her second marriage, one-half of said estate, real and personal, to be sold and divided, as follows." A later clause in the will read as follows: "If my beloved wife, Sibila Barbara Rupprecht, remain my widow, she is to have and to hold the whole estate, real and personal, for her own support, until her death, and after her death the residue shall be divided among the above named persons in the proportion of what is named to the whole." What estate does the wife take?

130.

A will contains the following provision: "I give and devise all the rest, residue and remainder of my real estate, of every name and nature whatsoever, upon the decease of my wife, Sarah Strawbridge, to be divided equally between my children, to-wit: John B. Strawbridge, William R. Strawbridge, Benjamin F. Strawbridge, Harry Strawbridge, George B. McC. Strawbridge, Emma Mehan, Jessie Strawbridge and Parson Strawbridge and to their children forever." Several of the children of the testator mentioned in the will had children of their own living at the time the will was made. Who takes under this devise, and what estate?

131.

A statute of Missouri prohibited civic leagues and similar associations from publishing reports on candidates or nominees for public office unless such reports contained the information upon which such reports were based, the names and addresses of the persons furnishing such information, and the information furnished by each. Was such statute constitutional?

132.

A corporation transfers its entire property to another corporation, the only consideration being the issuance of stock to trustees to be exchanged for the stock of the selling corporation. What rights have the creditors of the selling corporation?

133.

While a suit in equity against the incorporated board of levee commissioners in their official capacity was pending, the legislature of the state abolished this board and the duties of such board devolved upon the state auditor and treasurer. What action should be taken by the complainants?

134.

A sheriff, under authority of writ of replevin issued by a state court, seized railway cars that had been attached by a United States marshal in foreclosure proceedings in the Federal Court. How should action be taken to recover such cars from the sheriff?

135.

The plaintiff after having given a check, telegraphs to the bank not to pay the same. The telegram is received at the bank, fails to come to the notice of the proper officer of the bank in time to stop the payment. Is the bank liable for the amount of the check paid?

136.

What is the effect of a state statute providing that "no action shall be maintained or recovery had in any of the courts of this commonwealth by any foreign corporation so long as it fails to comply with the requirements" of the laws prescribing the conditions upon which such a corporation may transact business in the state, upon contracts made by such corporations, prior to complying with such conditions?

137.

A building is leased for five years, the property to be used, according to the terms of the lease for hotel and saloon

purposes. During the term of the lease, the legislature of the state in which the property is situated, passes an act prohibiting the sale of intoxicating liquors in the state. Is the lessee entitled to any reduction of the agreed rental?

138.

The issuance of certain railroad aid bonds by a town was secured by fraud. The town, however, pays the interest on these bonds regularly for nine years, and also pays off the principal of a portion of the bonds, and the bonds remaining unpaid have passed into the hands of bona fide holders for value. Can the town now contest the validity of the unpaid bonds?

139.

The creditors of A— brought a suit to set aside a conveyance of land to his daughter. At the trial the daughter testified that her father had frequently promised to give her the real estate in return for her aid in the support of the family. The court instructed the jury, that, in so far as the deed was given for services rendered by the daughter while a minor, they “were an inadequate consideration, as such services belonged to her father.” Was this instruction correct?

140.

An insurance policy contains the provision that “this insurance does not cover injuries fatal or otherwise resulting from poison or anything accidentally or otherwise taken, administered, absorbed or inhaled.” The insured died from eating unsound and spoiled oysters. Can there be a recovery under this policy?

141.

A petition was brought for an injunction to restrain a nuisance. Upon trial it was shown that the nuisance existed at the time the suit was brought, but had been terminated before the suit came to a hearing. Under this state of affairs can the injunction be issued?

142.

An insurance policy contains a clause which provides that the policy shall become void "if any change —— take place in the interest, title, or possession of the subject of insurance." The owner of the property makes a contract to sell the property insured and the consideration has been paid, but no transfer has been made either of possession or of title. Can the policy be recovered on in case of destruction of the property by fire?

143.

A— was convicted of the crime of compounding a felony. The indictment on which he was convicted did not allege that the person with whom the defendant was alleged to have made the corrupt agreement was guilty of the crime charged against him. Can the conviction be sustained?

144.

A—, the owner of a certain piece of real property, filed a bill in equity, seeking to restrain an adjoining property owner from maintaining a certain high fence. The ground alleged, upon which it is sought to secure the injunction is that the fence shuts out air and light from a building owned by the complainant. Should the injunction be granted?

145.

In an action against the city of A—, for damages for the death of the plaintiff's wife, through the negligence of the defendant in operating an electric lighting plant, the court ordered judgment to be given for the defendant, on the ground that the defendant, being a municipal corporation was not liable to pay any damages, even though the death of plaintiff's wife was caused by the negligent operation of the electric plant. Should this decision be sustained?

146.

A— devised property owned by him in fee to his two grand children, B— and C—. In the same will A— devises

property, in which he has but a life estate, and of which B— and C— are remaindermen, to C—. What are B's rights?

147.

A—, a married woman, purchases a set of books known as "Stoddard's Lectures," on credit; B—, her husband later makes an oral promise to pay for such books. B— is sued for the price of the books. Judgment for whom?

148.

In a suit for the value of a dog, the plaintiff, in order to prove the high value of the dog, offers as proof, the general reputation as to the pedigree of the dog. Is such evidence admissible?

149.

F—, writes to M—, who is not indebted to him and who does not have any of his (F's) funds in his possession, asking him to pay his (F's) debt to X—. M— orally promises X— to pay such debt and actually pays a part of it. Upon the refusal of M— to pay the balance, suit is brought by X— against M—. Can there be a recovery?

150.

H— is on trial for murder. The state presents as a witness against him, his second wife, B—, alleging that H— had another wife living at the time of his marriage to B—. This is denied by the defense who object to B— being allowed to testify. Is the question of the competency of the witness one for the court or for the jury?

ANSWERS.

(With reference to case upon which question is based.)

1. No. While it is the duty of cities and villages to use reasonable care to keep their streets in reasonably safe condition for public travel, and free from obstructions, yet they are not insurers against accidents to persons using the streets, and they have power to authorize the laying of street railroad tracks and the erection of electric light poles in the streets. (*Village of Lockport vs. Licht*, 221 Ill., 35.)

2. Yes. A proprietor of land may change the course of a natural water course within the limits of his own land, provided he restores it to the original channel before the lands of another are reached. (*Fenton and Thompson Railroad Company vs. Adams*, 221 Ill., 201.)

3. Gas may be the subject of larceny, and the person in this case is guilty of this crime. The selling price of the gas to consumers in the vicinity where the gas is stolen, is to be taken in determining the value of the gas stolen. (*Woods vs. Illinois*, 222 Ill., 293.)

4. Yes. There may be a recovery under the common counts, on a written contract, provided the agreement has been substantially performed and nothing remains to be done but to make payment thereunder. (*Bauer vs. Hindley*, 222 Ill., 319.)

5. In determining whether, or not, a child was guilty of contributory negligence, it is proper to consider the age, experience, intelligence, etc., of the child; and the instruction in this case was properly refused. (*Star Brewery Co. vs. Hanek*, 222 Ill., 348.)

6. Yes. The reply of the motorman to the warning given was sufficiently closely connected with the thing done to make it competent. (*The Chicago City Railway Company vs. McDonough, Adms.*, 221 Ill., 69.)

7. Yes. In this transaction B was held to be the agent of C; and notice to the agent was binding on the principal. (*Amos vs. The American Trust and Saving Bank, Conservator*, 221 Ill., 100.)

8. No. Whether the fact that a juror has formed an opinion as to the case is cause for challenge depends largely upon the strength of such opinion, as ranging from a mere impression to a settled conviction; and the mere fact that he states that it will require evidence to change that opinion and that he will otherwise give his verdict in accordance with such opinion is not cause for challenge, irrespective of the degree of evidence its removal will require. (*Williams vs. Supreme Court of Honor*, 221 Ill., 152.)

9. No. Equity will not enforce a contract of this character in restraint of trade. (*Simms vs. Burnette*, 55 Fla., 702.)

10. No. An answer to this question by this particular witness would, of necessity, be merely hearsay evidence. (*Estate of Dolbeer*, 153 Cal., 652.)

11. The estate of the grandmother was liable for the expenses of one additional year's expenses only. (*Youngerman vs. Youngerman*, 136 Iowa, 488.)

12. Embezzlement. An agent is guilty of this crime who appropriates to his own use property received by virtue of his implied authority as well as property received by virtue of his express authority. (*Smith vs. State*, 53 Tex. Crim., 117.)

13. No. This statement is not susceptible of the meaning attached to it by the plaintiff, in this suit, that the contractor was dishonest, unreliable and undeserving of the confidence of the public in his vocation. If any tort is committed by placing a name on a blacklist, it is not that of libel. (*Labor Review Publishing Co. vs. Galliher*, 153 Ala., 364.)

14. No. This is not such a contract as may be sued upon by a person who was not a party to the contract. (*Saunders vs. Saunders*, 154 Mass., 337; 28 N. E., 270.)

15. No. It was held that the contract showed the in-

tention of the parties to be that the support should be given to the brother and sister at the place specified and nowhere else. (*Dwelley vs. Dwelley*, 143 Mass., 509; 10 N. E., 468.)

16. Yes. It was held that there were facts indicating that an agency existed, which would justify the jury in finding such to be the case, even against the positive testimony of both father and son to the contrary. (*Ford vs. Linehan*, 146 Mass., 283; 15 N. E., 591.)

17. No. The agent in this case was acting under the direction of the principal. (*New York P. and B. R. Co. vs. Dixon*, 114 N. Y., 80; 21 N. E., 110.)

18. Yes. Such evidence was immaterial on the question of the guilt of the person of the crime for which he was being tried. (*Commonwealth vs. Mullen*, 23 N. E., 51.)

19. No. (*Grisson vs. Hafins*, 39 Wash., 51; 4 American and English Annotated Cases, 125.)

20. In this case the note was held to be non-negotiable on account of the uncertainty of the amount to be paid. (*Green vs. Spires*, 71 S. C., 107; 4 American and English Annotated Cases, 261.) The decisions of the various courts, as to the effect upon the negotiability of a note, of a stipulation for the payment of an attorney's fee in case of suit, are in hopeless conflict. The federal courts and the courts of many of the states (e. g., Illinois) hold that such a provision does not destroy negotiability, the opposite view being held by remainder of the states.

21. No. (*Green vs. Hartford Life Insurance Co.*, 139 N. C., 309; 4 Amer. & English Annotated Cases, 360.)

22. Yes. The defense of failure of demand or protest is one which may be waived. No new consideration is required in such a case under the same theory by which no new consideration is necessary for the waiver of the defense furnished by the statute of limitations. (*Burgettstown National Bank vs. Nill*, 213 Pa. St., 456; 5 Amer. & Eng. Annotated Cases, 476.)

23. Yes. Equity here "looks at the intent rather than the form;" and it was evident that the intention of the

surety in buying the claim was merely to protect himself, and that he did not buy the debt for the purpose of an investment. (*Fanning vs. Murphy*, 26 Wis., 538.)

24. No. A surety is always entitled to rely upon the strict terms of the original contract; and although, in this case, no limit had been placed upon the duration of the bond, it could not be held to continue in force after the term for which the cashier had been elected had expired. (*Ilda County Savings Bank vs. Seidensticker*, 128 Iowa, 54; 5 *American and English Annotated Cases*, 945.)

25. No. It was held that the loss in this case fell under the excepted losses in the policy. (*Hall vs. National Fire Ins. Co.*, 115 Term., 513.)

26. Yes. Such books may be admitted as containing entries made in the regular course of business. (*Cobb vs. Wells*, 124 N. Y., 77; 26 N. E., 284.)

27. No. In a court of equity the complainant must recover, if at all, on the case made by his bill. Therefore, on a bill to prevent the removal of a bridge on the ground that it is a part of a public highway, and to have the same kept in repair, the complainant cannot have a decree enjoining the removal of the bridge on the ground it is his property by being located on his land, and because he has an interest in the road and bridge as an abutting property owner, which can not be taken without just compensation. (*Brockhausen vs. Boehland*, 137 Ill., 547.)

28. Yes. Where the agent of an insurance company is entrusted with checks and receipts for the purpose of settling a death claim, the agent's representations, declarations and admissions, in closing up the transaction, if made at the same time and constituting a part of the *res gestae*, are binding upon the company. (*Hartford Life Insurance Co. vs. N. J. Sherman*, 223 Ill., 329.)

29. No. A switch tender is not a fellow-servant of the crew of an engine switching in the yards where such crew is in the employ of a different company, which uses the yards of the switch tender's employer without being under the direction or control of the latter further than to obey

its yard-master's general orders as to what tracks to use, there being nothing to show the switch tender was loaned to the defendant or that he was co-operating with defendant's crew at the time of his injury. (Pittsburg, Cincinnati, Chicago and St. Louis Ry. Co. vs. Bovard, Admx., 223 Ill., 176.)

30. No. "The evidence as to the location of the posts was not admissible as proof of negligence or to establish a cause of action against the appellant, both for want of any averment concerning them in the declaration and because appellee knew all about their location and assumed all risks occasioned thereby. The posts were not the cause of the injury, and the evidence was only offered, for whatever it might amount to, as an excuse for not removing the slats in a different manner. It was a question whether appellee was exercising ordinary care for his own safety, and the court did not err in admitting the testimony as an explanation why he did not go behind the machine instead of putting his hand under the blade." (United States Wind Engine & Pump Co. vs. Butcher, 223 Ill., 638, 640.)

31. No. A pardon restores the convict, so far as the public is concerned, to the position he occupied before the conviction, but it can in no way affect the private rights of individuals. The right of the wife to sue for divorce is acquired upon the conviction, and cannot be taken away by the pardon. (Holloway vs. Holloway, 126 Ga., 459.)

32. No. Special, or sentimental, value which property may have for a person can never become an element in determining damages. (Wade vs. Hearndl, 127 Wis., 544; 7 American and English Annotated Cases, 591.)

33. Yes. Such aggravation of the previously existing ailment may be considered a proximate consequence of the injury received. Both sick and well persons have the right to recover damages for injuries received in the condition of health in which they are at the time of the injury. (Smart vs. Kansas City, 208 Mo., 162; 13 American and English Annotated Cases, 932.)

34. The Bath Company was a bailee for the mutual

benefit of bailor and bailee, and was liable for ordinary negligence. The plaintiff recovered a judgment in the case. (*Sulpho-Sabine Bath Co. vs. Allen*, 66 Neb., 295.)

35. The vendor should treat the note as a nullity, and sue the purchaser for the value of the goods sold. (*Montgomery vs. Forbes*, 148 Mass., 249; 19 N. E., 342.)

36. Yes. They plainly imply the commission of a crime which involves moral turpitude and is punishable by imprisonment. (*Logan vs. Hodges*, 146 N. C., 38.)

37. The instruction was improper; the use of the word "clear," before preponderance, being misleading. (*Fleming vs. Lockwood*, 36 Montana, 384.)

38. The evidence was incorrectly excluded. Notwithstanding the fact that the statute of the state provided that infants under the age of ten years should be incompetent to testify, the declaration of an infant under that age, made immediately after the happening of an accident in his presence, and having an important bearing on the responsibility for the accident, is admissible as part of the *res gestae*. (*Beal-Doyle Dry Goods Company vs. Carr*, 85 Ark., 479; 14 American and English Annotated Cases, 48.)

39. No. "The general rule is that the law will not aid either party to an illegal agreement, but an exception is made where the illegal agreement or purpose has not been carried out. * * * The broad rule has been laid down that when money or property is delivered by a principal to his agent for an illegal purpose or for the purpose of carrying into execution an illegal contract, the agent cannot set up such illegal object to prevent a recovery by the principal from the agent of such money or property, so long as it remains in his hands." (*Ware vs. Spinney*, 76 Kansas, 289.)

40. No. The sheriff, paying the note under these circumstances, was not a volunteer, and became subrogated to all the rights of the county against the surety. (*Wilson vs. White*, 82 Ark., 407; 12 American and English Annotated Cases, 378.)

41. Yes. One or more forged names on a negotiable in-

strument does not affect the liability of any person, whose signature on the paper is genuine, to a bona fide holder for value. (First National Bank vs. Show, 149 Mich., 362.)

42. Yes. "Even though the killing, by the husband of the paramour of the wife is done under such circumstances that the law would class the act as justifiable homicide, such killing is not at the hands of justice, either punitive or preventive, within the meaning of a clause in a life insurance policy excepting deaths 'caused or superinduced at the hands of justice,' etc. Death by the punitive hands of justice is when the law commands the killing. Death by the hands of preventive justice is where the law permits the killing. In each instance the killing must be by some person authorized to carry out the commands of the law, or who is permitted by the law to do the act is the advancement of public justice." (Supreme Lodge Knights of Pythias vs. Crenshaw, 129 Ga., 195; 12 American and English Annotated Cases, 307.)

43. Yes. A parol declaration is sufficient to create such trust; and it is not essential to the creation of a valid trust that the cestui que trust should know of the trust at the time of the transfer of the property in trust. (Clark vs. Callahan, 105 Md., 600.)

44. No. Suits of this character must be decided upon the particular state of facts in each case; and in this suit the court held that substantial damages had not been proved by the complainant. (Salvin vs. North Brancepeth Coal Co., Law Rep. 9 Chan, App., 705; Keener's Cases in Equity, Vol. I., P. 736.)

45. No. Under the principle contained in the equitable maxim, "equity acts in personam and not in rem," whenever an equity court has jurisdiction over the person of the defendant in a suit in equity, such court may decide a controversy affecting land lying outside of the territorial jurisdiction of the court. (Penn. vs. Lord Baltimore, 1 Vesey Sr., 444; Keener's Cases on Equity, Vol. I., P. 12.)

46. The Supreme Court of the United States decided that K—— had been put twice in jeopardy, and should be

discharged. It was held that wherever Congress used an expression which had an established meaning at common law, such expression must be presumed to have been used in the sense of such meaning established at the common law. (*Kepner vs. United States*, 195 U. S., 100.)

47. Yes. The effect of a plea of guilty amounts only to an admission of record of the truth of whatever is sufficiently charged in indictment. (*State vs. Kelley*, 206 Mo., 685; 12 *American & English Annotated Cases*, 681.)

48. Yes. Prohibitory provisions in a constitution are, with few exceptions, self-executory. (*Succession of Gabisco*, 119 La., 704.)

49. Yes. The circumstances in this case were sufficient to create a trust. (*McKenna vs. Devlin*, 158 Mass., 63; 32 N. E., 1028.)

50. Yes. This law was a valid exercise of the police power of the state. (*In re Selectmen of Norwood*, 161 Mass., 259; 37 N. E., 199.)

51. The defendant should demur. (*Bateman vs. Snoddy*, 132 Ind., 480; 32 N. E., 327.)

52. Yes. The mere fact that a cross bill sets forth new facts (as here that the deed created a trust) does not prevent the subject matter of the cross bill, being germane to the original bill, provided the cross bill does not make a foreign or multifarious issue. (*Kingsbury vs. Buckner*, 134 U. S., 650.)

53. Yes. The case made and the relief sought by the supplemental bill has a legitimate and natural connection with the case made and the relief sought in the original bill. (*Sheffield, etc., R. Co. vs. Newman*, 23 C. C. A., 459; 77 Fed. Rep., 787.)

54. Yes. "Though a court of equity cannot grant relief on a case that is not fairly made by the bill and answer, yet it is not necessary that these should point out in detail the exact course to be pursued. Under the prayer for general relief, the court will adapt and shape its decree in accordance with the true equity of the cause." *Street's Federal Equity Practice*, Par. 1943. (*Sage vs. Railway Co.*, 99 U. S., 334.)

55. Yes. If a quorum of a legislative body is present, a majority vote of those voting on a bill is sufficient to pass it. (Note. In some states there are constitutional provisions as to the vote required to pass a bill by the legislature.) (United States vs. Ballin, Joseph & Co., 144 U. S., 1.)

56. No. The provision of the Federal constitution giving Congress the power to regulate commerce between states is not violated by a state law passed under its police power and operating upon the subjects and means of interstate commerce and persons engaged therein, unless, in its effect, it lays some burdens or restrictions upon such commerce which would not otherwise exist. (People ex rel Stead vs. The Chicago, Indianapolis and Louisville Ry. Co. et al, 223 Ill., 581.)

57. Yes. In passing upon the constitutionality of a state statute, the Supreme Court of the United States will follow the decisions of the state court of last resort as to the purpose and scope of the statute, and will only determine whether the statute as so construed is in conflict with the Federal Constitution. (Northwestern National Life Ins. Co. vs. Riggs, 203 U. S., 243; 7 American & English Annotated Cases, 1104.)

58. Yes. (In re Paulson, 127 Wis., 612.)

59. Each daughter takes one-fifth of one-fifth of the estate; not one-fifth of the whole estate, although the will made no disposition of the remaining four-fifths of the estate. (Gilmore vs. Jenkins, 129 Iowa, 686.)

60. The exceptions should be overruled. When libelous words are written in a foreign language they should be set out in that language, and a translation given; and such translation must be proved to be correct. (Romano vs. De Vito, 191 Mass., 457.)

61. No. When evidence of a custom is introduced, either as an affirmative defense or for the purpose of recoupment, it must be specially pleaded. (McCurdy vs. Alaska & Chicago Commercial Co., 102 Ill. App., 120.)

62. No. Sufficient evidence was not presented that notice had been given the opposing side to produce the original document. (Landt vs. McCulloch, 103 Ill. App., 668.)

63. Yes. "Nothing is better settled by our cases than that where one commences a criminal prosecution for the purpose of compelling his debtor to pay a just debt, it is prima facie evidence of want of probable cause and of malice, and shifts the burden of showing it was not so on the defendant. The defendant having admitted that he commenced the criminal prosecution, for the purpose of getting his money back and thereby attempting to enforce payment of a debt is within the rule of the cases just cited, and the burden was on him to show that he had probable cause and was not actuated by malice." (MacDonald vs. Schroeder, 214 Pa. St., 411; 6 American & English Annotated Cases, 506.)

64. Yes. The decision in this case rested on the principle that a corporation charter is a contract, which is entitled to the same protection as any other contract. (Chenango Bridge Co. vs. Burghamton Bridge Co., 3 Wallace, 51.)

65. The question is one to be determined by the jury. In an action by the seller to recover for goods sold by sample it is a question of fact whether the goods delivered by the plaintiff correspond in size and quality with the sample. (Kemensky vs. Chapin, 193 Mass., 500; 9 American & English Annotated Cases, 1168.)

66. A may secure an order for the dissolution of the partnership, and also recover damage against B for the deceit. (Jones vs. Weir, 217 Pa. St., 321.)

67. No. A stockholder does not stand in a fiduciary position towards the corporation in which he holds stock. In the absence of fraud a stockholder in a corporation may contract with such corporation. The position of a stockholder who holds a controlling interest in a corporation has been thus stated: "Where a person has the actual control of a corporation, whether such control arises from the ownership of a majority of the shares, or from his position or influence, he is held to most rigid good faith. The onus is upon him to show the fairness of the transaction if it is called in question." (Price vs. Holeomb, 89 Iowa, 123.)

68. Yes. It was held that, as between the parties vari-

ously forming the partnership, an assumption and promise to pay the note held by the plaintiff arose, based upon a sufficient consideration, the benefit of which the plaintiff could take advantage of and enforce. (Case vs. Ellis, 30 N. E., 907.)

69. No. Duties imposed upon corporations, not by virtue of express law or by the conditions of their charters, but arising out of contract relations, will not be enforced by mandamus. (State ex rel. Burg vs. Milwaukee Medical College, 128 Wis., 7; 8 Amer. & Eng. Annot. Cases, 407.)

70. Yes. (Hannigan vs. Morrissey, 127 N. Y., 639; 27 N. E., 402.)

71. The laws of Indiana will determine the question of liability. In an action against a master to recover damages for personal injuries sustained in a foreign state by a servant during the course of his employment there, the law of the foreign state controls in determining the question whether the servant is entitled to recover, when the contract of employment was made in that state. (Christiansen vs. William Graver Tank Works, 223 Ill., 142.)

72. Yes. The amount of the property settled upon the wife is so disproportionate to the amount of the husband's estate, as to raise the presumption that an unfair advantage was taken of the wife, in inducing her to enter into the agreement. (Achilles vs. Achilles, 151 Ill., 499, 37 N. E., 693.)

73. The measure of the plaintiff's damage will be the difference between the contract price and the price for which the barrels can be sold to some other party. (Neal vs. Shewalter, 31 N. E., 848; 5 Ind. App., 147.)

74. No. A man is not under legal obligation to support his stepchild, but if he takes him into his home and stands towards him in loco parentis, he cannot recover for his support. (Livingston vs. Hammond, 162 Mass., 375.)

75. No. The rule that marriages, valid where made are valid everywhere is subject to exceptions, one of which is that, where a resident and citizen of one state goes into another, and there contracts a marriage prohibited, from

considerations of public policy and good morals, by the law of his domicile, such law cannot successfully be invoked in support of the marriage so contracted, or of claims predicated upon the validity thereof. (Succession of Gabisso, 119 La., 704; 12 Amer. & Eng. Annot. Cases, 574.)

76. No. The delivery back by the grantee, to the grantor, of an unrecorded deed does not affect the legal title, but such re-delivery if made with the intention that the deed shall be destroyed for the purpose of re-vesting title in the grantor, passes an equitable title. (Crossman vs. Keister, 223 Ill., 69.)

77. None of the evidence mentioned, or all of it together, was sufficient to prove undue influence. (Trubey vs. Richardson, 224 Ill., 136.)

78. No. The necessity of alleging a performance of the condition precedent, was done away with by the allegation of the waiver of such condition by the defendant. (Kissack vs. Bourke, 224 Ill., 352.)

79. Yes. The minor cannot be held bound by the contract of bailment made by his agent. (Still vs. Keith, 143 Mass., 224, 9 N. E., 577.)

80. Yes. Such pre-existing debt alone will not be a sufficient consideration to constitute the transferee a bona fide purchaser for value, as against the owner from whom the goods were obtained by fraud. (Eaton vs. Davidson, 46 Ohio St., 355; 21 N. E., 442.)

81. Yes. A merchant who (as in this case) sells ready-made cloaks at retail and provides mirrors for the use of customers while trying them on and clerks to aid in the process, thereby impliedly invites his customers to take off their wraps and lay them down in the store, and is bound to exercise some care over such wraps. (Bunnell vs. Stern, 25 N. E., 910.)

82. Yes. "We think that mirrors are generally regarded, as they were in the present case, as a part, not of the house, but of the furniture of the house, and although mirrors may be so attached that it would be the necessary inference that they were intended to form part of the

house, we think no such inference can properly be drawn from the facts of the present case." (Cranston vs. Beek, 70 N. J. L., 145; 1 Amer. & Eng. Annot. Cases, 686.)

83. Yes. "The contention that the option stipulated in the lease is a nudum pactum, because without mutuality or consideration, would have merit, if such stipulation stood alone; but as it is a part of the contract it cannot be severed therefrom. In a similar case this court held that the lease of the property was a sufficient consideration for an option to purchase." (Amisss vs. Witting's Executors, 121 La., 501; 15 Amer. & Eng. Annot. Cases, 379.)

84. No. Where a vendor sells off an estate in lots, with restrictions upon the use of the lots sold, he will lose his right in equity to enforce the restrictions against one grantee, if he has knowingly permitted other grantees to violate the same restrictions, the effect of which violation is to abrogate the purpose of the restriction and alter the general scheme intended to be conserved by it. (Ocean City Association vs. Chalfant, 65 N. J. Eg., 156; 1 Amer. & Eng. Annot. Cases, 601.)

85. No. (Park vs. Preston, 108 N. Y., 434; 15 N. E., 705.)

86. No. By retaining the ticket with knowledge of its purport, plaintiff ratified the contract according to its terms. (Godfrey vs. Ohio & M. Ry. Co., 116 Ind., 30; 18 N. E., 61.)

87. No. The modern doctrine is that a defendant in trespass can always excuse himself by showing that the injury complained was purely accidental, and was not attributable to any fault of his. (Holmes vs. Mather, L. R., 10; Exchs., 261.)

88. Yes. In the case of a trespass upon real property, the wrong-doer is liable for all the consequences which naturally follow from his wrongful act, which are not too remote. (Guille vs. Swan, 19 Johns (N. Y.), 381.)

89. Yes. The principle involved is the same as in the preceding case. (Eten vs. Luyster, 60 N. Y., 252.)

90. No. It was held that there was no negligence existing in this case, inasmuch as a person, of ordinary pru-

dence, could not be expected to foresee harm as a consequence of the course of conduct which was pursued by the defendant. (*Hammack vs. White*, 11 C. B. N. S., 588; 103 E. C. L., 588.)

91. No. The same reasoning applies as in the preceding case. (*East Indian R. Co. vs. Mukerjee*, A. C., 396.)

92. No. The mischief in question was not of such a character that the railway company could be expected to foresee and guard against it. (*Daniel vs. Metropolitan R. Co.*, L. R. 5 H. L., 45.)

93. Yes. When a case of negligence has been made out, liability extends to all consequences naturally following therefrom. (*Harris vs. Mobbs*, 3 Ex. D., 268.)

94. Yes. It was held that the loss occasioned by the fire was attributable to the negligent management of the train of oil cars as its proximate cause. (*Kuhn vs. Jewett*, 32 N. J. Eq., 647.)

95. The damage in this case was not attributable to the starting of the boat with the lame horse as its proximate cause, and there could be no recovery. (*Morrison vs. Davis*, 20 Pa. St., 171.)

96. The company was not liable, the loss of the glasses not being the proximate consequence of their acts. (*Glover vs. London, etc., R. Co.*, L. R., 3 Q. B., 25.)

97. Yes. "In order that a negligent act or negligent conduct should be considered the legal or proximate cause of the damage complained of, it is not essential that such act or conduct should be the sole and exclusive cause of the damage in question. Hence the negligence of A may be treated as a proximate cause of damage to B, although the negligence of a third person may also concur in bringing about the mischief." *Street's Foundations of Legal Liability*, Vol. 1, P. 122. (*Pastene vs. Adams*, 49 Cal., 87.)

98. Either trespass or trespass on the case is proper: trespass, because the beasts actually came upon the land; and trespass on the case, because of the negligence. (*Star vs. Rookesby*, 1 Salk., 335.)

99. Yes. Factors of aggravation which are usually

treated as supplying a basis for assessing exemplary damages, in addition to the damages for the legal injury, may be considered merely as aggravation of the injury itself. (Smith vs. Holcomb, 99 Mass., 552.)

100. Yes. (Keyse vs. Keyse, 11 P. D., 100.)

101. Yes. "A surface location might be made in such an irregular and many-sided shape as to destroy the right to go beyond the surface lines. That consequence, however, would not be because the end lines were not exactly parallel, but because it would be difficult, if not impossible, to tell which were side lines and which were end lines." (Doe vs. Sanger, 83 Cal. 203.)

102. No. The following laws, and these only, are *ex post facto* laws: "First every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. Second. Every law that aggravates a crime, or makes it greater than it was when committed. Third. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. Fourth. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of commission of the offense in order to convict the offender." (Calder vs. Bull, 3 Dallas, 386.)

103. Yes. Documents are "ancient" if 30 years old when offered in evidence. (Reuter vs. Stuckart, 181 Ill. 529.)

104. Yes. "Standard price lists and market reports, shown to be in general circulation and relied on by the commercial world and by those engaged in the trade, are admissible as evidence of market values of articles of trade." (St. Louis and San Francisco Railroad Co. vs. Pearce et al. 82 Ark. 353. 12 American & English Annotated Cases 125.)

105. Yes. Involuntary declarations of this character are properly part of the *res gestae*. (Galena etc. Ry. Co. vs. Fay, 16 Ill., 558.)

106. No. Words in a conveyance or devise which merely state the purpose for which the property is to be used do not

create a conditional estate. (Adams vs. First Baptist Church of St. Charles et al. 148 Mich. 140.)

107. Yes. A mandatory injunction should be granted. "Clauses of 'without impeachment of waste' never were extended to allow the very destruction of the estate itself; but only to excuse from permissive waste, and therefore such a clause would not give leave to sell and cut down the trees which were the ornament or shelter of his houses, much less to destroy or demolish his house." (Vane vs. Lord Barnard, Precedents in Chancery, 454; 2 Vernon, 738.)

108. No. This was not a proper subject upon which to introduce expert testimony. The court in its decision cited with approval the following statement of the law upon the admissibility of expert testimony. "It may be broadly stated as a general proposition that there are two classes of cases in which expert testimony is admissible. To the one class belong those cases in which the conclusions to be drawn by the jury depend upon the existence of facts which are not common knowledge and which are peculiarly within the knowledge of men whose experience or study enables them to speak with authority upon the subject. If, in such cases, the jury with all the facts before them can form a conclusion thereon, it is their sole province to do so. In the other class we find those cases in which the conclusions to be drawn from the the facts stated as well as knowledge of the facts themselves depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence. In such cases, not only the facts, but the conclusions to which they lead, may be testified to by qualified experts." (Welle vs. Celluloid Co. 79 N. E. 6.)

109. Yes. (Pittsburg, C., C. & St. L. Ry. Co. vs. Bovard, 223 Ill. 176; 79 N. E. 128.)

110. No. "With the exception of the copyrighted articles, the entire literary mater of 'The Encyclopedia Britannica, Ninth Edition' is public property in this country at least, and a rival publisher has the legal right to make any use of it he sees fit. He may use any part of it or all of it, and call it by what name he prefers. Neither the author or proprietor of a

literary work has any property in its name. It is a term of description which serves to identify the work; but any other person can with impunity adopt it and apply it to any other book or to any trade commodity, provided he does not use it as a false token to induce the public to believe that the thing to which it is applied is the identical thing which it originally designated. If literary property could be protected upon the theory that the name by which it is christened is equivalent to a trade-mark, there would be no necessity for copyright laws." (Black vs. Ehrich, 44 Fed. 793.)

111. Yes. (Gibbs vs. Mennard, 6th Page (N. Y.), 258.)

112. The court held in this case as follows: "1. If a man seised of lands in fee, makes a feoffment to the use of such person and persons, and of such estate and estates as he shall appoint by his will, that by operation of law the use doth vest in the feoffer, and he is seised of a qualified fee, that is to say, till declaration and limitation be made according to his power. When a man makes a feoffment to the use of his last will, he has the use in the meantime. 2. If in such case the feoffer by his will limits estates according to his power reserved to him on the feoffment there the estates shall take effect by force of the feoffment, and the use is directed by the will; so that in such case the will is but declaratory: but if in such case the feoffer by his will in writing devises the land itself, as owner of the land, without any reference to his authority, there it shall pass by the will, for the testator had an estate devisable in him, and power also to limit an use, and he had election to pursue which of them he would; and when he devised the land itself without any reference to his authority or power, he declared his intent, to devise an estate as owner of the land, by his will, and not to limit an use according to his authority; and in such case. the land being held in capite, the devise is good for two parts, and void for the third part. For as the owner of the land he cannot dispose of more; and in such case the devise cannot take effect by the will for two parts, and by the feoffment for the third part: for he made his devise as owner, and not according to his authority: and his devise shall be of as much validity as

the will of every other owner having any land held in capite. 3. If a man makes a feoffment in fee of lands held in capite, to the use of his last will, although he devises the land with reference to the feoffment, yet the will is void for a third part; for the feoffment to the use of his will, and to the use of him and his heirs is all one. 4. In the case at bar, when Clement Harwood had conveyed two parts to the use of his wife by act executed, he would not as owner of the land devise any part of the residue by his will, so that he had no power to devise any part thereof as owner of the land, and because he had not elected as in the case put before, either to limit it according to his power, or to devise it as owner of the land (for in the case at bar, having, as owner of the land, conveyed two parts to the use of his wife (ut supra) he could not make and devise (thereof) therefore the devise ought of necessity to enure as a limitation of an use, or otherwise the devise shall be utterly void; and judgment was given accordingly for the plaintiff for the whole land so devised." (Sir Edwards Clerc's Case, C Co. 17 b. Gray's cases on Real Property, 1st Edition Vol. 1 P. 502.)

113. "The Master of the Rolls said, that the timber may be considered under 2 denominations, (to wit) such as was thriving, and not fit to be felled; and such as was unthriving, and what a prudent man and a good husband would fell, etc. And ordered the Master to take an account, etc. and the value of the former which was waste, and therefore belongs to the plaintiff, who is next in remainder of the inheritance, is to go to the plaintiff, and the value of the other is to be laid out according to the settlement, etc. But as to repairs. the court never interposes in case of permissive waste either to prohibit or give satisfaction, as it does in case of wilful waste; and where the court having jurisdiction of the principal, viz. the prohibiting, it does in consequence give relief for waste done, either by way of account as for timber felled, or by obliging the party to rebuild, etc. as in case of houses, etc. and mentioned Lord Barnard's Case, as to Raby Castle, 2 Vern. But as to the repairs it was objected, that the plaintiff here had no remedy at law, by reason of the estate for life to the trus-

tees mean between plaintiff's remainder in tail and defendant's estate for life, and that therefore equity ought to interpose, etc. and that this was a point of consequence. *Sed non allocatur.*" (Lord Castleman vs. Lord Cranen, 22 Vin. Ab. 323, pl. 11. Gray's Cases on Real Property, Vol. 1, P. 577.)

114. Yes. The decree providing for the sale is absolutely void on account of the nonjoinder of the wife.

115. The deed may be considered as a mortgage and foreclosed. (Abbott vs. Sanders, 80 Vt. 179.) (NOTE. In some of the other states a different proceeding is held to be the proper remedy. Thus in Illinois, the proper proceedings would be by suit in equity to set aside the deed; and in Wisconsin, the proper course is a re-entry by the grantor for breach of a condition subsequent.)

116. No. Misrepresentations as to the wealth, social standing, or health, have always been held insufficient grounds upon which to base an annulment of a marriage (Lyon vs. Lyon, 230 Ill. 366.)

117. Yes. It is against public policy to allow a carrier to exempt itself from liability for damage occasioned by its own negligence. (St. Louis, Iron Mountain & Southern Railway Co., vs. Pitcock, 82 Ark. 441.)

118. Yes. The sale took place in Minnesota and was therefore legal. (Frankel vs. Hillier, 16 N. D. 387.)

119. No. (Cochran vs. Zachery, 137 Iowa 585.)

120. No. When a person is tried for any crime, it is never a defense to prove that others are guilty of the same crime. (Commonwealth vs. Perry, 139 Mass., 29 N. E. 656.)

121. The presumption is that a telegram properly addressed, and delivered to a telegraph company for transmission, is properly received. The presumption in such a case is similar to that in the case of a letter properly addressed and mailed, although not quite so strong. (Oregon Steamship Co., vs. Otis, 100 N. Y. 446; 3 N. E. 485.)

122. No. The guaranty of "life, liberty and property" cannot be held to include the right of corporations to combine together to fix rates, etc. (State vs. Firemen's Ins. Co. 43 L. R. A. 363.)

123. No. (Birmingham Matinee Club vs. McCarty, 152 Ala. 571.)

124. Yes. In an action for waste it is sufficient if the person bringing the action has an interest in the property at the time the waste was committed. (Hoolihan vs. Hoolihan, 193 N. Y. 197.)

125. Yes. (In re Robinson, 48 Wash. 153.)

126. Yes. All of this evidence has a direct bearing upon the question of the contributory negligence of the plaintiff. (Baltimore & Ohio Southwestern Rd. Co. vs. Mullen, 217 Ill. 203.)

127. The evidence as to the nearsightedness and the feebleness of the testator, while admissible was entitled to very little weight. The remaining evidence which only tended to blacken the character of the testator was inadmissible. (Graham vs. Deuterman, 217 Ill. 235.)

128. Yes. They were entries made by a person, deceased at the time of the trial, against his own interest. (Middleton vs. Melton, 10 B. & C. 317.)

129. Under the rule in Shelly's case, the widow takes a fee simple estate. (Rissman, Admv. vs. Wierth, 220 Ill. 181.)

130. The children of the testator, mentioned in this devise, take an estate in fee simple. "The term 'children' is primarily a word of purchase, and is not to be construed as equivalent to 'heirs' in the absence of other words or circumstances showing it to have been used in that sense, but where there are other words in the will showing that the word 'children' was used in the sense of 'heirs' the term will be construed as a word of limitation equivalent to 'heirs'. The words 'heirs', 'issue' and 'children', when found in wills, may be construed interchangeable when necessary to effectuate the intention of the testator." (Strawbridge vs. Strawbridge, 220 Ill. 63.)

131. The statute was unconstitutional as being in violation of the constitutional guaranty of freedom of speech. (Ex parte Harrison, 212 Mo. 88; American & Eng. Annotated Cases, Vol. XV, P. 1)

132. As against the creditors of the creditors of the selling

corporation, the purchasing corporation is not a purchaser in good faith, and the creditors of the selling corporation may treat the purchasing corporation as a fraudulent vendee. (Couse vs. Columbia Powder Mfg. Co. 33 Atl. 297.)

133. The complainants should bring a bill of revivor against the state auditor and treasurer. (Hemingway vs. Stansell, 106 U. S. 399.)

134. By means of an equitable proceeding in the Federal Court having jurisdiction of the foreclosure proceedings. (Freman vs. Howe, 24 How. 450.)

135. No. While a telegram countermanding a check may reasonably be acted upon by a banker, still an unauthenticated telegram is not a sufficient countermand of the check so as to render the bank liable for its payment. (Curtice vs. London City & Midland Bank, Limited, I K. B. 293.)

136. The contracts are not rendered void, or even voidable, but are merely unenforceable by the corporation in the state courts until the corporation complies with the provisions of the state statutes. (National Fertilizer Company vs. Fall River Five Cent Savings Bank et al, 196 Mass. 458.)

137. No. The court cites the case of Abadie vs. Berges as follows: "A landlord cannot be held to warranty and indemnity against the 'acts of the law', in the absence of express stipulation to that end. Should a tenant sustain damage in consequence of a constitutional police legislation adopted subsequently to his contract of lease, such as the 'Sunday law,' which forbids the use of the property rented, to a particular use to which the lessee applies it, in a special way and on a special day, such damage is *injuria sine damno*, which is not compensable. Such legislation could have been foreseen, and does not impair rights under the contract." (Lawrence vs. White, 131 Ga. 840.)

138. No. The town has been guilty of such extreme laches that a court of equity will not decree the cancellation of the bonds, even although the delay has not continued for the full statutory period of limitation of equitable actions. (Calhoun vs. Delhi & M. R. Co. 121 N. Y. 69; 24 N. E. 27.)

139. No. A father may emancipate his child in which

case the child would become competent to contract as if of full age. (*Kain vs. Larkin*, 30 N. E. 105, 131 N. Y. 300.)

140. No. (*Maryland Casualty Co. vs. Hudgins*, 97 Texas 124.)

141. Yes. The nuisance must be proved to have existed at the time the suit was commenced (unless the bill proceeds on the theory of a threatened nuisance); but a cessation of the nuisance, which may be intended to be only a temporary one, after the suit has been commenced, will not, of necessity, prevent the court from granting the injunction. (*State vs. City Club*, 65 S. E. 730, 83 S. C. 509.)

142. Yes. No change in "interest, title, or possession," has taken place. (*Garner vs. Milwaukee Mechanics' Insurance Company*, 73 Kan. 127.)

143. No. (*State vs. Hodge*, 142 N. C. 665.)

144. No. Unless such right has been acquired by grant or prescription, a land owner has no legal right to the uninterrupted access of light and air to his property, across the land of his neighbor. (*Kablegard et al. vs. Hale et al.* 60 W. Va. 37.)

145. No. The recent decisions hold that when a municipal corporation lawfully engages in the business of operating an electric light plant, for the purpose of providing its own light and also to sell light to the citizens of the corporation, such municipal corporation is liable for damages for its negligence, under the same conditions and to the same degree as a private corporation or an individual engaged in the same line of business. (*Davoust vs. City of Alameda*, 149 Cal. 69. See also note to this case in *American & Eng. Annotated Cases*, Vol. IX, P. 851.)

146. This is a case for the application of the equitable doctrine of election. If B— takes the property left to him by A's will, he cannot assert any claim to the property left to C— by the same will. (*Bletson vs. Stoops*, 186 N. Y. 456.)

147. For the defendant. The books are not necessities, and a promise by a husband to pay a debt due by his wife, for which he is not already responsible, like any other contract

to answer for the debt or default of another, must be in writing. (Based upon part of the facts in case of *Shuman vs. Steinel*, 129 Wis. 422.)

148. Yes. The pedigree and ancestry, either of a man or of horses, cattle, or dogs, may be proved by common or general reputation. (*Citizens' Co. vs. Dew*, 100 Tenn. 317:)

149. No. The contract is one which comes under the statute of frauds, and the fact that the request from F— to M— was in writing does not satisfy the requirements of the statute. (*Chicago Heights Lumber Co. vs. Miller*, 219 Ill. 79.)

150. The question of deciding the competency of the witness is for the court, and in deciding that question the court is not only the judge of the law, but also of the questions of fact necessary to be determined. (*Hoch vs. Illinois*, 219 Ill. 264.)

FIFTY LEGAL MAXIMS.

(Note.—The principal equitable maxims are given in the Chapter on Equity Jurisprudence.)

1. The act of God is so treated by the law as to affect no one injuriously.

2. In law the immediate, not the remote, cause of any event is regarded.

3. Ignorance of fact excuses—ignorance of law does not excuse.

4. That to which a person assents is not esteemed in law an injury.

5. No man should take advantage of his own wrong.

6. Acts indicate the intention.

7. It is a rule of law that a man shall not be twice vexed for one and the same cause.

8. Enjoy your own property in such a manner as not to injure that of another person.

9. Whatever is affixed to the soil belongs thereto.

10. He who possesses land possesses also all which is above it.

11. Alienation is favored by the law rather than accumulation.

12. An assignee is clothed with the rights of his principal.

13. Whoever grants a thing is supposed also tacitly to grant that without which the grant itself would be of no effect.

14. The incident shall pass by the grant of the principal but not the principal by the grant of the incident.

15. It is the consent of the parties, not their concubinage, which constitutes a valid marriage.

16. No one can be heir during the life of his ancestor.

17. A liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties.

18. A passage will be best interpreted by reference to that which precedes and follows it.

19. The words of an instrument shall be taken most strongly against the party employing them.

20. Latent ambiguity may be supplied by evidence; for an ambiguity which arises by proof of an extrinsic fact may, in the same manner, be removed.

21. That is sufficiently certain which can be made certain.

22. Surplusage does not vitiate that which in other respects is good and valid.

23. Mere false description does not make an instrument inoperative.

24. The express mention of one thing implies the exclusion of another.

25. Words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them.

26. Any one may, at his pleasure, renounce the benefit of a stipulation or other right introduced entirely in his own favor.

27. He who derives the advantage ought to sustain the burden.

28. A right of action cannot arise out of fraud.

29. No cause of action arises from a bare promise.

30. He who does an act through the medium of another party is in law considered as doing it himself.

31. A subsequent ratification has a retrospective effect, and is equivalent to a prior command.

32. Every presumption is to be made against a wrongdoer.

33. All acts are presumed to have been rightfully and regularly done.

34. A transaction between two parties ought not to operate to the disadvantage of a third.

35. No man can be compelled to criminate himself.

36. With respect to private rights, necessity privileges a person acting under its influences.

37. The laws are adapted to those cases which most frequently occur.

38. Where a person does an act by command of one exercising judicial authority, the law will not suppose that he acted from any wrongful or improper motive, for it was his duty to obey.

39. It is the office of the judge to instruct the jury in points of law—of the jury to decide on matters of fact.

40. No man should be condemned unheard.

41. A legal fiction is always consistent with equity.

42. The acquiescence of a party who might take advantage of an error obviates its effect.

43. The law does not concern itself about trifles.

44. Like reason doth make like law.

45. A matter, the validity of which is at issue in legal proceedings, cannot be set up as a bar thereto.

46. That which was originally void, does not by lapse of time become valid.

47. The law does not seek to compel a man to do that which he cannot possibly perform.

48. The bestower of a gift has a right to regulate its disposal.

49. In the absence of ambiguity, no exposition shall be made which is opposed to the express words of the instrument.

50. General words may be restrained according to the subject matter or person to which they relate.

APPENDIX A.

Important Dates in English Legal History.

Magna Charta	1215
Statute of Westminster II	1285
Statute of De Donis	1285
Statute of Quia Emptores	1290
Statute of Uses	1535
Statute of Wills	1540
Petition of Right	1628
Statute of Frauds	1676
Habeas Corpus Act	1679
Bill of Rights	1689

APPENDIX B.

CONSTITUTION OF THE UNITED STATES.

We, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Article I.

Section I. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section II.—1. The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

2. No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

3. Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every

thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three; Massachusetts, eight; Rhode Island and Providence Plantations, one; Connecticut, five; New York, six; New Jersey, four; Pennsylvania, eight; Delaware, one; Maryland, six; Virginia, ten; North Carolina, five; South Carolina, five; and Georgia, three.

4. When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

5. The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

Section III.—1. The Senate of the United States shall be composed of two senators from each state, chosen by the Legislature thereof, for six years; and each senator shall have one vote.

2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year; of the second class, at the expiration of the fourth year; and of the third class, at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the Legislature of any state, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

3. No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

4. The Vice-President of the United States shall be president of the Senate, but shall have no vote, unless they be equally divided.

5. The Senate shall choose their other officers, and also a president pro tempore, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments, when sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief-Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

Section IV.—1. The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators.

2. The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Section V.—1. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties, as each house may provide.

2. Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

3. Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy, and the yeas and nays of the members of either house on any ques-

tion shall, at the desire of one-fifth of those present, be entered on the journal.

4. Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

Section VI.—1. The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

2. No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

Section VII.—1. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

2. Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on

the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sunday excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

3. Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Section VIII.—1. The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

2. To borrow money on the credit of the United States;

3. To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

5. To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

6. To provide for the punishment of counterfeiting the securities and current coin of the United States;

7. To establish post-offices and post-roads;

8. To promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries;

9. To constitute tribunals inferior to the Supreme Court;

10. To define and punish piracies and felonies commit-

ted on the high seas, and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

13. To provide and maintain a navy;

14. To make rules for the government and regulation of the land and naval forces;

15. To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

16. To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

17. To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by session of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings;—
And

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Section IX.—1. The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax

or duty may be imposed on such importation, not exceeding ten dollars for each person.

2. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

3. No bill of attainder or ex-post-facto law shall be passed.

4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

5. No tax or duty shall be laid on articles exported from any state.

6. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to, or from, one state, be obliged to enter, clear, or pay duties in another.

7. No money shall be drawn from the treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

8. No title of nobility shall be granted by the United States: And no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

Section X.—1. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex-post-facto law, or law impairing the obligation of contracts, or grant any title of nobility.

2. No state shall, without the consent of the Congress, lay any impost or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net product of all duties and impost, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.

3. No state shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships-of-war, in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

Article II.

Section I.—1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:

2. Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

3. The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

4. No person except a natural-born citizen, or citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years resident within the United States.

5. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President; and such officer shall act accordingly until the disability be removed, or a President shall be elected.

6. The President shall, at stated times, receive for his

services a compensation which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

7. Before he enters on the execution of his office, he shall take the following oath or affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States."

Section II.—1. The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the Senate shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

3. The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Section III.—He shall from time to time give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall

judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Section IV.—The President, Vice-President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors.

Article III.

Section I.—The judicial power 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 continuance in office.

Section II.—1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and 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 lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction.

In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section III.—1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.

2. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.

3. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, of forfeiture, except during the life of the person attainted.

Article IV.

Section I.—Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section II.—1. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

2. A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

3. No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from

such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Section III.—1. New states may be admitted by the Congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.

2. The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state.

Section IV.—The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

Article V.

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; provided that no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the Senate.

Article VI.

1. All debts contracted, and engagements entered into, before the adoption of this Constitution, shall be as valid

against the United States under this Constitution, as under the confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

3. The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

Article VII.

The ratification of the conventions of nine states shall be sufficient for the establishment of this Constitution between the states so ratifying the same.

AMENDMENTS TO THE CONSTITUTION.

Article I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for redress of grievances.

Article II.

A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Article III.

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Article IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war and public danger; nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life,

liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article VII.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law.

Article VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article IX.

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Article X.

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.

Article XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Article XII.

The electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the Senate;—the president of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted;—the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the

whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Article XIII.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the person shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Article XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be appointed among the several states according to their respective numbers, counting the whole number of persons in each state excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive or judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a senator or representative

in Congress, or elector of President or Vice-President, or hold any office, civil or military, under the United States, or under any state, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pension and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article XV.

Section 1. The rights of citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of race, color, or previous condition of servitude.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

APPENDIX C.

CONSTITUTION OF ILLINOIS.

Adopted in convention May 13, 1870; ratified by the people July 2, 1870; in force August 8, 1870.

Preamble. We, the people of the State of Illinois—grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations—in order to form a more perfect government, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the State of Illinois.

Article I.

BOUNDARIES.

The boundaries and jurisdiction of the state shall be as follows, to-wit: Beginning at the mouth of the Wabash river; thence up the same, and with the line of Indiana, to the northwest corner of said state; thence east, with the line of the same state, to the middle of Lake Michigan; thence north, along the middle of said lake, to north latitude 42 degrees and 30 minutes; thence west to the middle of the Mississippi river, and thence down along the middle of that river to its confluence with the Ohio river, and thence up the latter river, along its northwestern shore, to the place of beginning: Provided, that this state shall exercise such jurisdiction upon the Ohio river as she is now entitled to, or such as may hereafter be agreed upon by this state and the State of Kentucky.

Article II.**BILL OF RIGHTS.**

1. All men are by nature free and independent, and have certain inherent and inalienable rights—among these are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.

2. No person shall be deprived of life, liberty or property, without due process of law.

3. The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.

4. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and eriminal, the truth, when published with good motives and for justifiable ends, shall be a sufficient defense.

5. The right of trial by jury as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace by a jury of less than twelve men may be authorized by law.

6. The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized.

7. All persons shall be bailable by sufficient sureties, except for capital offenses, where the proof is evident or the presumption great; and the privilege of writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it.

8. No person shall be held to answer for a criminal offense, unless on indictment of a grand jury, except in cases in which the punishment is by fine, or imprisonment otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army and navy, or in the militia, when in actual service in time of war or public danger: Provided, that the grand jury may be abolished by law in all cases.

9. In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

10. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

11. All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate; nor shall any person be transported out of the state for any offense committed within the same.

12. No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud.

13. Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners

thereof, shall remain in such owners subject to the use for which it is taken.

14. No ex post facto law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed.

15. The military shall be in strict subordination to the civil power.

16. No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, except in the manner prescribed by law.

17. The people have the right to assemble in a peaceable manner to consult for the common good, to make known their opinions to their representatives, and to apply for redress of grievances.

18. All elections shall be free and equal.

19. Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation; he ought to obtain, by law, right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay.

20. A frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty.

Article III.

DISTRIBUTION OF POWERS.

The powers of the government of this state are divided into three distinct departments—the legislative, executive and judicial; and no person, or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

Article IV.

LEGISLATIVE DEPARTMENT.

1. The legislative power shall be vested in a general assembly, which shall consist of a senate and house of representatives, both to be elected by the people.

ELECTION.

2. An election for members of the general assembly shall be held on the Tuesday next after the first Monday in November, in the year of our Lord one thousand eight hundred and seventy, and, every two years thereafter, in each county, at such places therein as may be provided by law. When vacancies occur in either house, the governor, or persons exercising the powers of governor, shall issue writs of election to fill such vacancies.

ELIGIBILITY AND OATH.

3. No person shall be a senator who shall not have attained the age of twenty-five years, or a representative who shall not have attained the age of twenty-one years. No person shall be a senator or representative who shall not be a citizen of the United States, and who shall not have been for five years a resident of this state, and for two years next preceding his election a resident within the territory forming the district from which he is elected. No judge or clerk of any court, secretary of state, attorney general, state's attorney, recorder, sheriff, or collector of public revenue, member of either house of congress, or person holding any lucrative office under the United States or this state, or any foreign government, shall have a seat in the general assembly: Provided, that appointments in the militia, and the offices of notary public and justice of the peace, shall not be considered lucrative. Nor shall any person, holding any office of honor or profit under any foreign government, or under the government of the United States (except postmasters whose annual compensation does not exceed the sum of \$300), hold any office of honor or profit under the authority of this state.

4. No person who has been, or hereafter shall be, convicted of bribery, perjury, or other infamous crime, nor any person who has been or may be a collector or holder of public moneys, who shall not have accounted for and paid over, according to law, all such moneys due from him, shall be eligible to the general assembly, or to any office of profit or trust in this state.

5. Members of the general assembly, before they enter upon their official duties, shall take and subscribe the following oath or affirmation:

I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of Illinois, and will faithfully discharge the duties of senator (or representative) according to the best of my ability; and that I have not, knowingly or intentionally, paid or contributed anything, or made any promise, in the nature of a bribe, to directly or indirectly influence any vote at the election at which I was chosen to fill the said office, and have not accepted, nor will I accept or receive, directly or indirectly, any money or other valuable thing, from any corporation, company or person, for any vote or influence I may give or withhold on any bill, resolution or appropriation, or for any other official act.

This oath shall be administered by a judge of the Supreme or Circuit Court, in the hall of the house to which the member is elected, and the secretary of state shall record and file the oath subscribed by each member. Any member who shall refuse to take the oath herein prescribed, shall forfeit his office, and every member who shall be convicted of having sworn falsely to or violating his said oath, shall forfeit his office, and be disqualified thereafter from holding any office of profit or trust in this state.

APPORTIONMENT—SENATORIAL.

6. The general assembly shall apportion the state every ten years, beginning with the year 1871, by dividing the population of the state, as ascertained by the federal census, by the number 51, and the quotient shall be the ratio of representation in the senate. The state shall be divided into 51 senatorial districts, each of which shall elect one senator, whose term of office shall be four years. The senators elected in the year of our Lord 1872, in districts bearing odd numbers, shall vacate their offices at the end of two years, and those elected in districts bearing even numbers, at the end of four years; and vacancies occurring

by the expiration of term, shall be filled by the election of senators for the full term. Senatorial districts shall be formed of contiguous and compact territory, bounded by county lines, and contain, as nearly as practicable, an equal number of inhabitants; but no district shall contain less than four-fifths of the senatorial ratio. Counties containing not less than the ratio and three-fourths, may be divided into separate districts, and shall be entitled to two senators, and to one additional senator for each number of inhabitants equal to the ratio contained by such counties in excess of twice the number of said ratio.

Note.—By the adoption of minority representation, sections 7 and 8 of this article cease to be a part of the constitution. Under section 12 of the schedule and the vote of the adoption, the following section relating to minority-representation is substituted for said sections:

MINORITY REPRESENTATION.

7 and 8. The house of representatives shall consist of three times the number of the members of the senate, and the term of office shall be two years. Three representatives shall be elected in each senatorial district at the general election in the year of our Lord 1872, and every two years thereafter. In all elections of representatives aforesaid, each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates, as he shall see fit; and the candidates highest in votes shall be declared elected.

TIME OF MEETING AND GENERAL RULES.

9. The sessions of the general assembly shall commence at 12 o'clock noon, on the Wednesday next after the first Monday in January, in the year next ensuing the election of members thereof, and at no other time, unless as provided by this constitution. A majority of the members elected to each house shall constitute a quorum. Each house shall determine the rules of its proceedings, and be

the judge of the election, returns and qualifications of its members; shall choose its own officers; and the senate shall choose a temporary president to preside when the lieutenant-governor shall not attend as president or shall act as governor. The secretary of state shall call the house of representatives to order at the opening of each new assembly, and preside over it until a temporary presiding officer thereof shall have been chosen and shall have taken his seat. No member shall be expelled by either house except by a vote of two-thirds of all the members elected to that house, and no member shall be twice expelled for the same offense. Each house may punish, by imprisonment, any person not a member, who shall be guilty of disrespect to the house by disorderly or contemptuous behavior in its presence. But no such imprisonment shall extend beyond twenty-four hours at one time, unless the person shall persist in such disorderly or contemptuous behavior.

10. The doors of each house, and of committees of the whole, shall be kept open, except in such cases as, in the opinion of the house, require secrecy. Neither house shall, without the consent of the other, adjourn, for more than two days, or to any other place than that in which the two houses shall be sitting. Each house shall keep a journal of its proceedings, which shall be published. In the senate at the request of two members, and in the house at the request of five members, the yeas and nays shall be taken on any question, and entered upon the journal. Any two members of either house shall have liberty to dissent from and protest, in respectful language, against any act or resolution which they think injurious to the public or to any individual, and have the reasons of their dissent entered upon the journals.

STYLE OF LAWS AND PASSAGE OF BILLS.

11. The style of the laws of this state shall be: "Be it enacted by the People of the State of Illinois, represented in the General Assembly."

12. Bills may originate in either house, but may be

altered, amended or rejected by the other; and on the final passage of all bills, the vote shall be by yeas and nays, upon each bill separately, and shall be entered upon the journal; and no bill shall become a law without the concurrence of the majority of the members elected to each house.

13. Every bill shall be read at large on three different days, in each house; and the bill and all amendments thereto shall be printed before the vote is taken on its final passage; and every bill, having passed both houses, shall be signed by the speakers thereof. No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed; and no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act. And no act of the general assembly shall take effect until the first day of July next after its passage, unless, in case of emergency (which emergency shall be expressed in the preamble or body of the act), the general assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct.

PRIVILEGES AND DISABILITIES.

14. Senators and representatives shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest during the session of the general assembly, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

15. No person elected to the general assembly shall receive any civil appointment within this state from the governor, the governor and senate, or from the general assembly, during the term for which he shall be elected; and all such appointments and all votes given for any such members for any such office or appointment, shall be void;

nor shall any member of the general assembly be interested, either directly or indirectly, in any contract with the state, or any county thereof, authorized by any law passed during the terms for which he shall have been elected, or within one year after the expiration thereof.

PUBLIC MONEYS AND APPROPRIATIONS.

16. The general assembly shall make no appropriation of money out of the treasury in any private law. Bills making appropriations for the pay of members and officers of the general assembly, and for the salaries of the officers of the government, shall contain no provision on any other subject.

17. No money shall be drawn from the treasury except in pursuance of an appropriation made by law, and on the presentation of a warrant issued by the auditor thereon; and no money shall be diverted from any appropriation made for any purpose, or taken from any fund whatever, either by joint or separate resolution. The auditor shall, within 60 days after the adjournment of each session of the general assembly, prepare and publish a full statement of all money expended at such session, specifying the amount of each item, and to whom and for what paid.

18. Each general assembly shall provide for all the appropriations necessary for the ordinary and contingent expenses of the government until the expiration of the first fiscal quarter after the adjournment of the next regular session, the aggregate amount of which shall not be increased without a vote of two-thirds of the members elected to each house, nor exceed the amount of revenue authorized by law to be raised in such time; and all appropriations, general or special, requiring money to be paid out of the state treasury, from funds belonging to the state, shall end with such fiscal quarter: Provided, the state may, to meet casual deficits or failures in revenues, contract debts, never to exceed in the aggregate \$250,000; and moneys thus borrowed shall be applied to the purpose for which they were obtained, or to pay the debt thus created, and to no other

purpose; and no other debt, except for the purpose of repelling invasion, suppressing insurrection, or defending the state in war (for payment of which the faith of the state shall be pledged, shall be contracted, unless the law authorizing the same shall, at a general election, have been submitted to the people, and have received a majority of the votes cast for members of the general assembly at such election. The general assembly shall provide for the publication of said law for three months at least before the vote of the people shall be taken upon the same; and provision shall be made, at the time, for the payment of the interest annually, as it shall accrue, by a tax levied for the purpose or from other sources of revenue; which law, providing for the payment of such interest by such tax, shall be irrevocable until such debt be paid: And, provided, further, that the law levying the tax shall be submitted to the people with the law authorizing the debt to be contracted.

19. The general assembly shall never grant or authorize extra compensation, fee or allowance to any public officer, agent, servant or contractor, after service has been rendered or a contract made, nor authorize the payment of any claim, or part thereof, hereafter created against the state under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void: Provided, the general assembly may make appropriations for expenditures incurred in suppressing insurrection or repelling invasion.

20. The state shall never pay, assume or become responsible for the debts or liabilities of, or in any manner give, loan or extend its credit to or in aid of any public or other corporation, association or individual.

PAY OF MEMBERS.

21. The members of the general assembly shall receive for their services the sum of \$5 per day, during the first session held under this constitution, and 10 cents for each

mile necessarily traveled in going to and returning from the seat of government, to be computed by the auditor of public accounts; and thereafter such compensation as shall be prescribed by law, and no other allowance or emolument, directly or indirectly, for any purpose whatever, except the sum of \$50 per session to each member, which shall be in full for postage, stationery, newspapers and all other incidental expenses and perquisites; but no change shall be made in the compensation of members of the general assembly during the term for which they may have been elected. The pay and mileage allowed to each member of the general assembly shall be certified by the speaker of their respective houses, and entered on the journals and published at the close of each session.

SPECIAL LEGISLATION PROHIBITED.

22. The general assembly shall not pass local or special laws in any of the following enumerated cases—that is to say, for—

Granting divorcees;

Changing the names of persons or places;

Laying out, opening, altering and working roads or highways;

Vacating roads, town plats, streets, alleys and public grounds;

Locating or changing county seats;

Regulating county and township affairs;

Regulating the practice in courts of justice;

Regulating the jurisdiction and duties of justices of the peace, police magistrates and constables;

Providing for changes of venue in civil and criminal cases;

Incorporating cities, towns or villages, or changing or amending the charter of any town, city or village;

Providing for the election of members of the board of supervisors in townships, incorporated towns or cities;

Summoning and impaneling grand or petit juries;

Providing for the management of common schools;

Regulating the rate of interest on money;

The opening and conducting of any election, or designating the place of voting;

The sale or mortgage of real estate belonging to minors or others under disability;

The protection of game or fish;

Chartering or licensing ferries or toll bridges;

Remitting fines, penalties or forfeitures;

Creating, increasing or decreasing fees, percentage or allowances of public officers, during the term for which said officers are elected or appointed;

Changing the law of descent;

Granting to any corporation, association or individual the right to lay down railroad tracks, or amending existing charters for such purpose;

Granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever.

In all other cases where a general law can be made applicable, no special law shall be enacted.

23. The general assembly shall have no power to release or extinguish, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual to this state or to any municipal corporation therein.

IMPEACHMENT.

24. The house of representatives shall have the sole power of impeachment; but a majority of all the members elected must concur therein. All impeachments shall be tried by the senate; and when sitting for that purpose, the senators shall be upon oath, or affirmation, to do justice according to law and evidence. When the governor of the state is tried, the chief justice shall preside. No person shall be convicted without the concurrence of two-thirds of the senators elected. But judgment, in such cases, shall not extend further than removal from office and disqualification to hold any office of honor, profit or trust under the government of this state. The party, whether convicted or

acquitted, shall, nevertheless, be liable to prosecution, trial, judgment and punishment according to law.

MISCELLANEOUS.

25. The general assembly shall provide, by law, that the fuel, stationery and printing paper furnished for the use of the state; the copying, printing, binding and distributing the laws and journals, and all other printing ordered by the general assembly, shall be let by contract to the lowest responsible bidder; but the general assembly shall fix a maximum price; and no member thereof, or other officer of the state, shall be interested, directly or indirectly, in such contract. But all such contracts shall be subject to the approval of the governor, and if he disapproves the same there shall be a re-letting of the contract, in such manner as shall be prescribed by law.

26. The state of Illinois shall never be made defendant in any court of law or equity.

27. The general assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets in this state.

28. No law shall be passed which shall operate to extend the term of any public officer after his election or appointment.

29. It shall be the duty of the general assembly to pass such laws as may be necessary for the protection of operative miners, by providing for ventilation, when the same may be required, and the construction of escapement shafts, or such other appliances as may secure safety in all coal mines, and to provide for the enforcement of said laws by such penalties and punishments as may be deemed proper.

30. The general assembly may provide for establishing and opening roads and cartways, connected with a public road, for private and public use.

31. The general assembly may pass laws permitting the owners of lands to construct drains, ditches and levees for

agricultural, sanitary or mining purposes, across the lands of others, and provide for the organization of drainage districts and vest the corporate authorities thereof with power to construct and maintain levees, drains and ditches, and to keep in repair all drains, ditches and levees heretofore constructed under the laws of this state, by special assessments upon the property benefited thereby. (This section was submitted to the voters at the election in November, 1878, as an amendment, was adopted and became a part of the constitution.)

32. The general assembly shall pass liberal homestead and exemption laws.

33. The general assembly shall not appropriate out of the state treasury, or expend on account of the new capitol grounds, and construction, completion, and furnishing of the state house, a sum exceeding, in the aggregate, \$3,500,000, inclusive of all appropriations heretofore made, without first submitting the proposition for an additional expenditure to the legal voters of the state, at a general election; nor unless a majority of all the votes cast at such election shall be for the proposed additional expenditure.

34. The general assembly shall have power, subject to the conditions and limitations hereinafter contained to pass any law (local, special or general) providing a scheme or charter of local municipal government for the territory now or hereafter embraced within the limits of the City of Chicago. The law or laws so passed may provide for consolidating (in whole or in part) in the municipal government of the city of Chicago, the powers now vested in the city, board of education, township, park and other local governments within said territory, or any part thereof, and for the assumption by the city of Chicago of the debts and liabilities (in whole or in part) of the governments or corporate authorities whose functions within its territory shall be vested in said city of Chicago, and may authorize said city, in the event of its becoming liable for the indebtedness of two or more of the existing municipal corporations lying wholly within said city of Chicago, to be-

come indebted to an amount (including its existing indebtedness and the indebtedness of all municipal corporations lying wholly within the limits of said city, and said city's proportionate share of the indebtedness of said county and sanitary district which share shall be determined in such manner as the general assembly shall prescribe) in the aggregate not exceeding five per centum of the full value of the taxable property within its limits, as ascertained by the last assessment either for the state or municipal purposes previous to the incurring of such indebtedness (but no new bonded indebtedness, other than for refunding purposes, shall be incurred until the proposition therefor shall be consented to by a majority of the legal voters of said city voting on the question at any election, general, municipal or special); and may provide for the assessment of property and the levy and collection of taxes within said city for corporate purposes in accordance with the principles of equality and uniformity prescribed by this constitution; and may abolish all offices, the functions of which shall be otherwise provided for; and may provide for the annexation of territory to or disconnection of territory from said city of Chicago by the consent of a majority of the legal voters (voting on the question at any election, general, municipal or special) of the said city and of a majority of the voters of such territory voting on the question at any election, general, municipal or special; and in case the general assembly shall create municipal courts in the city of Chicago it may abolish the offices of justices of the peace, police magistrates and constables in and for the territory within said city, and may limit the jurisdiction of justices of the peace in the territory of said county of Cook outside of said city to that territory, and in such case the jurisdiction and practice of said municipal courts shall be such as the general assembly shall prescribe; and the general assembly may pass all laws which it may deem requisite to effectually provide a complete system of local municipal government in and for the city of Chicago.

No law based upon this amendment to the Constitution,

affecting the municipal government of the city of Chicago, shall take effect until such law shall be consented to by a majority of the legal voters of said city voting on the question at any election, general, municipal or special; and no local or special law based upon this amendment affecting specially any part of the city of Chicago shall take effect until consented to by a majority of the legal voters of such part of said city voting on the question at any election, general, municipal or special. Nothing in this section contained shall be construed to repeal, amend or affect section four (4) of Article XI of the Constitution of this state.

Article V.

EXECUTIVE DEPARTMENT.

1. The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction and attorney general, who shall, each, with the exception of the treasurer, hold his office for the term of four years from the second Monday of January next after his election, and until his successor is elected and qualified. They shall, except the lieutenant governor, reside at the seat of government during their term of office, and keep the public records, books and papers there, and shall perform such duties as may be prescribed by law.

2. The treasurer shall hold his office for the term of two years, and until his successor is elected and qualified, and shall be ineligible to said office for two years next after the end of the term for which he was elected. He may be required by the governor to give reasonable additional security, and in default of so doing his office shall be deemed vacant.

ELECTION.

3. An election for governor, lieutenant governor, secretary of state, auditor of public accounts, and attorney general, shall be held on the Tuesday next after the first Monday of November, in the year of our Lord 1872, and every

four years thereafter; for superintendent of public instruction, on the Tuesday next after the first Monday of November, in the year 1870, and every four years thereafter and for treasurer on the day last above mentioned, and every two years thereafter, at such places and in such manner as may be prescribed by law.

4. The returns of every election for the above named officers shall be sealed up and transmitted, by the returning officers, to the secretary of state, directed to "The speaker of the house of representatives," who shall, immediately after the organization of the house, and before proceeding to other business, open and publish the same in the presence of a majority of each house of the general assembly, who shall, for that purpose, assemble in the hall of the house of representatives. The person having the highest number of votes for either of said offices shall be declared duly elected; but if two or more have an equal and the highest number of votes, the general assembly shall, by joint ballot, choose one of such persons for said office. Contested election for all of said offices shall be determined by both houses of the general assembly, by joint ballot, in such manner as may be prescribed by law.

ELIGIBILITY.

5. No person shall be eligible to the office of governor, or lieutenant governor, who shall not have attained the age of thirty years, and been, for five years next preceding his election, a citizen of the United States and of this state. Neither the governor, lieutenant governor, auditor of public accounts, secretary of state, superintendent of public instruction nor attorney general shall be eligible to any other office during the period for which he shall have been elected.

GOVERNOR.

6. The supreme executive power shall be vested in the governor, who shall take care that the laws be faithfully executed.

7. The governor shall, at the commencement of each ses-

sion, and at the close of his term of office, give to the general assembly information, by message, of the condition of the state, and shall recommend such measures as he shall deem expedient. He shall account to the general assembly, and accompany his message with a statement of all moneys received and paid out by him from any funds subject to his order, with vouchers, and, at the commencement of each regular session, present estimates of the amount of money required to be raised by taxation for all purposes.

8. The governor may, on extraordinary occasions, convene the general assembly, by proclamation, stating therein the purpose for which they are convened; and the general assembly shall enter upon no business except that for which they were called together.

9. In case of a disagreement between the two houses with respect to the time of adjournment, the governor may, on the same being certified to him, by the house first moving the adjournment, adjourn the general assembly to such time as he thinks proper, not beyond the first day of the next regular session.

10. The governor shall nominate, and by and with the advice and consent of the senate (a majority of all the senators elected concurring, by yeas and nays), appoint all officers whose offices are established by this constitution, or which may be created by law, and whose appointment or election is not otherwise provided for; and no such officer shall be appointed or elected by the general assembly.

11. In any case of vacancy, during the recess of the senate, in any office which is not elective, the governor shall make a temporary appointment until the next meeting of the senate, when he shall nominate some person to fill such office; and any person so nominated, who is confirmed by the senate (a majority of all the senators elected concurring by yeas and nays), shall hold his office during the remainder of the term, and until his successor shall be appointed and qualified. No person, after being rejected by the senate, shall be again nominated for the same office at

the same session, unless at the request of the senate, or be appointed to the same office during the recess of the general assembly.

12. The governor shall have power to remove any officer whom he may appoint, in case of incompetency, neglect of duty, or malfeasance in office; and he may declare his office vacant, and fill the same as is herein provided in other cases of vacancy.

13. The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, subject to such regulations as may be provided by law relative to the manner of applying therefor.

14. The governor shall be commander-in-chief of the military and naval forces of the state (except when they shall be called into the service of the United States), and may call out the same to execute the laws, suppress insurrection, and repel invasion.

15. The governor, and all civil officers of this state, shall be liable to impeachment for any misdemeanor in office.

VETO.

16. Every bill passed by the general assembly shall, before it becomes a law, be presented to the governor. If he approves, he shall sign it, and thereupon it shall become a law; but if he does not approve, he shall return it, with his objections, to the house in which it shall have originated, which house shall enter the objections at large upon its journal, and proceed to reconsider the bill. If, then, two-thirds of the members elected agree to pass the same, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members elected to that house, it shall become a law, notwithstanding the objections of the governor. But in all such cases the vote of each house shall be determined by yeas and nays, to be entered upon the journal.

Bills making appropriations of money out of the treasury shall specify the objects and purposes for which the

same are made, and appropriate to them respectively their several amounts in distinct items and sections, and if the governor shall not approve any one or more of the items or sections contained in any bill, but shall approve the residue thereof, it shall become a law as to the residue in like manner as if he had signed it.

The governor shall then return the bill, with his objections to the items or sections of the same not approved by him, to the house in which the bill shall have originated, which house shall enter the objections at large upon its journal, and proceed to reconsider so much of said bill as is not approved by the governor.

The same proceedings shall be had in both houses in reconsidering the same as is hereinbefore provided in case of an entire bill returned by the governor with his objections; and if any item or section of said bill not approved by the governor shall be passed by two-thirds of the members elected to each of the two houses of the general assembly, it shall become part of said law, notwithstanding the objections of the governor.

Any bill which shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, shall become a law in like manner as if he had signed it; unless the general assembly shall, by their adjournment, prevent its return, in which case it shall be filed with his objections in the office of the secretary of state, within ten days after such adjournment, or become a law.

LIEUTENANT GOVERNOR.

17. In case of the death, conviction on impeachment, failure to qualify, resignation, absence from the state, or other disability of the governor, the powers, duties and emoluments of the office, for residue of the term, or until the disability shall be removed, shall devolve upon the lieutenant governor.

18. The lieutenant governor shall be president of the senate, and shall vote only when the senate is equally divided. The senate shall choose a president, pro tempore,

to preside in case of the absence or impeachment of the lieutenant governor, or when he shall hold the office of governor.

19. If there be no lieutenant governor, or if the lieutenant governor shall, for any of the causes specified in section 17 of this article, become incapable of performing the duties of the office, the president of the senate shall act as governor until the vacancy is filled or the disability removed; and if the president of the senate, for any of the above named causes, shall become incapable of performing the duties of governor, the same shall devolve upon the speaker of the house of representatives.

OTHER STATE OFFICERS.

20. If the office of auditor of public accounts, treasurer, secretary of state, attorney general, or superintendent of public instruction shall be vacated by death, resignation or otherwise, it shall be the duty of the governor to fill the same by appointment, and the appointee shall hold his office until his successor shall be elected and qualified in such manner as may be provided by law. An account shall be kept by the officers of the executive department, and of all the public institutions of the state, of all moneys received or disbursed by them, severally, from all sources, and for every service performed, and a semi-annual report thereof be made to the governor, under oath; and any officer who makes a false report shall be guilty of perjury, and punished accordingly.

21. The officers of the executive department, and of all the public institutions of the state, shall, at least ten days preceding each regular session of the general assembly, severally report to the governor, who shall transmit such reports to the general assembly, together with the reports of the judges of the Supreme Court of the defects in the constitution and laws; and the governor may at any time require information in writing, under oath, from the officers of the executive department, and all officers and managers of state institutions, upon any subject relating to the

condition, management and expenses of their respective offices.

THE SEAL OF STATE.

22. There shall be a seal of the state, which shall be called the "Great seal of the State of Illinois," which shall be kept by the secretary of state, and used by him, officially, as directed by law.

FEES AND SALARIES.

23. The officers named in this article shall receive for their services a salary to be established by law, which shall not be increased or diminished during their official terms, and they shall not, after the expiration of the terms of those in office at the adoption of this constitution, receive to their own use any fees, costs, perquisites or office, or other compensation. And all fees that may hereafter be payable by law for any service performed by any officer provided for in this article of the constitution, shall be paid in advance into the state treasury.

DEFINITION AND OATH OF OFFICE.

24. An office is a public position created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency, for a temporary purpose, which ceases when that purpose is accomplished.

25. All civil officers, except members of the general assembly and such inferior officers as may be by law exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation:

I do solemnly swear (or affirm, as the case may be) that I will support the constitution of the United States, and the constitution of the State of Illinois, and that I will faithfully discharge the duties of the office of — according to the best of my ability.

And no other oath, declaration or test shall be required as a qualification.

Article VI.

JUDICIAL DEPARTMENT.

1. The judicial powers, except as in this article is otherwise provided, shall be vested in one supreme court, circuit courts, county courts, justices of the peace, police magistrates, and such courts as may be created by law in and for cities and incorporated towns.

SUPREME COURT.

2. The supreme court shall consist of seven judges, and shall have original jurisdiction in cases relating to the revenue, in mandamus and habeas corpus, and appellate jurisdiction in all other cases. One of said judges shall be chief justice; four shall constitute a quorum, and the concurrence of four shall be necessary to every decision.

3. No person shall be eligible to the office of judge of the supreme court unless he shall be at least thirty years of age, and a citizen of the United States, nor unless he shall have resided in this state five years next preceding his election, and be a resident of the district in which he shall be elected.

4. Terms of the supreme court shall continue to be held in the present grand divisions at the several places now provided for holding the same; and until otherwise provided by law, one or more terms of said court shall be held, for the northern division, in the city of Chicago, each year, at such times as said court may appoint, whenever said city or the county of Cook shall provide appropriate rooms therefor, and the use of a suitable library, without expense to the state. The judicial divisions may be altered, increased or diminished in number, and the times and places of holding said court may be changed by law.

5. The present grand divisions shall be preserved, and be denominated Southern, Central and Northern, until otherwise provided by law. The state shall be divided into

seven districts for the election of judges, and until otherwise provided by law, they shall be as follows:

First District.—The counties of St. Clair, Clinton, Washington, Jefferson, Wayne, Edwards, Wabash, White, Hamilton, Franklin, Perry, Randolph, Monroe, Jackson, Williamson, Saline, Gallatin, Hardin, Pope, Union, Johnson, Alexander, Pulaski and Massac.

Second District.—The counties of Madison, Bond, Marion, Clay, Richland, Lawrence, Crawford, Jasper, Effingham, Fayette, Montgomery, Macoupin, Shelby, Cumberland, Clark, Green, Jersey, Calhoun and Christian.

Third District.—The counties of Sangamon, Macon, Logan, DeWitt, Piatt, Douglas, Champaign, Vermilion, McLean, Livingston, Ford, Iroquois, Coles, Edgar, Moultrie and Tazewell.

Fourth District.—The counties of Fulton, McDonough, Hancock, Schuyler, Brown, Adams, Pike, Mason, Menard, Morgan, Cass and Scott.

Fifth District.—The counties of Knox, Warren, Henderson, Mercer, Henry, Stark, Peoria, Marshall, Putnam, Bureau, LaSalle, Grundy and Woodford.

Sixth District.—The counties of Whiteside, Carroll, Jo Daviess, Stephenson, Winnebago, Boone, McHenry, Kane, Kendall, DeKalb, Lee, Ogle and Rock Island.

Seventh District.—The counties of Lake, Cook, Will, Kankakee and DuPage.

The boundaries of the districts may be changed at the session of the general assembly next preceding the election for judges therein, and at no other time; but whenever such alterations shall be made, the same shall be upon the rule of equality of population, as nearly as county bounds will allow, and the districts shall be composed of contiguous counties, in as nearly compact form as circumstances will permit. The alteration of the districts shall not affect the tenure of office of any judge.

6. At the time of voting on the adoption of this constitution, one judge of the supreme court shall be elected by the electors thereof, in each of said districts numbered

two, three, six and seven, who shall hold his office for the term of nine years, from the first Monday of June, in the year of our Lord 1870. The term of office of judges of the supreme court, elected after the adoption of this constitution, shall be nine years; and on the first Monday of June of the year in which the term of any of the judges in office at the adoption of this constitution, or of the judges then elected, shall expire, and every nine years thereafter, there shall be an election for the successor or successors of such judges, in the respective districts wherein the term of such judges shall expire. The chief justice shall continue to act as such until the expiration of the term for which he was elected, after which the judges shall choose one of their number chief justice.

7. From and after the adoption of this constitution, the judges of the supreme court shall each receive a salary of \$4,000 per annum, payable quarterly, until otherwise provided by law. And after said salaries shall be fixed by law, the salaries of the judges in office shall not be increased or diminished during the terms for which said judges shall have been elected.

8. Appeals and writs of error may be taken to the supreme court, held in the grand division in which the case is decided, or, by consent of the parties, to any other grand division.

9. The supreme court shall appoint one reporter of its decisions, who shall hold his office for six years, subject to removal by the court.

10. At the time of the election for representatives in the general assembly, happening next preceding the expiration of the terms of office of the present clerks of said court, one clerk of said court for each division shall be elected, whose term of office shall be six years from said election, but who shall not enter upon the duties of his office until the expiration of the term of his predecessor, and every six years thereafter one clerk of said court for each division shall be elected.

APPELLATE COURTS.

11. After the year of our Lord 1874, inferior appellate courts, of uniform organization and jurisdiction, may be created in districts formed for that purpose, to which such appeals and writs of error as the general assembly may provide may be prosecuted from circuit and other courts, and from which appeals and writs of error shall lie to the supreme court, in all criminal cases, and cases in which a franchise or freehold or the validity of a statute is involved, and in such other cases as may be provided by law. Such appellate courts shall be held by such number of judges of the circuit courts, and at such times and places, and in such manner, as may be provided by law; but no judges shall sit in review upon cases decided by him, nor shall said judges receive any additional compensation for such services.

CIRCUIT COURTS.

12. The circuit courts shall have original jurisdiction of all causes in law and equity, and such appellate jurisdiction as is or may be provided by law, and shall hold two or more terms each year in every county. The terms of office of judges of circuit courts shall be six years.

13. The state exclusive of the county of Cook and other counties having a population of 100,000, shall be divided into judicial circuits, prior to the expiration of the terms of office of the present judges of the circuit courts. Such circuits shall be formed of contiguous counties, in as nearly compact form and as nearly equal as circumstances will permit, having due regard to business, territory and population, and shall not exceed in number one circuit for every 100,000 of population in the state. One judge shall be elected for each of said circuits by the electors thereof. New circuits may be formed and the boundaries of circuits changed by the general assembly, at its session next preceding the election for circuit judges, but at no other time: Provided, that the circuits may be equalized or changed at the first session of the general assembly after the adoption of this constitution. The creation, alteration or change of

any circuit shall not affect the tenure of office of any judge. Whenever the business of the circuit court of any one or of two or more contiguous counties, containing a population exceeding 50,000, shall occupy nine months of the year, the general assembly may make of such county or counties a separate circuit. Whenever additional circuits are created, the foregoing limitations shall be observed.

14. The general assembly shall provide for the times of holding court in each county, which shall not be changed, except by the general assembly next preceding the general election for judges of said courts; but additional terms may be provided for in any county. The election for judges of the circuit courts shall be held on the first Monday in June, in the year of our Lord 1873, and every six years thereafter.

15. The general assembly may divide the state into judicial circuits of greater population and territory, in lieu of the circuits provided for in section 13 of this article, and provide for the election therein, severally, by the electors thereof, by general ticket, of not exceeding four judges, who shall hold the circuit courts in the circuit for which they shall be elected, in such manner as may be provided by law.

16. From and after the adoption of this constitution, judges of the circuit courts shall receive a salary of \$3,000 per annum, payable quarterly, until otherwise provided by law. And after their salaries shall be fixed by law, they shall not be increased or diminished during the terms for which said judges shall be, respectively, elected; and from and after the adoption of this constitution, no judge of the supreme or circuit court shall receive any other compensation, perquisite or benefit, in any form whatsoever, nor perform any other than judicial duties to which may belong any emoluments.

17. No person shall be eligible to the office of judge of the circuit or any inferior court, or to membership in the "board of county commissioners," unless he shall be at least 25 years of age, and a citizen of the United States, nor unless he shall have resided in this state five years next

preceding his election, and be a resident of the circuit, county, city, cities or incorporated town in which he shall be elected.

COUNTY COURTS.

18. There shall be elected in and for each county, one county judge and one clerk of the county court, whose terms of office shall be four years. But the general assembly may create districts of two or more contiguous counties, in each of which shall be elected one judge, who shall take the place of and exercise the powers and jurisdiction of county judges in such districts. County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians and conservators, and settlements of their accounts, in all matters relating to apprentices, and in proceedings for the collection of taxes and assessments, and such other jurisdiction as may be provided for by general law.

19. Appeals and writs or error shall be allowed from final determinations of county courts, as may be provided by law.

PROBATE COURTS.

20. The general assembly may provide for the establishment of a probate court in each county having a population of over 50,000, and for the election of a judge thereof, whose term of office shall be the same as that of the county judge, and who shall be elected at the same time and in the same manner. Said courts, when established, shall have original jurisdiction of all probate matters, the settlement of estates of deceased persons, the appointment of guardians and conservators, and settlement of their accounts; in all matters relating to apprentices, and in cases of the sales of real estate of deceased persons for the payment of debts.

JUSTICES OF THE PEACE AND CONSTABLES.

21. Justices of the peace, police magistrates, and constables shall be elected in and for such districts as are, or

may be, provided by law, and the jurisdiction of such justices of the peace and police magistrates shall be uniform.

STATE'S ATTORNEYS.

22. At the election for members of the general assembly in the year of our Lord 1872, and every four years thereafter, there shall be elected a state's attorney in and for each county, in lieu of the state's attorneys now provided by law, whose term of office shall be four years.

COURTS OF COOK COUNTY.

23. The county of Cook shall be one judicial circuit. The circuit of Cook county shall consist of five judges, until their number shall be increased, as herein provided. The present judge of the recorder's court of the city of Chicago, and the present judge of the circuit court of Cook county, shall be two of said judges, and shall remain in office for the terms for which they were respectively elected and until their successors shall be elected and qualified. The superior court of Chicago shall be continued, and called the superior court of Cook county. The general assembly may increase the number of said judges, by adding one to either of said courts for every additional 50,000 inhabitants in said county, over and above a population of 400,000. The terms of office of the judges of said courts hereafter elected, shall be six years.

24. The judge having the shortest unexpired term shall be chief justice of the court of which he is a judge. In case there are two or more whose terms expire at the same time, it may be determined by lot which shall be chief justice. Any judge of either of said courts shall have all the powers of a circuit judge, and may hold the court of which he is a member. Each of them may hold a different branch thereof at the same time.

25. The judges of the superior and circuit courts, and the state's attorney, in said county, shall receive the same salaries, payable out of the state treasury, as is or may be paid from said treasury to the circuit judges and state's

attorneys of the state, and such further compensation, to be paid by the county of Cook, as is or may be provided by law; such compensation shall not be changed during their continuance in office.

26. The recorder's court of the city of Chicago shall be continued, and shall be called the "criminal court of Cook county." It shall have the jurisdiction of a circuit court, in all cases of criminal and quasi criminal nature, arising in the county of Cook, or that may be brought before said court pursuant to law; and all recognizances and appeals taken in said county, in criminal and quasi criminal cases, shall be returnable and taken to said court. It shall have no jurisdiction in civil cases, except in those on behalf of the people, and incident to such criminal or quasi criminal matters, and to dispose of unfinished business. The terms of said criminal court of Cook county shall be held by one or more of the judges of the circuit or superior court of Cook county, as nearly as may be in alternation, as may be determined by said judges, or provided by law. Said judges shall be *ex officio* judges of said court.

27. The present clerk of the recorder's court of the city of Chicago shall be the clerk of the criminal court of Cook county, during the term for which he was elected. The present clerks of the superior court of Chicago, and the present clerk of the circuit court of Cook county, shall continue in office during the terms for which they were respectively elected; and thereafter there shall be but one clerk of the superior court, to be elected by the qualified electors of said county, who shall hold his office for the term of four years, and until his successor is elected and qualified.

28. All justices of the peace in the city of Chicago shall be appointed by the governor, by and with the advice and consent of the senate (but only upon the recommendation of a majority of the judges of the circuit, superior and county courts), and for such districts as are now or shall hereafter be provided by law. They shall hold their offices for four years, and until their successors have been com-

missioned and qualified, but they may be removed by summary proceeding in the circuit or superior court, for extortion or other malfeasance. Existing justices of the peace and police magistrates may hold their offices until the expiration of their respective terms.

GENERAL PROVISIONS.

29. All judicial officers shall be commissioned by the governor. All laws relating to courts shall be general, and of uniform operation; and the organization, jurisdiction, powers, proceedings and practice of all courts, of the same class or grade, so far as regulated by law, and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform.

30. The general assembly may, for cause entered on the journals, upon due notice and opportunity of defense, remove from office any judge, upon concurrence of three-fourths of all the members elected, of each house. All other officers in this article mentioned shall be removed from office on prosecution and final conviction for misdemeanor in office.

31. All judges of courts of record, inferior to the supreme court, shall, on or before the first day of June, of each year, report in writing to the judges of the supreme court such defects and omissions in the laws as their experience may suggest; and the judges of the supreme court shall, on or before the first day of January of each year, report in writing to the governor such defects and omissions in the constitution and laws as they may find to exist, together with appropriate forms of bills to cure such defects and omissions in the laws. And the judges of the several circuit courts shall report to the next general assembly the number of days they have held court in the several counties composing their respective circuits, the preceding two years.

32. All officers provided for in this article shall hold their offices until their successors shall be qualified, and they shall, respectively, reside in the division, circuit,

county or district for which they may be elected or appointed. The terms of office of all such officers, where not otherwise prescribed in this article, shall be four years. All officers, where not otherwise provided for in this article, shall perform such duties and receive such compensation as is or may be provided by law. Vacancies in such elective offices shall be filled by election; but where the unexpired term does not exceed one year, the vacancy shall be filled by appointment, as follows: Of judges, by the governor; of clerks of courts, by the court to which the office appertains, or by the judge or judges thereof; and of all such other offices, by the board of supervisors or board of county commissioners in the county where the vacancy occurs.

33. All process shall run: In the name of the People of the State of Illinois; and all prosecutions shall be carried on: In the name and by the authority of the People of the State of Illinois; and conclude: Against the peace and dignity of the same. "Population," wherever used in this article, shall be determined by the next preceding census of this state, or of the United States.

Article VII.

SUFFRAGE.

1. Every person having resided in this state one year, in the county 90 days, and in the election district 30 days next preceding any election therein, who was an elector in this state on the first day of April, in the year of our Lord 1848, or obtained a certificate of naturalization before any court of record in this state prior to the first day of January, in the year of our Lord 1870, or who shall be a male citizen of the United States, above the age of 21 years, shall be entitled to vote at such election.

2. All votes shall be by ballot.

3. Electors shall, in all cases except treason, felony, or breach of the peace, be privileged from arrest during their attendance at elections, and in going to and returning from

the same. And no elector shall be obliged to do military duty on the days of election, except in time of war or public danger.

4. No elector shall be deemed to have lost his residence in this state by reason of his absence on business of the United States, or of this state, or in the military or naval service of the United States.

5. No soldier, seaman or marine in the army or navy of the United States shall be deemed a resident of this state in consequence of being stationed therein.

6. No person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and who shall not have resided in this state one year next preceding the election or appointment.

7. The general assembly shall pass laws excluding from the right of suffrage persons convicted of infamous crimes.

Article VIII.

EDUCATION.

1. The general assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education.

2. All lands, moneys, or other property, donated, granted or received for schools, college, seminary or university purposes, and the proceeds thereof, shall be faithfully applied to the objects for which such gifts or grants were made.

3. Neither the general assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property, ever be made by the state or any such public corporation, to any church, or for any sectarian purpose.

4. No teacher, state, county, township or district school officer shall be interested in the sale, proceeds or profits of any book, apparatus or furniture used or to be used in any school in this state, with which such officer or teacher may be connected, under such penalties as may be provided by the general assembly.

5. There may be a county superintendent of schools in each county, whose qualifications, powers, duties, compensation, and time and manner of election, and term of office, shall be prescribed by law.

Article IX.

REVENUE.

1. The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates.

2. The specification of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this constitution.

3. The property of the state, counties, and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation;

but such exemption shall be only by general law. In the assessment of real estate incumbered by public easement, any depreciation occasioned by such easement may be deducted in the valuation of such property.

4. The general assembly shall provide, in all cases where it may be necessary to sell real estate for the non-payment of taxes or special assessments for state, county, municipal or other purposes, that a return of such unpaid taxes or assessments shall be made to some general officer of the county having authority to receive state and county taxes; and there shall be no sale of said property for any of said taxes or assessments but by said officer, upon the order or judgment of some court of record.

5. The right of redemption from all sales of real estate for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof. And the general assembly shall provide by law for reasonable notice to be given to the owners or parties interested, by publication or otherwise, of the fact of the sale of the property for such taxes or assessments, and when the time of redemption shall expire: Provided, that occupants shall in all cases be served with personal notice before the time of redemption expires.

6. The general assembly shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, nor shall commutation for such taxes be authorized in any form whatsoever.

7. All taxes levied for state purposes shall be paid into the state treasury.

8. County authorities shall never assess taxes, the aggregate of which shall exceed 75 cents per \$100 valuation, except for the payment of indebtedness existing at the adoption of this constitution, unless authorized by a vote of the people of the county.

9. The general assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property, within the jurisdiction of the body imposing the same.

10. The general assembly shall not impose taxes upon municipal corporations, or the inhabitants or property thereof, for corporate purposes, but shall require that all the taxable property within the limits of municipal corporations shall be taxed for the payment of debts contracted under authority of law, such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same. Private property shall not be liable to be taken or sold for the payment of the corporate debts of a municipal corporation.

11. No person who is in default, as collector or custodian of money or property belonging to a municipal corporation, shall be eligible to any office in or under such corporation. The fees, salary or compensation of no municipal officer who is elected or appointed for a definite term of office, shall be increased or diminished during such term.

12. No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes, previous to the incurring of such indebtedness. Any county, city, school district, or other municipal corporation, incurring any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge

the principal thereof within twenty years from the time of contracting the same. This section shall not be construed to prevent any county, city, township, school district, or other municipal corporation, from issuing their bonds in compliance with any vote of the people which may have been had prior to the adoption of this constitution in pursuance of any law providing therefor.

13. The corporate authorities of the City of Chicago are hereby authorized to issue interest-bearing bonds of said city to an amount not exceeding five million dollars, at a rate of interest not to exceed five per centum per annum, the principal payable within thirty years from the date of their issue, and the proceeds thereof shall be paid to the treasurer of the World's Columbian Exposition, and used and disbursed by him under the direction and control of the directors, and aid of the World's Columbian Exposition, to be held in the City of Chicago, in pursuance of an act of congress of the United States. Provided: That if at the election for the adoption of this amendment to the constitution a majority of the votes cast within the limits of the City of Chicago shall be against its adoption, then no bonds shall be issued under this amendment. And said corporate authorities shall be repaid as large a proportionate amount of the aid given by them as is repaid to the stockholders on the sums subscribed and paid by them, and the money so received shall be used in the redemption of the bonds issued as aforesaid, provided that said authorities may take in whole or in part of the sum coming to them any permanent improvements placed on land held or controlled by them. And provided further that no such indebtedness so created shall in any part thereof be paid by the state, or from any state revenue, tax or fund, but the same shall be paid by the said City of Chicago alone.

Article X.

COUNTIES.

1. No new county shall be formed or established by the general assembly, which will reduce the county or coun-

ties, or either of them, from which it shall be taken, to less contents than 400 square miles; nor shall any county be formed of less contents; nor shall any line thereof pass within less than ten miles of any county seat of the county or counties proposed to be divided.

2. No county shall be divided, or have any part stricken therefrom, without submitting the question to a vote of the people of the county, nor unless a majority of all the legal voters of the county, voting on the question, shall vote for the same.

3. There shall be no territory stricken from any county, unless a majority of the voters living in such territory shall petition for such division; and no territory shall be added to any county without the consent of the majority of the voters of the county to which it is proposed to be added. But the portion so stricken off and added to another county, or formed in whole or in part into a new county, shall be holden for, and obliged to pay its proportion of the indebtedness of the county from which it has been taken.

COUNTY SEATS.

4. No county seat shall be removed until the point to which it is proposed to be removed shall be fixed in pursuance of law, and three-fifths of the voters of the county, to be ascertained in such manner as shall be provided by general law, shall have voted in favor of its removal to such point; and no person shall vote on such question who has not resided in the county six months, and in the election precinct ninety days next preceding such election. The question of the removal of a county seat shall not be oftener submitted than once in ten years to a vote of the people. But when an attempt is made to remove a county seat to a point nearer to the center of a county, then a majority vote only shall be necessary.

COUNTY GOVERNMENT.

5. The general assembly shall provide, by general law, for township organization, under which any county may organize whenever a majority of the legal voters of such

county, voting at any general election, shall so determine, and whenever any county shall adopt township organization, so much of this constitution as provides for the management of the fiscal concerns of the said county by the board of county commissioners, may be dispensed with, and the affairs of said county may be transacted in such manner as the general assembly may provide. And in any county that shall have adopted a township organization, the question of continuing the same may be submitted to a vote of the electors of such county, at a general election, in the manner that now is or may be provided by law; and if a majority of all the votes cast upon that question shall be against township organization, then such organization shall cease in said county; and all laws in force in relation to counties not having township organization, shall immediately take effect and be in force in such county. No two townships shall have the same name, and the day of holding the annual township meeting shall be uniform throughout the state.

6. At the first election of county judges under this constitution there shall be elected in each of the counties in this state, not under township organization, three officers, who shall be styled "The board of county commissioners," who shall hold sessions for the transaction of county business as shall be provided by law. One of said commissioners shall hold his office for one year, one for two years, and one for three years, to be determined by lot; and every year thereafter one such officer shall be elected in each of said counties for the term of three years.

7. The county affairs of Cook county shall be managed by a board of commissioners of fifteen persons, ten of whom shall be elected from the City of Chicago, and five from towns outside of said city, in such manner as may be provided by law.

COUNTY OFFICERS AND THEIR COMPENSATION.

8. In each county there shall be elected the following county officers, at the general election to be held on the

Tuesday after the first Monday in November, A. D. 1882: A county judge, county clerk, sheriff, and treasurer; and at the election to be held on the Tuesday after the first Monday in November, A. D. 1884, a coroner and clerk of the circuit court (who may be ex-officio recorder of deeds, except in counties having 60,000 and more inhabitants, in which counties a recorder of deeds shall be elected at the general election in 1884). Each of said officers shall enter upon the duties of his office, respectively, on the first Monday of December, after his election, and they shall hold their respective offices for the term of four years, and until their successors are elected and qualified: Provided, that no person having once been elected to the office of sheriff, or treasurer, shall be eligible to re-election to said office for four years after the expiration of the term for which he shall have been elected.*

9. The clerks of all the courts of record, the treasurer, sheriff, coroner and recorder of deeds of Cook county, shall receive, as their only compensation for their services, salaries to be fixed by law, which shall in no case be as much as the lawful compensation of a judge of the circuit court of said county, and shall be paid, respectively, only out of the fees of the office actually collected. All fees, perquisites and emoluments (above the amount of said salaries) shall be paid into the county treasury. The number of the deputies and assistants of such officers shall be determined by rule of the circuit court, to be entered of record, and their compensation shall be determined by the county board.

10. The county board, except as provided in section 9 of this article, shall fix the compensation of all county officers, with the amount of their necessary clerk hire, stationery, fuel and other expenses, and in all cases where fees are provided for, said compensation shall be paid only out of, and shall in no instance exceed, the fees actually

*This section as amended was proposed by the general assembly, 1879, ratified by a vote of the people Nov. 2, 1880, proclaimed adopted by the governor Nov. 22, 1880.

collected; they shall not allow either of them more per annum than \$1,500, in counties not exceeding 20,000 inhabitants; \$2,000 in counties containing 20,000 and not exceeding 30,000 inhabitants; \$2,500 in counties containing 30,000 and not exceeding 50,000 inhabitants; \$3,000 in counties containing 50,000 and not exceeding 70,000 inhabitants; \$3,500 in counties containing 70,000 and not exceeding 100,000 inhabitants; and \$4,000 in counties containing over 100,000 and not exceeding 250,000 inhabitants; and not more than \$1,000 additional compensation for each additional 100,000 inhabitants: Provided, that the compensation of no officer shall be increased or diminished during his term of office. All fees or allowances by them received, in excess of their said compensation, shall be paid into the county treasury.

11. The fees of township officers, and of each class of county officers, shall be uniform in the class of counties to which they respectively belong. The compensation herein provided for shall apply only to officers hereafter elected, but all fees established by special laws shall cease at the adoption of this constitution, and such officers shall receive only such fees as are provided by general law.

12. All laws fixing the fees of state, county and township officers, shall terminate with the terms, respectively, of those who may be in office at the meeting of the first general assembly after the adoption of this constitution; and the general assembly shall, by general law, uniform in its operation, provide for and regulate the fees of said officers and their successors, so as to reduce the same to a reasonable compensation for services actually rendered, but the general assembly may, by general law, classify the counties by population into not more than three classes, and regulate the fees according to class. This article shall not be construed as depriving the general assembly of the power to reduce the fees of existing officers.

13. Every person who is elected to any office in this state, who shall be paid in whole or in part by fees, shall be required by law to make a semi-annual report, under

oath, to some officer to be designated by law, of all his fees and emoluments.

Article XI.

CORPORATIONS.

1. No corporation shall be created by special laws, or its charter extended, changed or amended, except those for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the state, but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created.

2. All existing charters or grants of special or exclusive privileges, under which organization shall not have taken place, or which shall not have been in operation within ten days from the time this constitution takes effect, shall thereafter have no validity or effect whatever.

3. The general assembly shall provide, by law, that in all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to accumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner.

4. No law shall be passed by the general assembly granting the right to construct and operate a street railroad within any city, town or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad.

BANKS.

5. No state bank shall hereafter be created, nor shall the state own or be liable for any stock in any corporation or joint stock company or association for banking purposes, now created, or to be hereafter created. No act of the general assembly authorizing or creating corporations or associations with banking powers, whether of issue, deposit or discount, nor amendments thereto, shall go into effect or in any manner be in force unless the same shall be submitted to a vote of the people at the general election next succeeding the passage of the same, and be approved by a majority of all the votes cast at such election for or against such law.

6. Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held, for all its liabilities accruing while he or she remains such stockholder.

7. The suspension of specie payments by banking institutions, on their circulation, created by the laws of this state, shall never be permitted or sanctioned. Every banking association now, or which may hereafter be organized under the laws of this state, shall make and publish a full and accurate quarterly statement of its affairs (which shall be certified to, under oath, by one or more of its officers), as may be provided by law.

8. If a general banking law shall be enacted, it shall provide for the registry and countersigning, by an officer of the state, of all bills or paper credit, designed to circulate as money, and require security, to the full amount thereof, to be deposited with the state treasurer, in the United States or Illinois state stocks, to be rated at ten per cent below their par value; and in case of a depreciation of said stocks to the amount of ten per cent below par, the bank or banks owning said stocks shall be required to make up said deficiency by depositing additional stocks. And said law shall also provide for the recording

of the names of all stockholders in such corporations, the amount of stock held by each, at the time of any transfer thereof, and to whom such transfer is made.

RAILROADS.

9. Every railroad corporation organized or doing business in this state, under the laws or authority thereof, shall have and maintain a public office or place in this state for the transaction of its business, where transfers of stock shall be made, and in which shall be kept, for public inspection, books, in which shall be recorded the amount of capital stock subscribed, and by whom; the names of the owners of its stock, and the amounts owned by them respectively; the amount of stock paid in, and by whom; the transfer of said stock; the amount of its assets and liabilities, and the names and place of residence of its officers. The directors of every railroad corporation shall, annually, make a report, under oath, to the auditor of public accounts, or some officer to be designated by law, of all their acts and doings, which report shall include such matters relating to railroads as may be prescribed by law. And the general assembly shall pass laws enforcing by suitable penalties the provisions of this section.

10. The rolling stock, and all other movable property belonging to any railroad company or corporation in this state, shall be considered personal property, and shall be liable to execution and sale in the same manner as the personal property of individuals, and the general assembly shall pass no law exempting any such property from execution and sale.

11. No railroad corporation shall consolidate its stock, property or franchise with any other railroad corporation owning a parallel or competing line; and in no case shall any consolidation take place, except upon public notice given, of at least sixty days, to all stockholders, in such manner as may be provided by law. A majority of the directors of any railroad corporation, now incorporated

or hereafter to be incorporated by the laws of this state, shall be citizens and residents of this state.

12. Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the general assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state.

13. No railroad corporation shall issue any stock or bonds, except for money, labor or property actually received, and applied to the purposes for which such corporation was created; and all stock dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation, shall be void. The capital stock of no railroad corporation shall be increased for any purpose, except upon giving sixty days' public notice, in such manner as may be provided by law.

14. The exercise of the power, and the right of eminent domain, shall never be so construed or abridged as to prevent the taking, by the general assembly, of the property and franchises of incorporated companies already organized, and subjecting them to the public necessity the same as of individuals. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of the said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right.

15. The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises.

Article XII.**MILITIA.**

1. The militia of the state of Illinois shall consist of all able-bodied male persons, resident in the state, between the ages of eighteen and forty-five, except such persons as now are, or hereafter may be, exempted by the laws of the United States, or of this state.

2. The general assembly, in providing for the organization, equipment and discipline of the militia, shall conform as nearly as practicable to the regulations for the government of the armies of the United States.

3. All militia officers shall be commissioned by the governor, and may hold their commissions for such time as the general assembly may provide.

4. The militia shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest during their attendance at musters and elections, and in going to and returning from the same.

5. The military records, banners and relics of the state, shall be preserved as an enduring memorial of the patriotism and valor of Illinois, and it shall be the duty of the general assembly to provide, by law, for the safe keeping of the same.

6. No person having conscientious scruples against bearing arms shall be compelled to do militia duty in time of peace: Provided, such person shall pay an equivalent for such exemption.

Article XIII.**WAREHOUSES.**

1. All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses.

2. The owner, lessee or manager of each and every public warehouse situated in any town or city of not less than 100,000 inhabitants, shall make weekly statements

under oath, before some officer to be designated by law, and keep the same posted in some conspicuous place in the office of such warehouse, and shall also file a copy for public examination in such place as shall be designated by law, which statement shall correctly set forth the amount and grade of each and every kind of grain in such warehouse, together with such other property as may be stored therein, and what warehouse receipts have been issued, and are, at the time of making such statement, outstanding therefor; and shall, on the copy posted in the warehouse, note daily such changes as may be made in the quantity and grade of grain in such warehouse; and the different grades of grain shipped in separate lots shall not be mixed with inferior or superior grades without the consent of the owner or consignee thereof.

3. The owners of property stored in any warehouse, or holder of a receipt for the same, shall always be at liberty to examine such property stored, and all the books and records of the warehouse in regard to such property.

4. All railroad companies and other common carriers on railroads shall weigh or measure grain at points where it is shipped, and receipt for the full amount, and shall be responsible for the delivery of such amount to the owner or consignee thereof, at the place of designation.

5. All railroad companies receiving and transporting grain in bulk or otherwise, shall deliver the same to any consignee thereof, or any elevator or public warehouse to which it may be consigned, provided such consignee or the elevator or public warehouse can be reached by any track owned, leased or used, or which can be used, by such railroad companies; and all railroad companies shall permit connections to be made with their track, so that any such consignee, and any public warehouse, coal bank or coal yard, may be reached by the cars on said railroad.

6. It shall be the duty of the general assembly to pass all necessary laws to prevent the issue of false and fraudulent warehouse receipts, and to give full effect to this article of the constitution, which shall be liberally con-

strued so as to protect producers and shippers. And the enumeration of the remedies herein named shall not be construed to deny to the general assembly the power to prescribe by law such other and further remedies as may be found expedient, or to deprive any person of existing common law remedies.

7. The general assembly shall pass laws for the inspection of grain, for the protection of producers, shippers and receivers of grain and produce.

Article XIV.

AMENDMENTS TO THE CONSTITUTION.

1. Whenever two-thirds of the members of each house of the general assembly shall, by a vote entered upon the journals thereof, concur that a convention is necessary to revise, alter or amend the constitution, the question shall be submitted to the electors at the next general election. If a majority voting at the election vote for a convention, the general assembly shall, at the next session, provide for a convention, to consist of double the number of members of the senate, to be elected in the same manner, at the same places and in the same districts. The general assembly shall, in the act calling the convention, designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the payment of the same, together with expenses necessarily incurred by the convention in the performance of its duties. Before proceeding, the members shall take an oath to support the constitution of the United States, and of the state of Illinois, and to faithfully discharge their duties as members of the convention. The qualification of members shall be the same as that of members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the general assembly. Said convention shall meet within three months after such election, and prepare such revision, alteration or amendments of the constitution as shall be deemed necessary, which shall be sub-

mitted to the electors for their ratification or rejection, at an election appointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alterations or amendments shall take effect.

2. Amendments to this constitution may be proposed in either house of the general assembly, and if the same shall be voted for by two-thirds of all the members elected to each of the two houses, such proposed amendments, together with the yeas and nays of each house thereon, shall be entered in full on their respective journals; and said amendments shall be submitted to the electors of this state for adoption or rejection, at the next election of members of the general assembly, in such manner as may be prescribed by law. The proposed amendments shall be published in full at least three months preceding the election, and if a majority of the electors voting at said election shall vote for the proposed amendments, they shall become a part of this constitution. But the general assembly shall have no power to propose amendments to more than one article of this constitution at the same session, nor to the same article oftener than once in four years.

Separate Sections.

ILLINOIS CENTRAL RAILROAD.

No contract, obligation or liability whatever, of the Illinois Central Railroad Company, to pay any money into the state treasury, nor any lien of the state upon, or right to tax property of said company in accordance with the provisions of the charter of said company, approved February 10th, in the year of our Lord 1851, shall ever be released, suspended, modified, altered, remitted, or in any manner diminished or impaired by legislative or other authority; and all moneys derived from said company, after the payment of the state debt, shall be appropriated and

set apart for the payment of the ordinary expenses of the state government, and for no other purposes whatever.

MUNICIPAL SUBSCRIPTIONS TO RAILROADS OR PRIVATE CORPORATIONS.

No county, city, town, township or other municipality, shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation: Provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption.

CANAL.

The Illinois and Michigan Canal shall never be sold or leased until the specific proposition for the sale or lease thereof shall first have been submitted to a vote of the people of the state at a general election, and have been approved by a majority of all the votes polled at such election. The general assembly shall never loan the credit of the state, or make appropriations from the treasury thereof, in aid of railroads or canals: Provided, that any surplus earnings of any canal, waterway or power may be appropriated for its enlargement, maintenance or extension.

Provided, further, that the general assembly may, by suitable legislation, provide for the construction of a deep waterway or canal from the present water power plant of the Sanitary District of Chicago, at or near Lockport, in the township of Lockport, in the county of Will, to a point in the Illinois river at or near Utica, which may be practical for a general plan and scheme of deep waterway along a route, which may be deemed most advantageous for such plan of deep waterway; and for the erection, equipment and maintenance of power plants, locks, bridges, dams and appliances sufficient and suitable for

the development and utilization of the water power thereof; and authorize the issue, from time to time, of bonds of this state in a total amount not to exceed twenty million dollars which shall draw interest, payable semi-annually, at a rate not to exceed four per cent per annum, the proceeds whereof may be applied as the general assembly may provide, in the construction of said waterway and in the erection, equipment and maintenance of said power plants, locks, bridges, dams and appliances.

All power developed from said waterway may be leased in part or in whole, as the general assembly may by law provide; but in the event of any lease being so executed, the rental specified therein for water power shall be subject to a revaluation each ten years of the term created, and the income therefrom shall be paid into the treasury of the state.

CONVICT LABOR.

Hereafter it shall be unlawful for the commissioners of any penitentiary or other reformatory institution in the state of Illinois, to let by contract to any person or persons, or corporations, the labor of any convict confined within said institution. (This section was submitted to the voters at the election in November, 1886, as an amendment, was adopted, and became a part of this Constitution.)

SCHEDULE.

That no inconvenience may arise from the alterations and amendments made in the constitution of this state, and to carry the same into complete effect, it is hereby ordained and declared:

1. That all laws in force at the adoption of this constitution, not inconsistent therewith, and all rights, actions, prosecutions, claims, and contracts of this state, individuals, or bodies corporate, shall continue to be as valid as if this constitution had not been adopted.

2. That all fines, taxes, penalties and forfeitures, due and owing to the state of Illinois under the present con-

stitution and laws, shall inure to the use of the people of the state of Illinois, under this constitution.

3. Recognizances, bonds, obligations, and all other instruments entered into or executed before the adoption of this constitution, to the people of the state of Illinois, to any state or county officer or public body, shall remain binding and valid; and rights and liabilities upon the same shall continue, and all crimes and misdemeanors shall be tried and punished as though no change had been made in the constitution of this state.

4. County courts for the transaction of county business in counties not having adopted township organization, shall continue in existence and exercise their present jurisdiction until the board of county commissioners provided in this constitution is organized in pursuance of an act of the general assembly; and the county courts in all other counties shall have the same power and jurisdiction they now possess until otherwise provided by general law.

5. All existing courts which are not in this constitution specifically enumerated shall continue in existence and exercise their present jurisdiction until otherwise provided by law.

6. All persons now filling any office or appointment shall continue in the exercise of the duties thereof according to their respective commissions or appointments, unless by this constitution it is otherwise directed.

* * * * *

18. All laws of the state of Illinois, and all official writings, and the executive, legislative and judicial proceedings, shall be conducted, preserved and published in no other than the English language.

19. The general assembly shall pass all laws necessary to carry into effect the provisions of this constitution.

20. The circuit clerks of the different counties having a population over sixty thousand shall continue to be recorders (ex-officio) for their respective counties, under this constitution, until the expiration of their respective terms.

21. The judges of all courts of record in Cook county

shall, in lieu of any salary provided for in this constitution, receive the compensation now provided by law until the adjournment of the first session of the general assembly after the adoption of this constitution.

22. The present judge of the circuit court of Cook county shall continue to hold the circuit court of Lake county until otherwise provided by law.

23. When this constitution shall be adopted, and take effect as the supreme law of the state of Illinois, the two-mill tax provided to be annually assessed and collected upon each dollar's worth of taxable property, in addition to all other taxes, as set forth in article fifteen of the now existing constitution, shall cease to be assessed after the year of our Lord one thousand eight hundred and seventy.

24. Nothing contained in this constitution shall be so construed as to deprive the general assembly of power to authorize the city of Quincy to create any indebtedness for railroad or municipal purposes, for which the people of said city shall have voted, and to which they shall have given, by such vote, their assent, prior to the thirteenth day of December, in the year of our Lord one thousand eight hundred and sixty-nine: Provided, that no such indebtedness, so created, shall in any part thereof be paid by the state, or from any state revenue, tax or fund, but the same shall be paid, if at all, by the said city of Quincy alone, and by taxes to be levied upon the taxable property thereof: And, provided, further, that the general assembly shall have no power in the premises that it could not exercise under the present constitution of this state.

25. In case this constitution and the articles and sections submitted separately be adopted, the existing constitution shall cease in all its provisions; and in case this constitution be adopted, and any one or more of the articles or sections submitted separately be defeated, the provisions of the existing constitution (if any) on the same subject shall remain in force.

26. The provisions of this constitution required to be

executed prior to the adoption or rejection thereof shall take effect and be in force immediately.

Done in convention at the capitol, in the city of Springfield, on the thirteenth day of May, in the year of our Lord one thousand eight hundred and seventy, and of the independence of the United States of America the ninety-fourth.

APPENDIX D.

UNIFORM NEGOTIABLE INSTRUMENTS ACT.

Title I.—Negotiable Instruments in General.

(The text of the original act is given in full, the changes in the Illinois statutes, in addition, being inserted in brackets.)

Article I.—Form and Interpretation.

[**Negotiable Instrument Must Conform to What Requirements.**] § 1. An instrument payable in money, to be negotiated, must conform to the following requirements:

1. It must be in writing and signed by the maker or drawer.
2. Must contain an unconditional promise or order to pay a sum certain in money.
3. Must be payable on demand or at a fixed or determinable future time.
4. Must be payable to order or to bearer, and,
(4. Must be payable to the order of a specified person or to bearer; and,)
5. Where the instrument is addressed to a drawee, he must be named or otherwise indicated therein with reasonable certainty.

[**Sum Payable Within the Act.**] § 2. The sum payable is a sum certain within the meaning of this act, although it is to be paid:

1. With interest; or
2. By stated installments; or
3. By stated installments, with a provision that upon default in payment of any installment, or of interest, the whole shall become due; or
4. With exchange, whether at a fixed rate or at the current rate; or

5. With costs of collection or an attorney's fee, in case payment shall not be made at maturity.

[**Promise to Pay—Unconditional—What Constitutes.**]

§ 3. An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with:

1. An indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or
2. A statement of the transaction which gives rise to the instrument.

But an order or promise to pay out of a particular fund is not unconditional.

[**Time Payable.**] § 4. An instrument is payable at a determinable future time, within the meaning of this act, which is expressed to be payable:

1. At a fixed period after date or sight; or
2. On or before a fixed or determinable future time specified therein; or
3. On or at a fixed period after the occurrence of a specified event, which is certain to happen, though the time of happening be uncertain.

An instrument payable upon a contingency is not negotiable, and the happening of the event does not cure the defect.

[**Negotiability—Affected by Including Act Additional to Payment.**] § 5. An instrument which contains an order or promise to do an act in addition to the payment of money is not negotiable under this act. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which:

1. Authorizes the sale of collateral securities in case the instrument be not paid at maturity; or
2. Authorizes a confession of judgment if the instrument be not paid at maturity; or
- (2. Authorizes a confession of judgment; or)
3. Waives the benefit of any law intended for the advantage or protection of the obligor; or
- (3. Waives the benefit of any law intended for the advantage or protection of the obligator; or)

4. Gives the holder an election to require something to be done in lieu of payment of money.

But nothing in this section shall validate any provision or stipulation otherwise illegal or authorize the waiver of exemptions from execution.

[**Validity and Negotiability, How Not Affected.**] § 6. The validity and negotiable character of an instrument are not affected by the fact that:

1. It is not dated; or
2. Does not specify the value given, or that any value has been given therefor; or
3. Does not specify the place where it is drawn or the place where it is payable; or
4. Bears a seal; or
5. Designates a particular kind of current money in which payment is to be made.

(5. Is payable in currency or current funds; or designates a particular kind of current money in which payment is to be made.)

[**Payable on Demand.**] § 7. An instrument is payable on demand:

1. Where it is expressed to be payable on demand, or at sight, or on presentation; or
2. In which no time for payment is expressed.

Where an instrument is issued, accepted or indorsed when over due, it is, as regards the person so issuing, accepting or indorsing it, payable on demand.

[**Payable to Order.**] § 8. The instrument is payable to order where it is drawn payable to the order of a specified person or to him or his order. It may be drawn payable to the order of:

1. A payee who is not maker, drawer or drawee; or
2. The drawer or maker; or
3. The drawee; or
4. Two or more payees jointly; or
5. One or some of several payees; or
- (5. One or more of several payees; or)
6. The holder of an office for the time being.
7. An instrument payable to the estate of a deceased

person shall be deemed payable to the order of the administrator or executor of his estate.

Where the instrument is payable to order, the payee must be named or otherwise indicated therein with reasonable certainty.

[**Payable to Bearer.**] § 9. The instrument is payable to bearer:

1. When it is expressed to be so payable; or

2. When it is payable to a person named therein or bearer; or

3. When it is payable to the order of a fictitious or non-existing person, and such fact was known to the person making it so payable; or

(3. When it is payable to the order of a person known by the drawer or maker to be fictitious or non-existent or of a living person not intended to have any interest in it; or)

4. When the name of the payee does not purport to be the name of any person; or

5. When the only or last endorsement is an endorsement in blank.

(5. When although originally payable to order, it is indorsed in blank by the payee or a subsequent endorsee.)

[**Need Not Follow Words of Statute.**] § 10. The negotiable instrument need not follow the language of this act, but any terms are sufficient which clearly indicate an intention to conform to the requirements thereof.

[**Date Deemed Date.**] § 11. When the instrument or an acceptance or any indorsement thereon is dated, such date is deemed prima facie to be the true date of the making, drawing, acceptance or indorsement, as the case may be.

[**Antedated, or Post-dated Instrument Takes Effect From Delivery.**] § 12. The instrument is not invalid for the reason only that it is antedated or post-dated, provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered acquires the title thereto as of the date of delivery.

[**Undated—Any Holder May Insert Date.**] § 13. When an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, but as to him, the date so inserted is to be regarded as the true date.

[**Signed in Blank, may Be Filled by Holder After Delivery.**] § 14. Where the instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is issued or negotiated to a holder in due course it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time.

[**Incomplete Instrument Negotiated Without Authority, Void.**] § 15. Where an incomplete instrument has not been delivered it will not, if completed and negotiated, without authority, be a valid contract in the hands of any holder, as against any person whose signature was placed thereon before delivery.

[**Delivery Required—When Presumed.**] § 16. Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties,

and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him, is conclusively presumed. And where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved.

Ambiguities and Omissions—Rules of Construction.

§ 17. Where the language of the instrument is ambiguous, or there are omissions therein, the following rules of construction apply:

1. Where the sum payable is expressed in words and also in figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, reference may be had to the figures to fix the amount.

2. Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof.

3. Where the instrument is not dated, it will be considered to be dated as of the time it was issued.

4. Where there is conflict between the written and printed provisions of the instrument, the written provisions prevail.

5. Where the instrument is so ambiguous that there is doubt whether it is a bill or a note, the holder may treat it as either, at his election.

6. Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser.

7. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon.

[**Signature—Trade or Assumed Name.**] § 18. No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed his own name.

[**May be Signed by Agent.**] § 19. The signature of any party may be made by a duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency.

[**Descriptive Words Added to Signature—When Surplusage.**] § 20. Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as agent, or as filling a representative character without disclosing his principal, does not exempt him from personal liability.

[**Signature by Procuration—Notice of Limited Authority.**] § 21. A signature by "procuration" operates as notice that the agent has but limited authority to sign, and the principal is bound in case the agent in so signing acted within the actual limits of his authority.

[**Assignment by Infant or Corporation Passes Title.**] § 22. The indorsement or assignment of the instrument by a corporation or by an infant passes the property therein, notwithstanding that for want of capacity the corporation or infant may incur no liability thereon.

[**Forged Signature.**] § 23. Where a signature is forged or made without authority it is wholly inoperative, and no right to retain the instrument or to give a discharge thereof, or to enforce payment thereof against any party thereto, can be acquired through or under such signature,

unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

Article II.—Consideration.

[**Consideration Presumed.**] § 24. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon to have become a party thereto for value.

[**Consideration — Value — Pre-existing Claim.**] § 25. Value is any consideration sufficient to support a simple contract.

2. An antecedent or pre-existing claim, whether for money or not, constitutes value where an instrument is taken either in satisfaction therefor or as security therefor and is deemed such, whether the instrument is payable on demand or at a future time.

[**Holder for Value.**] § 26. Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time.

[**Value Presumed to Extent of Lien.**] § 27. Whether the holder has a lien on the instrument arising either from contact or by implication of law, he is deemed a holder for value to the extent of his lien.

[**Absence or Failure of Consideration as Defense.**] § 28. Absence or failure of consideration is a matter of defense as against any person not a holder in due course, and partial failure of consideration is a defense pro tanto, whether the failure is an ascertained and liquidated amount or otherwise.

[**Accommodation Paper—Liabilities.**] § 29. An accommodation party is one who has signed the instrument as maker, drawer, acceptor, or indorser, for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party, and in case a transfer after maturity was intended by the accommo-

dating party notwithstanding such holder acquired title after maturity.

Article III.—Negotiation.

[**Negotiation—How Completed.**] § 30. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof; if payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery.

[**Indorsement, How Made—Not Negatived by Additional Words.**] § 31. The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement, and the addition of words of assignment or of guaranty shall not negative the additional effect of the signature as an indorsement unless otherwise expressly stated.

[**Indorsement Must be of Entire Instrument.**] § 32. The indorsement must be an indorsement of the entire instrument. An indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part, it may be indorsed as to the residue.

[**Indorsement May be Blank, Special or Restrictive.**] § 33. An indorsement may be either in blank or special; and it may also be either restrictive or qualified, or conditional.

[**Indorsement in Blank Payable to Bearer.**] § 34. A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery.

[**Holder May Convert Blank Indorsement Into Special.**] § 35. The holder may convert a blank indorsement into a

special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement.

[**Restrictive Indorsement, Elements of.**] § 36. An indorsement is restrictive which either:

1. Prohibits the further negotiation of the instrument; or

2. Constitutes the indorsee the agent of the indorser; or

3. Vests the title in the indorsee in trust for or to the use of some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive.

[**Rights Conferred by Restrictive Indorsements.**] § 37. A restrictive indorsement confers upon the indorsee the right:

1. To receive payment of the instrument.

2. To bring any action thereon that the indorser could bring.

(2. To bring any action thereon that the indorser could bring or accept in the case of a restrictive indorsement specified in section 36—sub-section 2, any action against the indorser or any prior party that a special indorsee would be entitled to bring.)

3. To transfer his rights as such indorsee, where the form of the indorsement authorizes him to do so.

(3. To transfer the instrument where the form of the indorsement authorizes him to do so.)

But all subsequent indorsees acquire only the title of the first indorsee under the restrictive indorsement specified in section 36—sub-section 1—and as against the principal or cestui que trust only the title of the first indorsee under the restrictive indorsements specified in section 36—sub-sections 2 and 3 respectively.

[**Qualified Indorsement Does Not Impair Negotiability.**] § 38. A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words "without recourse" or any words of similar import. Such

an indorsement does not impair the negotiable character of the instrument.

[**Conditional Indorsement Obligatory on Indorsee.**] § 39. Where an indorsement is conditional, a party required to pay the instrument may disregard the condition, and make a payment to the indorsee or his transferee, whether the condition has been fulfilled or not. But any person to whom an instrument so indorsed is negotiated, will hold the same, or the proceeds thereof, subject to the rights of the person indorsing conditionally.

[**Remote Special Indorser Protected.**] § 40. Where an instrument originally payable to or indorsed specially to bearer is subsequently indorsed specially it may nevertheless be further negotiated by delivery; but the person indorsing specially is liable as indorser to only such holders as make title through his indorsement.

[**When Payable to Several, All to Indorse.**] § 41. Where an instrument is payable to the order of two or more payees or indorseees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others.

[**Paper Drawn to Cashier Deemed Payable to His Bank.**] § 42. Where an instrument is drawn or indorsed to a person, as "Cashier" or other fiscal officer of a bank or corporation, it is deemed prima facie to be payable to the bank or corporation of which he is such officer; and may be negotiated by either the indorsement of the bank or corporation, or the indorsement of the officer.

[**Indorsement by Wrongly Designated Payee.**] § 43. Where the name of the payee or indorsee is wrongly designated or misspelled, he may indorse the instrument as therein described, adding, if he thinks fit, his proper signature.

[**Indorsement in Representative Capacity May Negative Personal Liability.**] § 44. Where any person is under obligation to indorse in a representative capacity, he may indorse in such terms as to negative personal liability.

[**Presumption of Negotiation Before Maturity.**] § 45. Except where an indorsement bears date after the matu-

rity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.

[**Presumptive Identity of Place of Indorsement With Date.**] § 46. Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated.

[**Negotiability Continues Till Discharge by Indorsement, Payment or Otherwise.**] § 47. An instrument negotiable in its origin continues to be negotiable until it has been respectively indorsed or discharged by payment or otherwise.

[**Owner May Strike Out Any Indorsement—Subsequent Indorsers Released.**] § 48. The owner may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out, and all indorsers subsequent to him, are thereby relieved from liability on the instrument.

[**Transfer Without Indorsement—Title Acquired.**] § 49. Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transferer vests in the transferee such title as the transferee had therein, and the transferee acquires, in addition, the right to enforce the instrument against one who signed for the accommodation of the transferer and the right to have the indorsement of the transferer if omitted by accident or mistake. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.

[**Prior Indorser May Acquire and Reissue Paper, But Can Not Enforce Against Intervening Indorsers.**] § 50. Where an instrument is negotiated back to a prior party, such party may, subject to the provisions of this act, reissue and further negotiate the same, but he is not entitled to enforce payment thereof against any intervening party to whom he was personally liable.

Article IV.—Rights of the Holder.

[**Holder May Sue in Own Name.**] § 51. The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument.

[**Holder in Due Course Defined.**] § 52. A holder in due course is a holder who has taken the instrument under the following conditions:

1. That it is complete and regular upon its face;
- (1. That the instrument is complete and regular upon its face.)
2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact.
3. That he took it in good faith and for value.
4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

[**Demand Paper Must be Negotiated Within Reasonable Time to Confer Rights.**] § 53. Where an instrument payable on demand is negotiated an unreasonable length of time after its issue, the holder is not deemed a holder in due course.

[**Transferee Receiving Notice of Infirmity After Partial Payment Protected Only Pro Tanto.**] § 54. Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.

[**Title Defective Through Obtaining Instrument or Signature Through Fraud or Duress.**] § 55. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

[**Notice of Infirmity—What Constitutes.**] § 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

[**Rights of a Holder in Due Course.**] § 57. A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves and may enforce payment of the instrument for the full amount thereof against all parties liable thereon (except the defect and defense specified in section 10 of act entitled "An act to revise the law in relation to promissory notes, bonds, due bills and other instruments in writing," approved March 18, 1874, in force July 1, 1874, and except the defect and defense specified in sections 131 and 136 of an act to revise the law in relation to criminal jurisprudence, approved March 27, 1874, in force July 1, 1874, known as sections 131 and 136 of Chapter 38 of the Revised Statutes of Illinois, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon.)

[**Rights of a Holder Deriving His Title Through Holder in Due Course.**] § 58. In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. But the holder who derives his title through a holder in due course, and who is not himself a party to any fraud or duress or illegality affecting the instrument, has all the rights of such former holder in respect to all parties prior to such holder.

[**Presumption in Favor of Holder in Due Course—Shifting Burden—Exception.**] § 59. Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last

mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.

Article V.—Liabilities of Parties.

[**Engagements of Maker.**] § 60. The maker of a negotiable instrument by making it engages that he will pay it according to its tenor, and admits the existence of the payee and his then capacity to indorse.

[**Engagements of Drawer.**] § 61. The drawer by drawing the instrument admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted or paid, or both, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any indorser who may be compelled to pay it. But the drawer may insert in the instrument an express stipulation negating or limiting his own liability to the holder.

[**Engagements of Acceptor.**] § 62. The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance, and admits:

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument; and

2. The existence of the payee and his then capacity to indorse.

[**Signing Otherwise Than as Maker, Drawer or Acceptor Deemed an Indorsement Unless Restricted.**] § 63. A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an endorser, unless he clearly indicated by appropriate words his intention to be bound in some other capacity.

[**Liability of Indorser in Blank Before Delivering.**] § 64. Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

1. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

(1. If the instrument is a note or bill, payable to the order of a third person or an accepted bill, payable to the order of the drawer, he is liable to the payee and to all subsequent parties.)

2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

(2. If the instrument is a note or unaccepted bill payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.)

3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.

[Warranties Imported by Negotiation by Delivery or Qualified Indorsement.] § 65. Every person negotiating an instrument by delivery or by a qualified indorsement, warrants:

1. That the instrument is genuine and in all respects what it purports to be.

2. That he has a good title to it.

3. That all prior parties had capacity to contract.

4. That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless.

(4. That he has no knowledge of any fact which would impair the validity of the instrument.)

But when the negotiation is by delivery only, the warranty extends in favor of no holder other than the immediate transferee.

The provisions of subdivision three of this section do not apply to persons negotiating public or corporate securities, other than bills and notes.

[Warranties of All Indorsers Except Accommodation Indorsers with Qualification.] § 66. Every indorser not an accommodating party who indorses without qualification, warrants to all subsequent holders in due course:

1. The matters and things mentioned in subdivision one, two, three and four of the next preceding section; and
2. That the instrument is at the time of his indorsement valid and subsisting.

And, in addition, every indorser engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent indorser who may be compelled to pay it.

[Indorsement of Instrument Negotiable by Delivery.]

§ 67. Where a person places his indorsement on an instrument negotiable by delivery he incurs all the liabilities of an indorser.

[Indorsers Liable in Order of Indorsements—Joint and Several Liability.] § 68. As respects one another, indorsers are liable prima facie in the order in which they indorse; but evidence is admissible to show that as between or among themselves they have agreed otherwise. All parties jointly liable on a negotiable instrument are deemed to be jointly and severally liable.

[Liability of Broker or Agent Negotiating Instrument Without Indorsement.] § 69. Where a broker or other agent negotiated an instrument without indorsement, he incurs all the liabilities prescribed by section sixty-five of this act, unless he discloses the name of his principal, and the fact that he is acting only as agent.

[Measure of Damages on Protest of Bill Drawn or Indorsed Within This State and Payable Without the State.] § 69a. Whenever any bill of exchange drawn or indorsed within this state and payable without this state is duly protested for non-acceptance or non-payment, the drawer or indorser thereof, due notice being given of such non-acceptance or non-payment, shall pay such bill at the current rate of exchange and with legal interest from the time such bill ought to have been paid until paid, together with the costs and charges of protest, and on bills payable in the United States in case suit has to be brought thereon

and on bills payable without the United States with or without suit, 5% damages in addition.

Article VI.—Presentment for Payment.

[**Presentment, When Necessary.**] § 70. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument except in case of bank notes; but if the instrument is, by its terms, payable at a special place and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided, presentment for payment is necessary in order to charge the drawer and indorsers.

[**Time off.**] § 71. Where the instrument is not payable on demand, presentment must be made on the day it falls due. Where it is payable on demand, presentment must be made within a reasonable time after its issue, except that in case of a bill of exchange, presentment for payment will be sufficient if made within a reasonable time after the last negotiation thereof.

[**Elements of Sufficiency.**] § 72. Presentment for payment, to be sufficient, must be made:

1. By the holder, or by some person authorized to receive payment on his behalf.
2. At a reasonable hour on a business day.
3. At a proper place as herein defined.
4. To the person primarily liable on the instrument, or if he is absent or inaccessible, to any person found at the place where the presentment is made.

[**Requirements as to Place.**] § 73. Presentment for payment is made at the proper place:

1. Where a place of payment is specified in the instrument and it is there presented.
2. Where no place of payment is specified and the address of the person to make the payment is given in the instrument and it is there presented.
3. Where no place of payment is specified and no address is given and the instrument is presented at the usual

place of business or residence of the person to make payment.

4. In any other case, if presented to the person to make payment wherever he can be found, or if presented at his last known place of business or residence.

[**Exhibition of Instrument and Delivery to Party Paying.**] § 74. The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.

[**Instrument Payable at Bank Must Be Presented During Banking Hours—Exception.**] § 75. Where the instrument is payable at a bank, presentment for payment must be made during banking hours, unless the person to make payment has no funds there to meet it at any time during the day, in which case presentment at any hour before the bank is closed on that day is sufficient.

[**To Personal Representative of Deceased Maker or Indorser.**] § 76. Where the person primarily liable on the instrument is dead, and no place of payment is specified, presentment for payment must be made to his personal representative if such there be, and if with exercise of reasonable diligence, he can be found.

[**Presentment for Payment to Any One of Several Partners.**] § 77. Where the persons primarily liable on the instrument are liable as partners, and no place of payment is specified, presentment for payment may be made to any one of them, even though there has been a dissolution of the firm.

[**Must Be Made to All Persons Primarily Liable Who Are Not Partners.**] § 78. Where there are several persons, not partners, primarily liable on the instrument, and no place of payment is specified, presentment must be made to them all.

[**To Drawee for Payment Not Required to Charge Drawer Where It Would Be Unavailing.**] § 79. Presentment for payment is not required in order to charge the drawer where he has no right to expect or require that the drawee or acceptor will pay the instrument.

[Not Required to Charge Indorser Upon Paper Made for His Accommodation.] § 80. Presentment for payment is not required to charge an indorser where the instrument was made or accepted for his accommodation.

[Delay in Making, When Excused.] § 81. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

[When Dispensed With.] § 82. Presentment for payment is dispensed with:

1. When after the exercise of reasonable diligence presentment as required by this act cannot be made.
2. Where the drawee is a fictitious person.
3. By waiver of presentment, express or implied.

[Instrument Dishonored by Non-payment When.] § 83. The instrument is dishonored by non-payment when:

1. It is duly presented for payment and payment is refused or cannot be obtained; or
2. Presentment is excused and the instrument is overdue and unpaid.

[Immediate Right of Recourse Against All Parties Secondarily Liable Accrues to Holder Upon Dishonor by Non-payment.] § 84. Subject to the provisions of this act, when the instrument is dishonored by non-payment, an immediate right of recourse to all parties secondarily liable thereon accrues to the holder.

[Time of Payment—No Grace—Sundays and Holidays.] § 85. Every negotiable instrument is payable at the time fixed therein without grace. When the day of maturity falls upon Sunday, or a holiday, the instrument is payable upon the next succeeding business day. Instruments falling due on Saturday are to be presented for payment on the next succeeding business day, except that instruments payable on demand may, at the option of the holder, be presented for payment before 12:00 o'clock noon on Saturday, when that entire day is not a holiday.

[**Computation of Time.**] § 86. Where the instrument is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the date of payment.

§ 87. Where the instrument is made payable at a bank, it is equivalent to an order to the bank to pay the same for the account of the principal debtor thereon.

[**What Is Payment Made in Due Course.**] § 88. Payment is made in due course when it is made at or after maturity of the instrument to the holder thereof in good faith and without notice that his title is defective.

Article VII.—Notice of Dishonor.

[**Notice of Dishonor Must Be Given Drawer and Each Indorser.**] § 89. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

[**On Whose Behalf Given.**] § 90. The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

[**Notice May Be Given by Agent.**] § 91. Notice of dishonor may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

[**Notice Given by Holder Inures for Benefit of All Prior Parties.**] § 92. Where notice is given by or on behalf of the holder, it inures for the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

[**Notice Inures for Benefit of Holder and All Parties Subsequent.**] § 93. Where notice is given by or on behalf of a party entitled to give notice, it inures for the benefit of

the holder and all parties subsequent to the party to whom notice is given.

[Instrument Dishonored in Hands of Agent—Notice, How Given.] § 94. Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

[Written Notice May Be Supplemented by Verbal Communication.] § 95. A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate unless the party to whom the notice is given is in fact misled thereby.

[Notice May Be Written or Oral—Personally or Through Mail.] § 96. The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

[Notice of Dishonor May Be Given to Party or Agent.] § 97. Notice of dishonor may be given either to the party himself or to his agent in that behalf.

[Service of Notice Upon Personal Representative of Deceased Party.] § 98. Where any party is dead, and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

[Notice to Any One of Several Partners Sufficient.] § 99. Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.

[Notice to Joint Parties Not Partners to be Given.] § 100. Notice to joint parties who are not partners must

be given to each of them, unless one of them has authority to receive such notice for the others.

[**Notice in Case of Bankrupt or Insolvent.**] § 101. Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of his creditors, notice may be given either to the party himself or to his trustee or assignee.

[**Time of Giving Notice of Dishonor.**] § 102. Notice may be given as soon as the instrument is dishonored, and unless delay is excused as hereinafter provided, must be given within the times fixed by this act.

[**Times Required for Notice Where Persons Giving and Receiving Reside in Same Place.**] § 103. Where the person giving and the person to receive notice reside in same place, notice must be given within the following times:

1. If given at the place of business of the person to receive notice, it must be given before the close of business hours on the day following.

2. If given at his residence, it must be given before the usual hours of rest on the day following.

3. If sent by mail, it must be deposited in the post-office in time to reach him in the usual course on the day following.

[**Times for Notice Where Persons Giving and Receiving Reside in Different Places.**] § 104. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

1. If sent by mail, it must be deposited in the post-office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

2. If given otherwise than through the postoffice, then within the time that notice would have been received in due course of mail, if it had been deposited in the postoffice within the time specified in the last subdivision.

[**Notice Duly Mailed Deemed Due Notice Notwithstanding Miscarriage.**] § 105. Where notice of dishonor is

duly addressed and deposited in the postoffice, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

[**Deposit in Letter Box Same as Postoffice.**] § 106. Notice is deemed to have been deposited in the postoffice when deposited in any branch postoffice or in any letter box under the control of the postoffice department.

[**Party Receiving Notice Has Same Time for Notifying Antecedent Parties.**] § 107. Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after dishonor.

[**Notice Sent, to What Address.**] § 108. Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

1. Either to the postoffice nearest to his place of residence, or to the postoffice where he is accustomed to receive his letters; or

2. If he lives in one place, and has his place of business in another, notice may be sent to either place; or

3. If he is sojourning in another place, notice may be sent to the place where he is sojourning.

But where the notice is actually received by the party within the time specified in this act, it will be sufficient, though not sent in accordance with the requirements of this section.

[**Notice May be Waived.**] § 109. Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give due notice, and the waiver may be express or implied.

[**Waiver Embodied in Instrument Binding on All Parties.**] § 110. Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only.

[**Waiver of Protest Waives Presentment and Notice of Dishonor.**] § 111. A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable in-

strument, is deemed to be a waiver not only of a formal protest, but also of a presentment and notice of dishonor.

[**Notice of Dishonor, When Dispensed With.**] § 112. Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it can not be given to or does not reach the parties sought to be charged.

[**Delay in Giving Notice of Dishonor, When Excused.**] § 113. Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

[**Notice of Dishonor, When Not Required to Drawer.**] § 114. Notice of dishonor is not required to be given to the drawer in either of the following cases:

1. Where the drawer and drawee are the same person.
2. Where the drawee is a fictitious person or a person not having capacity to contract.
3. Where the drawer is the person to whom the instrument is presented for payment.
4. Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument.
5. Where the drawer has countermanded payment.

[**Notice of Dishonor, When Not Required to Indorser.**] § 115. Notice of dishonor is not required to be given to an indorser in either of the following cases:

1. Where the drawee is a fictitious person or a person not having capacity to contract and the indorser was aware of the fact at the time he indorsed the instrument.
2. Where the indorser is the person to whom the instrument is presented for payment.
3. Where the instrument was made or accepted for his accommodation.

[**Notice of Non-acceptance Annuls Necessity for Notice of Subsequent Non-payment.**] § 116. Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary, unless in the meantime the instrument has been accepted.

[**Omission of Notice for Non-acceptance Not to Prejudice Holder in Due Course Subsequently.**] § 117. An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

[**Protest Required Only in Foreign Bills.**] § 118. Where any negotiable instrument has been dishonored it may be protested for non-acceptance or non-payment as the case may be; but protest is not required, except in the case of foreign bills of exchange.

Article VIII.—Discharge of Negotiable Instruments.

[**How Discharged.**] § 119. A negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor.

2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation.

3. By the intentional cancellation thereof by the holder.

4. By any other act which will discharge a simple contract for the payment of money.

(4. When the principal debtor becomes the holder of the instrument at or after maturity in his own right.)

[**How Secondary Liability Discharged.**] § 120. A person secondarily liable on the instrument is discharged:

1. By an act which discharges the instrument.

2. By the intentional cancellation of his signature by the holder.

3. By the discharge of a prior party.

(3. By a valid tender of payment made by a prior party.)

4. By a release of the principal debtor, unless the holder's right of recourse against the part (party) secondarily liable is expressly reserved, or unless the principal debtor be an accommodating party.

5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved.

(5. By an agreement in favor of the principal debtor binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent prior or subsequent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved, or unless the principal debtor be an accommodating party.)

6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved.

[**Rights of Party Secondarily Liable, on Paying.**] § 121. Where the instrument is paid by a party secondarily liable thereon, it is not discharged; but the party so paying it is remitted to his former rights as regards all prior parties, and he may strike out his own and all subsequent indorsements, and again negotiate the instrument, except:

1. Where it is payable to the order of a third person and has been paid by the drawer; and

2. Where it was made or accepted for accommodation, and has been paid by the party accommodated.

[**Holder May Expressly Renounce His Rights Against Any Party to the Paper.**] § 122. The holder may expressly renounce his rights against any party to the instrument before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument, discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

[**Unintentional Cancellation Inoperative—Burden of Proof.**] § 123. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where an instrument or any signature thereon appears to have been cancelled, the burden of

proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority.

[Material or Fraudulent Alteration of Instrument.]

§ 124. Where a negotiable instrument is fraudulently or materially altered by the holder without the assent of all the parties liable thereon, it is avoided except as against a party who has himself made, authorized or assented to the alteration and subsequent indorsers.

But when an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor.

[What Are Material Alterations.] § 125. Any alteration which changes:

1. The date.
2. The sum payable, either for principal or interest.
3. The time or place of payment.
4. The number and the relations of the parties.
5. The medium or currency in which payment is to be made.

Or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration.

TITLE II.—BILLS OF EXCHANGE.

Article I.—Form and Interpretation.

[Bill of Exchange Defined.] § 126. A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer.

[No Assignment of Funds Until Acceptance.] § 127. A bill of itself does not operate as an assignment of the funds in the hands of the drawee available for the payment

thereof, and the drawee is not liable on the bill unless and until he accepts the same.

[**May be Addressed to Several Drawees Jointly, But Not in the Alternative.**] § 128. A bill may be addressed to two or more drawees jointly, whether they are partners or not; but not to two or more drawees in the alternative or in succession.

[**Inland and Foreign Bills.**] § 129. An inland bill of exchange is a bill which is, or on its face purports to be, both drawn and payable within this state. Any other bill is a foreign bill. Unless the contrary appears on the face of the bill, the holder may treat it as an inland bill.

[**May be Treated at Option as a Bill or Note.**] § 130. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument at his option, either as a bill of exchange or a promissory note.

[**Referee in Case of Need.**] § 131. The drawer of a bill and any indorser may insert thereon the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonored by non-acceptance or non-payment. Such person is called the referee in case of need. It is the option of the holder to resort to the referee in case of need, or not, as he may see fit.

Article II.—Acceptance.

[**Acceptance Must be in Writing and Unconditional.**] § 132. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money.

[**Holder May Require Acceptance Written on Bill.**] § 133. The holder of a bill presenting the same for acceptance may require that the acceptance be written on the bill, and if such request is refused may treat the bill as dishonored.

[**Effect of Acceptance on Separate Paper.**] § 134.

Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person who, on the faith thereof, receives the bill for value.

[**Effect of Promise in Writing to Accept a Bill.**] § 135.

An unconditional promise in writing to accept a bill before or after it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value.

[**Twenty-four Hours Allowed for Decision as to Acceptance.**] § 136. The drawee is allowed twenty-four hours after presentment in which to decide whether or not he will accept the bill; but the acceptance, if given, dates as the day of presentation.

[**When Bill May be Accepted.**] § 137. A bill may be accepted before it has been signed by the drawer, or while otherwise incomplete, or when it is overdue, or after it has been dishonored by a previous refusal to accept, or by non-payment.

[**Acceptance After Dishonor Reinstates Original Date.**] § 138. But when a bill payable after sight is dishonored by non-acceptance and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill payable accepted as of the date of the first presentment.

[**General and Qualified Acceptance.**] § 139. An acceptance is either general or qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

[**Acceptance to Pay at Particular Place.**] § 140. An acceptance to pay at a particular place is a general acceptance unless it expressly states that the bill is to be paid there only, and not elsewhere.

[**Qualified Acceptance Characterized.**] § 141. An acceptance is qualified which is:

1. Conditional; that is to say, which makes payment

by the acceptor dependent on the fulfillment of a condition therein stated.

2. Partial; that is to say, an acceptance to pay part only of the amount for which the bill is drawn.

3. Local; that is to say, an acceptance to pay only at a particular place.

4. Qualified as to time.

5. The acceptance of some one or more of the drawees, but not of all.

[**Qualified Acceptance May be Refused—Effect if Taken.**] § 142. The holder may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance, he may treat the bill as dishonored by non-acceptance. Where a qualified acceptance is taken, the drawer and indorsers are discharged from liability on the bill, unless they have expressly or impliedly authorized the holder to take a qualified acceptance, or subsequently assent thereto. When the drawer or indorser receives notice of a qualified acceptance, he must within a reasonable time express his dissent to the holder, or he will be deemed to have assented thereto.

Article III.—Presentment for Acceptance.

[**When Presentment Required.**] § 143. Presentment for acceptance must be made:

1. Where the bill is payable after sight, or in any other case where presentment for acceptance is necessary in order to fix the maturity of the instrument; or

2. Where the bill expressly stipulates that it shall be presented for acceptance; or

3. Where the bill is drawn payable elsewhere than at the residence or place of business of the drawee.

In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

[**Must be Presented or Negotiated Within Reasonable Time.**] § 144. Except as herein otherwise provided, the holder of a bill which is required by the next preceding section to be presented for acceptance must either present

it for acceptance or negotiate it within a reasonable time. If he fails to do so, the drawer and all indorsers are discharged.

[**When, How and Upon Whom Presentment for Acceptance to be Made.**] § 145. Presentment for acceptance must be made by or on behalf of the holder at a reasonable hour, on a business day, and before the bill is overdue, to the drawee or some person authorized to accept or refuse acceptance on his behalf; and:

1. Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept or refuse acceptance for all, in which case presentment may be made to him only.

2. Where the drawee is dead, presentment may be made to his personal representative.

3. Where the drawee has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, presentment may be made to him or to his trustee or assignee.

[**When Presentment to be Made.**] § 146. A bill may be presented for acceptance on any day on which negotiable instruments may be presented for payment under the provisions of sections seventy-two and eighty-five of this act. When Saturday is not otherwise a holiday, presentment for acceptance may be made before twelve o'clock noon on that day.

[**When Delay is Excused.**] § 147. Where the holder of a bill drawn payable elsewhere than at the place of business or residence of the drawee has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused and does not discharge the drawers and indorsers.

[**When Presentment is Excused.**] § 148. Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a

fictitious person or a person not having capacity to contract by bill.

2. Where, after the exercise of reasonable diligence, presentment cannot be made.

3. Where, although presentment has been irregular, acceptance has been refused on some ground.

[**When a Bill is Dishonored by Non-acceptance.**] § 149.

A bill is dishonored by non-acceptance:

1. When it is duly presented for acceptance as is prescribed by this act is refused or cannot be obtained; or

2. When a presentment for acceptance is excused and the bill is not accepted.

[**Dilatory Presentment Renders Bill Dishonored for Non-Acceptance.**] § 150. Where a bill is duly presented for acceptance and is not presented within the prescribed time, the person presenting it must treat the bill as dishonored by non-acceptance, or he loses the right of recourse against the drawer and indorsers.

[**Dishonor by Non-acceptance Renders Presentment for Payment Unnecessary.**] § 151. When a bill is dishonored by non-acceptance, an immediate right of recourse against the drawers and indorsers accrues to the holders, and no presentment for payment is necessary.

Article IV.—Protest.

[**Protest of Foreign Bill.**] § 152. Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance, and where such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof, in case of dishonor, is unnecessary.

[**Specifications of Protest.**] § 153. The protest must be annexed to the bill or must contain a copy thereof, and must be under the hand and seal of the notary making it and must specify:

1. The time and place of presentment.

2. The fact that presentment was made and the manner thereof.

3. The cause or reason for protesting the bill.

4. The demand made and the answer given, if any, of the fact that the drawee or acceptor could not be found.

[**By Whom Protest Made.**] § 154. Protest may be made: by

1. A notary public; or

2. By any respectable resident of the place where the bill is dishonored, in the presence of two or more credible witnesses.

[**When Protest to be Made.**] § 155. When a bill is protested, such protest must be made on the day of its dishonor, unless delay is excused as herein provided. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

[**Where Protest to be Made.**] § 156. A bill must be protested at the place where it is dishonored, except that when a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonored by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable; and no other presentment for payment to, or demand on, the drawee is necessary.

[**Subsequent Protest for Non-Payment May be Made.**] § 157. A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

[**Protest May be Had in Cases of Bankrupts or Insolvents.**] § 158. When the acceptor has been adjudged a bankrupt or an insolvent or has made an assignment for the benefit of creditors, before the bill matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

[**When Protest May be Dispensed With or Delay Excused.**] § 159. Protest is dispensed with by any circumstances which would dispense with notice of dishonor. Delay in noting or protesting is excused when delay is caused by circumstances beyond the control of the holder and not

imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the bill must be noted or protested with reasonable diligence.

[**Protest on Copy of Lost Bill.**] § 160. Where a bill is lost or destroyed or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

Article V.—Acceptance for Honor.

[**Acceptance by Third Party for Honor.**] § 161. Where a bill of exchange has been protested for dishonor by non-acceptance, or protested for better security, and is not overdue, any person not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill supra protest for the honor of any party liable thereon or for the honor of the person for whose account the bill is drawn. The acceptance for honor may be for part only of the sum for which the bill is drawn, and where there has been an acceptance for honor for one party there may be a further acceptance by a different person for the honor of another party.

[**Acceptance for Honor Must be in Writing.**] § 162. An acceptance for honor supra protest must be in writing and indicate that it is an acceptance for honor, and must be signed by the acceptor for honor.

[**Deemed for Honor of Drawer When Not Expressed.**] § 163. Where an acceptance for honor does not expressly state for whose honor it was made, it is deemed to be an acceptance for the honor of the drawer.

[**To Whom Acceptor for Honor Liable.**] § 164. The acceptor for honor is liable to the holder and to all parties to the bill subsequent to the party for whose honor he has accepted.

[**Engagements of Acceptor for Honor.**] § 165. The acceptor for honor by such acceptance engages that he will, on due presentment, pay the bill according to the terms of his acceptance, provided it shall not have been paid by the drawee, and provided also that it shall have

been duly presented for payment and protested for non-payment and notice of dishonor given to him.

[**Acceptance for Honor Dates From Non-acceptance.**] § 166. When a bill payable after sight is accepted for honor, its maturity is calculated from the date of the noting for non-acceptance and not from the date of the acceptance for honor.

[**Bill Accepted for Honor Must be Protested for Non-payment, etc.**] § 167. Where a dishonored bill has been accepted for honor supra protest or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honor or referee in case of need.

[**Presentment for Payment to Acceptor for Honor, How Made.**] § 168. Presentment for payment to the acceptor for honor must be made as follows:

1. If it is to be presented in the place where the protest for non-payment was made, it must be presented not later than the day following its maturity.

2. If it is to be presented in some other place than the place where it was protested, then it must be forwarded within the time specified in section 103.

[**Delay in Making Presentment to Acceptor for Honor.**] § 169. The provisions of section 81 apply where there is delay in making presentment to the acceptor for honor or referee in case of need.

[**Protest for Non-payment by Acceptor for Honor.**] § 170. When the bill is dishonored by the acceptor for honor it must be protested for non-payment by him.

Article VI.—Payment for Honor.

[**Any Person May Pay Supra Protest for Honor.**] § 171. Where a bill has been accepted for non-payment, any person may intervene and pay it supra protest for the honor of any person liable thereon or for the honor of the person for whose account it was drawn.

[**Must be Attested by Notarial Act of Honor.**] § 172. The payment for honor supra protest in order to operate

as such and not as a mere voluntary payment must be attested by a notarial act of honor which may be appended to the protest or form an extension to it.

[**Payer Must Declare Intention, and for Whose Honor.**]

§ 173. The notarial act of honor must be founded on a declaration made by the payer for honor or by his agent in that behalf declaring his intention to pay the bill for honor and for whose honor he pays.

[**Preference Among Persons Offering to Pay for Honor.**]

§ 174. Where two or more persons offer to pay a bill for the honor of different parties, the person whose payment will discharge most parties to the bill is to be given the preference.

[**Discharge of Parties Subsequent to Party for Whose Honor Paid.**] § 175. Where a bill has been paid for honor, all parties subsequent to the party for whose honor it is paid are discharged, but the payer for honor is subrogated for, and succeeds to, both the rights and duties of the holder as regards the party for whose honor he pays and all parties liable to the latter.

[**Effect of Holder Refusing to Receive Payment Supra Protest.**] § 176. Where the holder of a bill refuses to receive payment supra protest, he loses his right of recourse against any party who would have been discharged by such payment.

[**Payer for Honor Entitled to Receive Bill and Protest.**]

§ 177. The payer for honor, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonor, is entitled to receive both the bill itself and the protest.

Article VII.—Bills in a Set.

[**The whole of the Parts of a Bill Drawn in a Set Constitute One Bill.**] § 178. Where a bill is drawn in a set, each part of the set being numbered and containing a reference to other parts, the whole of the parts constitute one bill.

[**Parts of Set Negotiated to Different Holders—True Owner.**] § 179. Where two or more parts of a set are

negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, the true owner of the bill. But nothing in this section affects the rights of a person who in due course accepts or pays the part first presented to him.

[**Holder Indorsing More Than One Part Liable on All Such.**] § 180. Where the holder of a set indorses two or more parts to different persons he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed, as if such parts were separate bills.

[**Acceptance on More Than One Part.**] § 181. The acceptance may be written on any part and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts are negotiated to different holders in due course, he is liable on every such part as if it were a separate bill.

[**Acceptor Liable on Outstanding Part Accepted by Him.**] § 182. When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereon.

[**Payment of One Part Discharges All.**] § 183. Except as herein otherwise provided, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged.

TITLE III.—PROMISSORY NOTES AND CHECKS.

Article I.

[**What is a Negotiable Promissory Note.**] § 184. A negotiable promissory note within the meaning of this act is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time, a sum certain in money to order or to bearer. Where a note is drawn to the maker's own order, it is not complete until indorsed by him.

[**What is a Check.**] § 185. A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act are applicable to a bill of exchange payable on demand and apply to a check.

[**Requisite Action on Checks, Presentment, Notice, Etc.**] § 186. A check must be presented for payment within a reasonable time after its issue, and notice of dishonor given to the drawer as provided for in the case of bills of exchange, or the drawer will be discharged from liability thereon to the extent of the loss caused by the delay.

[**Certification Equivalent to Acceptance.**] § 187. Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance.

[**Certification Discharges All Drawers and Indorsers.**] § 188. Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from liability thereon.

[**Check Does Not Operate as Assignment of Fund Until Acceptance.**] § 189. A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

TITLE IV.—GENERAL PROVISIONS.

Article I.

[**Title of Act.**] § 190. This act shall be known as the Negotiable Instrument Law.

[**Meaning of Words Used in Act.**] § 191. In this act, unless the context otherwise requires:

“Acceptance” means an acceptance completed by delivery or notification.

“Action” includes counter-claim and set-off.

“Bank” includes any person or association of persons carrying on the business of banking, whether incorporated or not.

“Bearer” means the person in possession of a bill or note which is payable to bearer.

"Bill" means bill of exchange, and "note" means negotiable promissory note.

"Delivery" means transfer of possession, actual or constructive, from one person to another.

"Holder" means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

"Indorsement" means an indorsement completed by delivery.

"Instrument" means negotiable instrument.

"Issue" means the first delivery of the instrument, complete in form, to a person who takes it as a holder.

"Person" includes a body of persons, whether incorporated or not.

"Value" means valuable consideration.

"Written" includes printed, and "writing" includes print.

[**Person Primarily Liable.**] § 192. The person "primarily" liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same. All other parties are "secondarily" liable.

[**Reasonable Time.**] § 193. In determining what is a "reasonable time" or an "unreasonable time," regard is to be had to the nature of the instrument, the usage of trade or business (if any) with respect to such instruments, and the facts of the particular case.

[**Time Prescribed—Sundays and Holidays, etc.**] § 194. Where the day, or the last day, for doing an act herein required or permitted to be done falls on Sunday or on a holiday, the act may be done on the next succeeding secular or business day.

[**Provisions of Act Not to Apply to Previously Given Instruments.**] § 195. The provisions of this act do not apply to negotiable instruments made and delivered prior to the passage hereof.

[**Law Merchant to Govern Cases Not Provided in This Act.**] § 196. In any case not provided for in this act, the rules of the law merchant shall govern.

APPENDIX E.

AMERICAN BAR ASSOCIATION—CANONS OF PROFESSIONAL ETHICS.

Chapter I.

PREAMBLE.

In America, where the stability of courts and of all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration. The future of the Republic, to a great extent, depends upon our maintenance of justice pure and unsullied. It cannot be so maintained unless the conduct and the motives of the members of our profession are such as to merit the approval of all just men.

Chapter II.

THE CANONS OF ETHICS.

No code or set of rules can be framed which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned:

Section 1. The Duty of the Lawyer to the Courts.

It is the duty of the lawyer to maintain towards the courts a respectful attitude, not for the sake of the con-

temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves, are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected.

Section 2. The Selection of Judges.

It is the duty of the Bar to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. It should protest earnestly and actively against the appointment or election of those who are unsuitable for the bench; and it should strive to have elevated thereto only those willing to forego other employments, whether of a business, political or other character, which may embarrass their free and fair consideration of questions before them for decision. The aspiration of lawyers for judicial position should be governed by an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves.

Section 3. Attempts to Exert Personal Influence on the Court.

Marked attention and unusual hospitality on the part of a lawyer to a judge, uncalled for by the personal relations of the parties, subject both the judge and the lawyer to misconstructions of motive and should be avoided. A lawyer should not communicate or argue privately with the judge as to the merits of a pending cause, and he deserves rebuke and denunciation for any device or attempt to gain from a judge special personal consideration or favor. A self-respecting independence in the discharge of professional duty, without denial or diminution of the courtesy

and respect due the judge's station, is the only proper foundation for cordial personal and official relations between Bench and Bar.

Section 4. When Counsel for an Indigent Prisoner.

A lawyer assigned as counsel for an indigent prisoner ought not to ask to be excused for any trivial reason, and should always exert his best efforts in his behalf.

Section 5. The Defense or Prosecution of Those Accused of Crime.

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

The primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.

Section 6. Adverse Influences and Conflicting Interests.

It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel.

It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

Section 7. Professional Colleagues and Conflicts of Opinion.

A client's proffer of assistance of additional counsel should not be regarded as evidence of want of confidence, but the matter should be left to the determination of the client. A lawyer should decline association as colleague, if it is objectionable to the original counsel, but if the lawyer first retained is relieved, another may come into the case.

When lawyers jointly associated in a cause cannot agree as to any matter vital to the interest of the client, the conflict of opinion should be frankly stated to him for his final determination. His decision should be accepted unless the nature of the difference makes it impracticable for the lawyer whose judgment has been overruled to co-operate effectively. In this event it is his duty to ask the client to relieve him.

Efforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the bar; but, nevertheless, it is the right of any lawyer, without fear or favor, to give proper advice to those seeking relief against unfaithful or neglectful counsel, generally after communication with the lawyer of whom the complaint is made.

Section 8. Advising Upon the Merits of a Client's Cause.

A lawyer should endeavor to obtain full knowledge of his client's cause before advising thereon, and he is bound to give a candid opinion of the merits and probable result of pending or contemplated litigation. The miscarriages to which justice is subject, by reason of surprises and disappointments in evidence and witnesses, and through mis-

takes of juries and errors of courts, even though only occasional, admonish lawyers to beware of bold and confident assurances to clients, especially where the employment may depend upon such assurance. Whenever the controversy will admit of fair adjustment, the client should be advised to avoid or to end the litigation.

Section 9. Negotiations With Opposite Party.

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

Section 10. Acquiring Interest in Litigation.

The lawyer should not purchase any interest in the subject matter of the litigation which he is conducting.

Section 11. Dealing With Trust Property.

Money of the client or other trust property coming into the possession of the lawyer should be reported promptly, and except with the client's knowledge and consent should not be commingled with his private property or be used by him.

Section 12. Fixing the Amount of the Fee.

In fixing fees, lawyers should avoid charges which overestimate their advice and services, as well as those which undervalue them. A client's ability to pay cannot justify a charge in excess of the value of the service, though his property may require a less charge, or even none at all. The reasonable requests of brother lawyers, and of their widows and orphans without ample means, should receive special and kindly consideration.

In determining the amount of the fee, it is proper to

consider: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other business while employed in the particular case or antagonisms with other clients; (3) the customary charges of the bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling. They are mere guides in ascertaining the real value of the service.

In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

Section 13. Contingent Fees.

Contingent fees lead to many abuses, and where sanctioned by law should be under the supervision of the court.

Section 14. Suing a Client for a Fee.

Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.

Section 15. How Far a Lawyer May Go in Supporting a Client's Cause.

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem

and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.

It is improper for a lawyer to assert in argument his personal belief in his client's innocence or in the justice of his cause.

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client.

Section 16. Restraining Clients from Improprieties.

A lawyer should use his best efforts to restrain and to prevent his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation.

Section 17. Ill Feeling and Personalities Between Advocates.

Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be

allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. In the trial of a cause it is indecent to allude to the personal history or the personal peculiarities and idiosyncrasies of counsel on the other side. Personal colloquies between counsel which cause delay and promote unseemly wrangling should also be carefully avoided.

Section 18. Treatment of Witnesses and Litigants.

A lawyer should always treat adverse witnesses and suitors with fairness and due consideration, and he should never minister to the malevolence or prejudices of a client in the trial or conduct of a cause. The client cannot be made the keeper of the lawyer's conscience in professional matters. He has no right to demand that his counsel shall abuse the opposite party or indulge in offensive personalities. Improper speech is not excusable on the ground that it is what the client would say if speaking in his own behalf.

Section 19. Appearance of Lawyer as Witness for His Client.

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

Section 20. Newspaper Discussion of Pending Litigation.

Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should

not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.

Section 21. Punctuality and Expedition.

It is the duty of the lawyer not only to his client, but also to the courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes.

Section 22. Candor and Fairness.

The conduct of the lawyer before the court and with other lawyers should be characterized by candor and fairness.

It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a text-book; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

It is unprofessional and dishonorable to deal other than candidly with the facts in taking the statements of witnesses, in drawing affidavits and other documents, and in the presentation of causes.

A lawyer should not offer evidence which he knows the court should reject, in order to get the same before the jury by argument for its admissibility, nor should he address to the judge arguments upon any point not properly calling for determination by him. Neither should he introduce into an argument, addressed to the court, remarks or statements intended to influence the jury or bystanders.

These and all kindred practices are unprofessional and unworthy of an officer of the law charged, as is the law-

yer, with the duty of aiding in the administration of justice.

Section 23. Attitude Toward Jury.

All attempts to curry favor with juries by fawning, flattery or pretended solicitude for their personal comfort are unprofessional. Suggestions of counsel, looking to the comfort or convenience of jurors, and propositions to dispense with argument, should be made to the court out of the jury's hearing. A lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause.

Section 24. Right of Lawyer to Control the Incidents of the Trial.

As to incidental matters pending the trial, not affecting the merits of the cause, or working substantial prejudice to the rights of the client, such as forcing the opposite lawyer to trial when he is under affliction or bereavement; forcing the trial on a particular day to the injury of the opposite lawyer when no harm will result from a trial at a different time; in agreeing to an extension of time for signing a bill of exceptions, cross interrogatories and the like, the lawyer must be allowed to judge. In such matters no client has a right to demand that his counsel shall be illiberal, or that he do anything therein repugnant to his own sense of honor and propriety.

Section 25. Taking Technical Advantage of Opposite Counsel; Agreements With Him.

A lawyer should not ignore known customs or practice of the bar or of a particular court, even when the law permits, without giving timely notice to the opposing counsel. As far as possible, important agreements, affecting the rights of clients, should be reduced to writing; but it is dishonorable to avoid performance of an agreement fairly made because it is not reduced to writing, as required by rules of court.

Section 26. Professional Advocacy Other Than Before Courts.

A lawyer openly, and in his true character, may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of governments, upon the same principles of ethics which justify his appearance before the courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding to influence action.

Section 27. Advertising, Direct or Indirect.

The most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct. The publication or circulation of ordinary simple business cards, being a matter of personal taste or local custom, and sometimes of convenience, is not per se improper. But solicitation of business by circulars or advertisements, or by personal communications or interviews, not warranted by personal relations, is unprofessional. It is equally unprofessional to procure business by indirection through touters of any kind, whether allied real estate firms or trust companies advertising to secure the drawing of deeds or wills or offering retainers in exchange for executorships or trusteeships to be influenced by the lawyer. Indirect advertisement for business by furnishing or inspiring newspaper comments concerning causes in which the lawyer has been or is engaged, or concerning the manner of their conduct, the magnitude of the interests involved, the importance of the lawyer's positions, and all other like self-laudation defy the traditions, and lower the tone of our high calling, and are intolerable.

Section 28. Stirring Up Litigation, Directly or Through Agents.

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife and litigation is not only unprofessional, but it is indictable at common law. It is disreputable to hunt up defects in titles or other causes of action and inform thereof in order to be employed to bring suit, or to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients, or to employ agents or runners for like purposes, or to pay or reward, directly or indirectly, those who bring or influence the bringing of such cases to his office, or to remunerate policemen, court or prison officials, physicians, hospital attaches or others who may succeed, under the guise of giving disinterested friendly advice, in influencing the criminal, the sick and the injured, the ignorant or others, to seek his professional services. A duty to the public and to the profession devolves upon every member of the bar, having knowledge of such practices upon the part of any practitioner, immediately to inform thereof to the end that the offender may be disbarred.

Section 29. Upholding the Honor of the Profession.

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the bar who has wronged his client. The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities. The lawyer should aid in guarding the bar against the admission to the profession of candidates unfit or unqualified because deficient in either moral character or education. He should strive at all times to uphold the honor and to maintain the dignity of

the profession and to improve not only the law but the administration of justice.

Section 30. Justifiable and Unjustifiable Litigations.

The lawyer must decline to conduct a civil cause or to make a defense when convinced that it is intended merely to harass or to injure the opposite party or to work oppression or wrong. But otherwise it is his right, and, having accepted retainer, it becomes his duty to insist upon the judgment of the court as to the legal merits of his client's claim. His appearance in court should be deemed equivalent to an assertion on his honor that in his opinion his client's case is one proper for judicial determination.

Section 31. Responsibility for Litigation.

No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what business he will accept as counsel, what causes he will bring into court for plaintiffs, what cases he will contest in court for defendants. The responsibility for advising questionable transactions, for bringing questionable suits, for urging questionable defenses, is the lawyer's responsibility. He cannot escape it by urging as an excuse that he is only following his client's instructions.

Section 32. The Lawyer's Duty in Its Last Analysis.

No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he ad-

vances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust, and to public duty, as an honest man and as a patriotic and loyal citizen.

Chapter III.

OATH OF ADMISSION.

The general principles which should ever control the lawyer in the practice of his profession are clearly set forth in the following Oath of Admission to the bar, formulated upon that in use in the State of Washington, and which conforms in its main outlines to the "duties" of lawyers as defined by statutory enactments in that and many other states of the Union*—duties which they are sworn on admission to obey and for the wilful violation of which disbarment is provided:

I DO SOLEMNLY SWEAR:

I will support the Constitution of the United States and the Constitution of the State of

I will maintain the respect due to Courts of Justice and judicial officers:

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense

*Alabama, California, Georgia, Idaho, Indiana, Iowa, Minnesota, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington and Wisconsin. The oaths administered on admission to the bar in all the other states require the observance of the highest moral principle in the practice of the profession, but the duties of the lawyer are not as specifically defined by law as in the states named.

except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. SO HELP ME GOD.

We commend this form of oath for adoption by the proper authorities in all states and territories.

APPENDIX F.

UNIFORM SALES ACT.

PART I.

FORMATION OF THE CONTRACT.

Section 1.—Contracts to Sell and Sales.

(1.) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2.) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

(3.) A contract to sell or a sale may be absolute or conditional.

(4.) There may be a contract to sell or a sale between one part owner and another.

Section 2. Capacity—Liabilities for Necessaries.

Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessaries are sold and delivered to an infant or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

Formalities of the Contract.

Section 3. Form of Contract or Sale.

Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writ-

ing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

Section 4. Statute of Frauds.

(1.) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2.) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3.) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

Subject Matter of Contract.

Section 5. Existing and Future Goods.

(1.) The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods."

(2.) There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3.) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

Section 6. Undivided Shares.

(1.) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2.) In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

Section 7. Destruction of Goods Sold.

(1.) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2.) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated in quality as to be substantially changed in character, the buyer may at his option treat the sale—

(a.) As avoided, or

(b.) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible, or to pay the agreed price for the goods in which the property passes if the sale was divisible.

Section 8. Destruction of Goods Contracted to be Sold.

(1.) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

(2.) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract—

(a.) As avoided, or

(b.) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

The Price.

Section 9. Definition and Ascertainment of Price.

(1.) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

(2.) The price may be made payable in any personal property.

(3.) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply.

(4.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Section 10. Sale at a Valuation.

(1.) Where there is a contract to sell or a sale of goods at a price on or terms to be fixed by a third person, and such third person without fault of the seller or the buyer, cannot

or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2.) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Parts IV and V of this act.

Conditions and Warranties.

Section 11. Effect of Conditions.

(1.) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first mentioned party may also treat the non-performance of the condition as a breach of warranty.

(2.) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

Section 12. Definition of Express Warranty.

Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

Section 13. Implied Warranties of Title.

In a contract to sell or a sale, unless a contrary intention appears, there is—

(1.) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in

case of a contract to sell he will have a right to sell the goods at the time when the property is to pass;

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale;

(3.) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

(4.) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

Section 14. Implied Warranty in Sale by Description.

Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Section 15. Implied Warranties of Quality.

Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2.) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

(3.) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4.) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(5.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6.) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

Sale by Sample.

Section 16. Implied Warranties in Sale by Sample.

In the case of a contract to sell or a sale by sample:

(a.) There is an implied warranty that the bulk shall correspond with the sample in quality.

(b.) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47 (3).

(c.) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

PART II.

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER.

Section 17. No Property Passes Until Goods Are Ascertained.

Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.

Section 18. Property in Specific Goods Passes When Parties so Intend.

(1.) Where there is a contract to sell specific or ascertained

goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

Section 19. Rules for Ascertaining Intention.

Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. (1.) When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

(2.) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer—

(a.) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b.) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has

been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. (1.) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2.) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Rule 5. If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

Section 20. Reservation of Right of Possession or Property When Goods Are Shipped.

(1.) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

(2.) Where goods are shipped, and by the bill of lading

the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(3.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

(4.) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

Section 21. Sale by Auction.

In the case of sale by auction—

(1.) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

(2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

(3.) A right to bid may be reserved expressly by or on behalf of the seller.

(4.) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

Section 22. Risk of Loss.

Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that—

(a.) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

(b.) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Transfer of Title.

Section 23. Sale by a Person Not the Owner.

(1.) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2.) Nothing in this act, however, shall affect—

(a.) The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(b.) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Section 24. Sale by One Having a Voidable Title.

Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith, for value, and without notice of the seller's defect of title.

Section 25. Sale by Seller in Possession of Goods Already Sold.

Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by any agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

Section 26. Creditors' Rights Against Sold Goods in Seller's Possession.

Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

Section 27. Definition of Negotiable Documents of Title.

A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title.

Section 28. Negotiation of Negotiable Documents by Delivery.

A negotiable document of title may be negotiated by delivery,—

(a.) Where by the terms of the document the carrier,

warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

(b.) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

Section 29. Negotiation of Negotiable Documents by Indorsement.

A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

Section 30. Negotiable Documents of Title Marked "Not Negotiable."

If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the mean of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable," "non-negotiable," or the like.

Section 31. Transfer of Non-Negotiable Documents.

A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable document cannot be negotiated and the indorsement of such a document gives the transferee no additional right.

Section 32. Who May Negotiate a Document.

A negotiable document of title may be negotiated—

(a.) By the owner thereof, or

(b.) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

Section 33. Rights of Person to Whom Document Has Been Negotiated.

A person to whom a negotiable document of title has been duly negotiated acquires thereby,

(a.) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and

(b.) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

Section 34. Rights of Person to Whom Document Has Been Transferred.

A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable, such person also ac-

quires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

Section 35.—Transfer of Negotiable Document Without Indorsement.

Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

Section 36. Warranties on Sale of Document.

A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

- (a.) That the document is genuine;
- (b.) That he has a legal right to negotiate or transfer it;
- (c.) That he has knowledge of no fact which would impair the validity or worth of the document, and
- (d.) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

Section 37. Indorser Not a Guarantor.

The indorsement of a document of title shall not make the

indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfil their respective obligations.

Section 38. When Negotiation Not Impaired by Fraud, Mistake or Duress.

The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or eustody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor without notice of the breach of duty, or fraud, mistake or duress.

Section 39. Attachment or Levy Upon Goods for Which a Negotiable Document Has Been Issued.

If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

Section 40. Creditors' Remedies to Reach Negotiable Documents.

A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

PART III.**PERFORMANCE OF THE CONTRACT.****Section 41. Seller Must Deliver and Buyer Accept Goods.**

It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

Section 42. Delivery and Payment Are Concurrent Conditions.

Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

Section 43. Place, Time and Manner of Delivery.

(1.) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

(2.) Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3.) Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice

of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

Section 44. Delivery of Wrong Quantity.

(1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

Section 45. Delivery in Instalments.

(1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2.) Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of

one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

Section 46. Delivery to a Carrier on Behalf of the Buyer.

(1.) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 19, Rule 5, or unless a contrary intent appears.

(2.) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

Section 47. Right to Examine the Goods.

(1.) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2.) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

(3.) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

Section 48. What Constitutes Acceptance.

The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

Section 49. Acceptance Does Not Bar Action for Damages.

In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

Section 50. Buyer Is Not Bound to Return Goods Wrongly Delivered.

Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

Section 51. Buyer's Liability for Failing to Accept Delivery.

When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

PART IV.**RIGHTS OF UNPAID SELLER AGAINST THE GOODS.****Section 52. Definition of Unpaid Seller.**

(1.) The seller of goods is deemed to be an unpaid seller within the meaning of this act—

(a.) When the whole of the price has not been paid or tendered.

(b.) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

(2.) In this part of this act the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

Section 53.—Remedies of an Unpaid Seller.

(1.) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has—

(a.) A lien on the goods or right to retain them for the price while he is in possession of them ;

(b.) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;

(c.) A right of resale as limited by this act;

(d.) A right to rescind the sale as limited by this act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

Unpaid Seller's Lien.

Section 54. When Right of Lien May Be Exercised.

(1.) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(a.) Where the goods have been sold without any stipulation as to credit;

(b.) Where the goods have been sold on credit, but the term of credit has expired;

(c.) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Section 55. Lien After Part Delivery.

Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

Section 56. When Lien Is Lost.

(1.) The unpaid seller of goods loses his lien thereon,—

(a.) When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof;

(b.) When the buyer or his agent lawfully obtains possession of the goods;

(c.) By waiver thereof.

(2.) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in Transitu.

Section 57. Seller May Stop Goods on Buyer's Insolvency.

Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

Section 58. When Goods Are in Transit.

(1.) Goods are in transit within the meaning of section 57,—

(a.) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;

(b.) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

(2.) Goods are no longer in transit within the meaning of section 57,—

(a.) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

(b.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his

agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer;

(c.) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

(3.) If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(4.) If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

Section 59. Ways of Exercising the Right to Stop.

(1.) The unpaid seller may exercise his right of stoppage in transitu either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

(2.) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such delivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

Resale by the Seller.

Section 60. When and How Resale May Be Made.

(1.) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the

buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods in transitu may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2.) Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

(3.) It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

(4.) It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

(5.) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

Rescission by the Seller.

Section 61. When and How the Seller May Rescind the Sale.

(1.) An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2.) Where a resale is made, as authorized in this section,

rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.

Section 62. Effect of Sale of Goods Subject to Lien or Stoppage in Transitu.

Subject to the provisions of this act, the unpaid seller's right of lien or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier, or other bailee who issued such document, of the seller's claim to a lien or right of stoppage in transitu.

PART V.

**ACTIONS FOR BREACH OF THE CONTRACT.
REMEDIES OF THE SELLER.**

Section 63. Action for the Price.

(1.) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2.) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the

price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

(3.) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

Section 64. Action for Damages for Non-Acceptance of the Goods.

(1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

(4.) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation

or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

Section 65. When Seller May Rescind Contract or Sale.

Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

REMEDIES OF THE BUYER.

Section 66. Action for Converting or Detaining Goods.

Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

Section 67. Action for Failing to Deliver Goods.

(1.) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

(2.) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

(3.) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

Section 68. Specific Performance.

Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the

buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.

Section 69. Remedies for Breach of Warranty.

(1.) Where there is a breach of warranty by the seller, the buyer may, at his election,—

(a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price;

(b.) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty;

(c.) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty;

(d.) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(2.) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3.) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4.) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price

or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5.) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53.

(6.) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(7.) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

Section 70. Interest and Special Damages.

Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI.

INTERPRETATION.

Section 71. Variation of Implied Obligations.

Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

Section 72. Rights May Be Enforced by Action.

Where any right, duty or liability is declared by this act, it may, unless otherwise by this act provided, be enforced by action.

Section 73. Rule for Cases Not Provided for by This Act.

In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

Section 74. Interpretation Shall Give Effect to Purpose of Uniformity.

This act shall be so interpreted and construed, as to effectuate its general purpose to make uniform the laws of those states which enact it.

Section 75. Provisions Not Applicable to Mortgages.

The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.

Section 76. Definitions.

(1.) In this act, unless the context or subject matter otherwise requires—

“Action” includes counterclaim, set-off and suit in equity.

“Buyer” means a person who buys or agrees to buy goods or any legal successor in interest of such person.

“Defendant” includes a plaintiff against whom a right of set-off or counterclaim is asserted.

“Delivery” means voluntary transfer of possession from one person to another.

“Divisible contract to sell or sale” means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

“Document of title to goods” includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of

goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

“Fault” means wrongful act or default.

“Fungible goods” means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

“Future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale.

“Goods” include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

“Order” in sections of this act relating to documents of title means an order by indorsement on the document.

“Person” includes a corporation or partnership of two or more persons having a joint or common interest.

“Plaintiff” includes defendant asserting a right of set-off or counterclaim.

“Property” means the general property in goods, and not merely a special property.

“Purchaser” includes mortgagee and pledgee.

“Purchases” includes taking as a mortgagee or as a pledgee.

“Quality of Goods” includes their state or condition.

“Sale” includes a bargain and sale as well as a sale and delivery.

“Seller” means a person who sells or agrees to sell goods, or any legal successor in the interest of such person.

“Specific goods” means goods identified and agreed upon at the time a contract to sell or a sale is made.

“Value” is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of

titles are taken either in satisfaction thereof or as security therefor.

(2.) A thing is done "in good faith" within the meaning of this act when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is insolvent within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

(4.) Goods are in a "deliverable state" within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

Section 76a. Act Does Not Apply to Existing Sales or Contracts to Sell.

None of the provisions of this act shall apply to any sale, or to any contract to sell, made prior to the taking effect of this Act.

Section 76b. No Repeal or Uniform Warehouse Receipt Act or Uniform Bills of Lading Act.

Nothing in this Act or in any repealing clause thereof shall be construed to repeal or limit any of the provisions of the Act to make Uniform the Law of Warehouse Receipts, or of the Act to Make Uniform the Law of Bills of Lading.

Section 77. Inconsistent Legislation Repealed.

All acts or parts of acts inconsistent with this act are hereby repealed except as provided in section 76b.

Section 78. Time When the Act Takes Effect.

This act shall take effect on the day of, one thousand nine hundred and

Section 79. Name of Act.

This act may be cited as the Uniform Sales Act.

DEFINITIONS AND LATIN LEGAL TERMS.

(The following pages contain a few definitions and Latin legal terms which a student should read before taking his bar examination. Many of the definitions here given have been involved in questions given in recent bar examinations in the different states.)

A.

Ab initio.—From the beginning.

Absque.—Without.

Absque hoc.—Without this.

Acquittance.—Release of a sum of money due.

Ad damnum.—To the damage.

Ademption (of legacy).—Taking away the legacy of specific property, by disposing of the property before the death of the testator.

Ad litem.—For the time.

Ad manus et possessionem devenerunt.—They had come to his hands and possession.

Ad ostium ecclesie.—At the door of the church.

Aliunde.—From elsewhere.

Allonge.—A piece of paper, annexed to a negotiable instrument, upon which indorsements may be written.

Ambulatory.—Capable of alteration or revocation.

A mensa et thoro.—From bed and board.

Amicus curiae.—Friend of the court. A person, not interested in a pending suit, inform to the court as to some matter of which the court has the right to take judicial notice.

Ancillary.—Something which is subordinate to, or assists some other thing.

Animo capiendi.—With intent to take.

Animo furandi.—With intent to steal.

Animo revertendi.—With intent to return.

Animus testandi.—Intention of making a will.

Appendant.—Used to designate something annexed to certain property.

A vinculo.—From bonds.

A vinculo matrimonii.—From the bonds of matrimony.

B.

Bona fide.—In good faith.

Bottomry.—A species of mortgage of a ship. If the property is destroyed the debt is cancelled and consequently a rate of interest, beyond that allowed under the usury laws is permitted.

C.

Capias.—A general term for writs which order the person to whom they are addressed to arrest a person named in the writ.

Capias ad respondendum.—A writ under which a person is arrested to compel him to answer.

Capias ad satisfaciendum.—A writ under which a person is arrested to compel him to satisfy a judgment.

Case.—Used as an abbreviation for trespass on the case.

Causa mortis.—Because of death.

Caveat emptor.—Let the buyer beware.

Certiorari.—An original writ by which the record of a case is caused to be certified up from a lower (or trial) court to a higher (or appellate) court.

Cestui que vie.—The party for whose life (an estate is held).

Cestui que trust.—The party holding the beneficial interest.

Chose.—A thing. Personal property.

Chose in action.—A right of action to recover a debt or property.

Circum.—About.

Close.—A piece of land.

Collateral.—Indirect.

Commodatum.—A gratuitous loan of a chattel.

Contra bonos mores.—Against good morals.

Corpus.—Body (or substance).

Corpus delicti.—Body of crime.

Cum testamento annexo.—With will annexed.

Curia Regis.—Court of King.

Cy Pres.—As nearly as possible.

D.

Damnum absque injuria.—Loss without wrong.

Darrein presentment.—Last presentment (i. e. a benefice).

Debet.—He owes.

Debet et detinet.—He owes and detains.

De bene esse.—Concerning what is.

De bonis non cum testamento annexo.—Of goods not (administered) with will annexed.

De bonis non.—Of goods not (i. e. administered).

Dedimus postestem (we have given power).—A writ authorizing a person to do a certain act; e. g. to take testimony.

De donis.—Concerning ejectment from land.

De facto.—Of (in) fact.

Defeasance.—A condition annexed to a deed, or other document, providing that upon the happening of a certain event, the deed or other document shall become void.

De injuria sua propria.—From his own proper wrong.

De jure.—Of right.

Delectus personarum.—Choice of persons.

Deodand.—A personal chattel which has been the immediate cause of the death of a human being.

Depositum.—A gratuitous bailment of goods for custody or safe keeping.

Detinet.—He detains.

Detinue sur trover.—Detained on finding.

Dicta.—Something said.

Distress.—A taking without legal process of personal property, from a wrong doer, or one in default.

E.

E converso.—From the converse.

Eleemosynary (Corporations).—Corporate bodies created for the perpetual distribution of the bounty of the founder of the corporation.

Enabling statute.—One which removes a restriction or disability.

Entail.—The settlement of real property upon a man and the heirs of his body.

Et nomine.—By that name; under that name.

Escrow.—A writing delivered to a third person, to be held by him, and later delivered to some person who will be benefited thereby, upon the fulfillment of some condition.

Et al.—And another.

Et a fortiori.—And so it follows; by the stronger reason.

Ex delicto.—From wrong.

Exemplification.—A certified copy, or a copy under seal, of a public document.

Exoneration.—Relief from some burden.

Extradition.—The surrender of a criminal from one state or nation to another.

Ex parte.—From part (i. e. a case where only one side was represented or heard—or sometimes when one side was the public.)

Ex post facto.—After the fact.

F.

Fac simile.—An exact copy.

Feoffment.—The transfer of possession of a freehold estate by livery or seisin.

Fructus industriales.—Products which are produced by human efforts.

Fructus naturales.—Natural fruits or products.

G.

Gavelkind.—A certain English tenure—only existing in the county of Kent. Under this tenure land was divided equally instead of going entirely to the eldest son.

H.

Habeas corpus.—Have you the body (i. e. before the court issuing the writ.)

Hereditaments.—Every kind of property that can be inherited.

Heriot.—The best chattel of a tenant, which, under the Feudal system went to the lord upon the death of the tenant.

High seas.—That part of the ocean more than three miles from shore.

Hundred.—A subdivision of a country.

I.

Idiocy.—Mental deficiency existing from birth.

Indebitatus assumpsit.—Being indebted promised.

In consimili casu.—In a similar case.

In contractu.—In contract.

In delicto.—In tort.

Inducement.—That which constitutes the motive for doing a thing.

In esse.—In being—born.

Information.—A formal accusation filed by some law officer of the government.

In pari delicto.—In equal fault.

In personam.—Against the person.

In rem.—Against the thing.

In statu quo.—In present state (or condition).

Inter vivos.—Among the living.

In transitu.—In transit.

Intrusion.—The entry of a stranger on land, after the termination of a particular estate, before the heir can enter.

J.

Jactitation.—A false pretension to marriage.

Jeofail.—An expression used in the time of oral pleading to acknowledge an error in pleading, for the purpose of correcting it.

Jus desponendi.—The right of disposing.

K.

Kin.—Relations by consanguinity.

L.

Laches.—Unreasonable delay, negligence.

Last resort (court of).—A court from which there is no appeal.

Lex fori.—Law of the forum (i. e. the place where the action is tried).

Lex loci contractus.—Law of the place of contracting.

Lex mercatoria.—Law merchant.

Libellant.—One who files a libel (in an ecclesiastical or admiralty court) against another.

Lis pendens.—Pending suit.

Livery.—Formal transfer.

Loco parentis.—In the place of a parent.

Locatio.—The hiring of a chattel.

Locatio custodiae.—Hired custody of a thing.

Locatio operis.—Hired services.

Locatio operis faciendi.—The hired services upon a thing.

Locatio operis mercium vehendorum.—Hired carriage of the thing.

Locatio rei.—The hired use of a thing.

Locus celebrationis.—Place of celebrating (i. e. making).

Locus considerationis.—Place of consideration.

Locus poenitentiae.—Place for repentance.

Locus solutionis.—Place of performance.

M.

Majority.—Full age.

Mala in se.—Wrong in itself.

Mala prohibita.—Wrong (because) prohibited.

Mandate.—A judicial command.

Mesne.—Middle, intermediate.

Mesne process.—All writs in a case after its commencement and before the final decree.

Misjoinder.—The improper union of parties or causes in a suit.

Mitigation.—Reduction of damages, guilty of punishment.

Monuments.—Permanent landmarks for purpose of indicating boundaries.

Mortmain.—A state of ownership which makes the land inalienable.

Mutatis mutandis.—That being changed which must be changed (the changes being only as to details).

N.

Narratio.—A declaration.

Ne exeat.—(Let him not go out.) A chancery writ.

Negative pregnant.—An evasive denial, carrying with it an affirmative.

Nisi prius.—Unless sooner.

Nominal.—Unimportant. In name only.

Non assumpsit.—He did not promise.

Non compos mentis.—Not of sound mind.

Non detinet.—He does not detain.

Non est factum.—It is not made; or it is not his deed.

Non est inventus.—It is not found.

Novation.—The substitution of a new obligation for an old one.

Nudum pactum.—Naked promise, i. e. without any consideration.

Nul tiel record.—No such record.

Nul tiel corporation.—No such corporation.

O.

Obiter dicta.—Said by the way.

Onus probandi.—Burden of proof.

P.

Panel.—List of persons summoned as jurors.

Pari delicto.—In equal fault.

Pari materia.—On the same matter, or relating to the same subject.

Patent.—Originally any open public document. Now only applied, in this country to (1) a deed of land from government, and (2) the right to exclusive use of his invention granted to an inventor.

Peer.—Equal. In England also a member of the House of Lords.

Per auter vie.—For the life of another.

Per se.—Through (or by) itself.

Perambulator.—A walking of boundaries.

Per verba de futuro eum copula.—By words concerning the future with copulation.

Per verba de praesenti.—By words concerning the present.

Pre-emptor.—The right to purchase property before any other person.

Pro tanto.—For so much.

Pro tempore.—For the time; temporarily.

Puis darrein continuance.—Since the last continuance.

Purpresture.—The enclosing or appropriating of lands when belong to the public, by an individual.

Q.

Quaere.—Inquire.

Quash.—To annul or discharge.

Quia emptores.—Because purchasers.

Quantum meruit.—What it is worth: how much he merits.

Quantum valebant.—How much they are worth.

Quare clausum fregit.—Because he broke the close (or enclosure).

Quare impedit.—Why he hinders; a real possessory action, which could be brought only in a court of common pleas.

Quasi.—As if.

R.

Rebate.—Discount.

Rebut.—To answer or disprove.

Relation.—A carrying back (i. e. in time).

Relevancy.—Connection between fact tendered in evidence and fact sought to be proved.

Res gestae.—The thing taking place.

S.

Seienter.—An allegation in a pleading that the defendant did a certain thing wilfully.

Scilicet.—To wit. That is to say.

Seire facias.—Cause to know.

Stare decisis.—To stand by the decisions.

Superstitious uses.—Uses for religious purposes not recognized by law.

Supra.—Above or before.

Supra protest.—Under protest.

T.

Tacking.—The adding of a junior mortgage to a first mortgage.

Trespass de bonis asportatis.—Trespass from carrying away goods.

U.

Ubberrima fides.—Utmost good faith.

Ultra vires.—Beyond power.

Unde nihil habet.—Where she had none.

Upset price.—A price, under which, property put up at auction cannot be sold.

V.

Vacate.—To annul or cancel.

Venue.—The neighborhood or place.

Vi et armis.—With force and arms.

Vitiation.—Material alteration in an instrument.

Vivum vadium.—Live pledge.

Vouch.—To call to warranty.

W.

Warranty.—A guaranty concerning goods given by a vendor to the vendee.

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